



Question

Whether the change of use from residential use to a hostel for homeless accommodation, is or is not development or is or is not exempted development.

Location

15/17, Lower Drumcondra Road,
Dublin, 9

Declaration

Planning Authority

Dublin City Council North

Planning Authority Reg. Ref.

0313/20

Applicant for Declaration

Anthony Corbett

Planning Authority Decision

Is exempted development

Referral

Referred by

Anthony Corbett

Owner

Brimwood Ltd.

Observer

None

Site Inspection

16th February 2021

Inspector

Máire Daly

1.0 Site Location and Description

- 1.1. The subject site is located on the eastern side of the Lower Drumcondra Road, approximately 100m north of the Royal Canal and circa. 1.1km north of O' Connell Street in Dublin City centre. The site is approximately 80m south east of Drumcondra Dart Station and is mid-way between the junction with Fitzroy Avenue and Whitworth Place.
- 1.2. The site is comprised of two adjacent mid terraced two-bay 3-storey over basement properties (no.15 and no.17) which are connected internally and accessed by one door on the southernmost property (no. 15). A large rear garden extends to the east of the building and access is provided via a narrow alleyway which leads northwards to Fitzroy Avenue.
- 1.3. The front of the site faces directly onto the Lower Drumcondra Road and the boundary to the front of the subject structure is comprised of iron railing on granite plinth. There is a mix of uses in the area, including commercial, office and retail. The majority of the adjacent properties appear to be in residential use.

2.0 The Question

- 2.1.1. The question referred by the referrer to the planning authority pursuant to Section 5(1) of the Planning and Development Act, 2000, as amended ("the Act") and subsequently referred by the referrer to the Board, for review, pursuant to Section 5(3)(a) of the Act is, as follows

'Whether the change of use from residential use to a hostel for homeless accommodation is or is not development or is or is not exempted development'.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. By order dated 29th September 2020 the Planning Authority declared that the works undertaken to the property are exempted development in accordance with Section 4(1)(h) of the Planning and Development Act 2000 (as amended) and that the

Planning Authority is satisfied based on Section 4(1)(f) of the Planning and Development Act 2000 (as amended) the change of use is exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The recommendation within the report of the Executive Planner (September 2020), reflects the declaration issued by the planning authority and can be summarised as follows:

- The planning officer expands on the description of the question at hand, stating that the applicant seeks a declaration as to whether the change of use from residential use to a hostel for homeless accommodation is or is not development and is or is not exempted development.
- The declaration request was split into two queries and was addressed as follows:

a) Is or is not development

The planning officer outlines the definition of 'development' under Section 3(1) of the Planning and Development Act 2000 as:

"The carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land".

Based on the information provided the planning officer was satisfied that works had occurred which involved altering the property to increase the number of bedrooms from 17 to 21 bedrooms, with 40 bedspaces together with an increase in the number of shower rooms for the facility.

The planning authority was satisfied that the works undertaken to the property would constitute development insofar as the carrying out of works on the land has occurred. The report went on to further state, that the planning authority was further satisfied that a material change of use of the land had occurred such that a change of use from residential (Class 1) to hostel (Class 9 - hostel where care is provided) had occurred.

b) Is it or is not exempted development

The planning officer examined Section 4(1)(h) of the Planning and Development Act 2000 (as amended) and stated that the planning authority was satisfied that the works undertaken to the property are exempted development in accordance with this section.

In relation to the change of use, Section 4(1)(f) of the Planning and Development Act 2000 (as amended) was examined and based on this it was determined that the hostel is the subject of a contract entered into on behalf of Dublin City Council, which is a local authority, therefore the change of use was considered exempted development.

3.2.2. Other Technical Reports

- None received.

4.0 Planning History

4.1. Referral Site:

- Enforcement P.A. Ref. E0207/20 – Building works taking place/converted to hostel type building.

No other relevant history on site.

4.2. Other Relevant Referrals

4.2.1. The following referrals decided by the Board are considered relevant to this case:

- ABP Ref. 307064 – in September 2020 the Board decided that the change of use of Westbrook House (Ennis, Co. Clare) from commercial guesthouse to a homeless persons hostel managed by an approved housing body is development and is not exempted development.

It should be noted that Westbrook House at the time of the referral was in the ownership of Clare County Council and operated under the management of Mid-West Simon.

- ABP Ref. 303392 – in September 2019 the Board decided that the change of use of a monastery to use as a hub/hostel for homeless families at the

Carmelite Monastery, Firhouse Road, Dublin 24, is development and is exempted development.

- ABP Ref. 301688 – in February 2019 the Board decided that the conversion of the premises at Nos.57, 59 & 61 Cabra Road (Protected Structure) which was in use as a nursing home, to a supported homeless accommodation facility is development and is exempted development.
- ABP Ref. PL86.RL3032 – in March 2013 the Board decided that the amalgamation of Nos.5 & 6 Kilmantin Hill, Wicklow Town, into one unit and their change of use to a temporary accommodation centre for homeless persons is development and is not exempted development;
- ABP Ref. PL68.RL2685 – in May 2010 the Board decided that the change of use of the first and second floors of a hotel at Nos.58 & 59 Main Street, Longford, to a hostel to accommodate refugees is development and is not exempted development;
- ABP Ref. PL79.RL2503 – in August 2008 the Board decided that the refurbishment and change of use of a residential unit at 56 Mitchel Street, Thurles, County Tipperary, for use as emergency accommodation for not more than six persons deemed to be homeless is development and is exempted development;

5.0 Policy Context

5.1. Development Plan

- 5.1.1. The site is zoned Z2 Residential Neighbourhoods (Conservation Area) with a stated objective *'to protect and/or improve the amenities of residential conservation areas.'*
- 5.1.2. Permissible Uses include *'Buildings for the health, safety and welfare of the public'* and *'residential'* among others, but do not specifically include *'hostel'*, however *'hostel'* is referred to under the *'land-use definitions'* outlined under Appendix 21 below.
- 5.1.3. **Appendix 21, Section 21.1** provides Land-Use Definitions and outlines the uses of *Buildings for the Health, Safety or Welfare of the Public* as follows:

- *Use of a building as a health centre or clinic or for the provision of any medical or health services (but not the use of a house of a consultant or practitioner, or any building attached to the house or within the curtilage thereof, for that purpose), hospital, hostel (where care is provided)(emphasis added), retirement home, nursing home, day centre and any other building for:*
- *The provision of residential accommodation and care to people in need of care (but not the use of a dwelling house for that purpose);*

5.1.4. **Section 5.5.11** sets out policy for Homeless Services stating: *The City Council and other statutory agencies provide appropriate accommodation and work together to improve the range and quality of services available for homeless persons. An over-concentration of institutional accommodation can have an undue impact on residential communities and on the inner city in particular. A co-ordinated approach to the provision and management of these facilities as well as their spread across the city is important.*

5.1.5. **Policy QH29** – support implementation of the Homeless Action Plan Framework

5.1.6. **Policy QH30** – states ‘*To ensure that all proposals to provide or extend temporary homeless accommodation or support services shall be supported by information demonstrating that the proposal would not result in an undue concentration of such uses nor undermine the existing local economy, resident community or regeneration of an area. All such applications shall include: a map of all homeless services within a 500 metre radius of the application site, a statement on the catchment area identifying whether the proposal is to serve local or regional demand; and a statement regarding management of the service/facility*’.

5.1.7. **Section 16.12 Standards** – Institutions/Hostels and Social Support Services.

An over-concentration of institutional hostel accommodation, homeless accommodation and social support institutions can potentially undermine the sustainability of a neighbourhood and so there must be an appropriate balance in the further provision of new developments and/or expansion of such existing uses in electoral wards which already accommodate a disproportionate quantum. Accordingly, there shall be an onus on all applicants to indicate that any proposal for homeless accommodation or support services will not result in an undue

concentration of such uses, nor undermine the existing local economy, the resident community, the residential amenity, or the regeneration of the area.

All such applications for such uses shall include the following:

- *A map of all homeless and other social support services within a 500 m radius of application site*
- *A statement on catchment area, i.e. whether proposal is to serve local or regional demand*
- *A statement regarding management of the service/facility.*

5.2. Natural Heritage Designations

5.2.1. None relevant.

6.0 The Referral

6.1. Referrer's Case

6.1.1. A submission was made by the referrer (seeking a review by the Board of the planning authority declaration) dated 27th October 2020, and can be summarised as follows:

- The planning authority has a clear conflict of interest in making this declaration, relying on their interest in the development to find it exempt under Section 4(1)(f). The case should have been referred to An Bord Pleanála (ABP) under Section 5(4) of the P&D Act 2000-2020.
- ABP should overturn DCC's Declaration on the basis that the change of use that occurred in April and May 2020 is development and is not exempt development on the basis that there was a material change in the planning use on the premises from residential use to a hostel where care is provided.
- DCC has presented no rationale or explanation for its decision in its planning report.
- The properties at 15-17 Drumcondra Road Lower were in operation as multi-unit residential accommodation up until approx. Feb 2020.

- The applicant details the communications between himself and Dublin City Council regarding the use of the site as a hostel for homeless accommodation and states that Mr. Owen Keegan (Chief Executive) of the City Council outlined that, from the advice available, the development did not require planning permission and that the applicant had the option to refer the matter to DCC for a formal determination and that any subsequent decision could be appealed to the ABP. Mr. Keegan however outlined that in the event of a decision by ABP that planning permission is required, the City Council would still have the option of invoking its emergency planning powers to grant permission for the development.
- The applicant highlights that Mr. Keegan was incorrect in his advice on planning matters and as held in the Carman's Hall case, the use of emergency powers is Ultra Vires DCC's powers to materially contravene their own development plan.
- DCC and the Dublin Region Homeless Executive (DRHE) has taken out a lease on the property, therefore the property owner is providing a service to its tenant (DCC). It cannot be said that the works or change of use were undertaken on behalf of, jointly or in partnership with DCC. The local authority did not engage directly or indirectly in development. The referrer then states that if a public authority is not willing to be the developer and take on the associated costs and risks with that, they do not avail of exceptions which are designed to protect communities from certain types of development.
- Section 4 of the Planning Act is subject to a significant number of limitations provided for under the Planning Regulations (Part 8) not least 80(1)(k). Article 80(1)(k) effectively eliminates the development as exempt as the lease of the property exceeds €126,000, therefore DCC cannot rely on 4(1)(f) of the act as an exemption. The courts have not accepted DCC's rationale in recent cases brought against DCC.
- It is unclear if Dublin City Council as a tenant can rely on its emergency powers to allow Brimwood Ltd to avoid its statutory planning obligations.
- Hostel is neither 'permissible' or 'open for consideration' under the zoning objective Z2. Therefore, the development materially contravenes both the

zoning objective and also DCC's policy to prevent over concentration of institutional hostel accommodation, homeless accommodation and social support institutions.

- Internal changes have been implemented which have increased the number of bedrooms (or units) from 17 to 21 bedrooms and the provision of 40 bedspaces – having regard to Section 4(1)(h) it is apparent that the works affect only the interior of the structure and do not materially affect the external appearance of the structure.
- The referrer states that the established use of the premises is residential and the new use is Hostel under Class 9(a) and highlights that Part 4 of the Second Schedule of the regulations deals with exempted development and classes of use under Article 10. The referrer then goes on to reference a number of recent cases relating to change of use:
 - Referral Case at Mount Argus (DCC Ref. 0369/19) - This case highlights the change of use within Class 9 and without increase in intensity (i.e. additional bedrooms) is exempt. The referrer states that this clearly does not apply in the current case as there is an increase in bedrooms provided.
 - Referral Case at Westbrook House, Gort Road, Ennis Co Clare (ABP Ref. PL03.307064) - The Board in this case overruled its inspector's recommendation and found that a material change of use had occurred. The referrer draws similarities between this case and the current case and notes that the property was purchased by Clare County Council and was under management of Midwest Simon.

The referrer states that the Board's direction is particularly instructive stating *'the current use does not therefore come within the scope of Class 6 of Part 4 of the Second Schedule of Planning and Development Regulations 2001, as amended, namely use as a hostel (other than a hostel where care is provided) as the current use includes the provision of care to residents and instead falls within the scope of Class 9 of Part 4 of the Second Schedule, namely the provision of residential accommodation and care to people in need of care'*. The Board stated that *'the current use therefore constitutes a change of use*

from the permitted use, which is a material change of use by reason of providing a different service to different user group' and 'this material change of use would not come under the scope of article 10(1) of the Planning and Development Regulations 2001, as amended, as it does not constitute a change of use within any one class' and 'there are no other exemptions available for this material change of use within existing legislation'.

- The referrer also mentions relevant legal cases where the courts have dealt with hostels in reference to homeless accommodation under DCC's Emergency planning powers under Section 178 of the Planning Act:
 - The High Court in *Byrnes v Dublin City Council* [2017] IEHC 19 held that the provision of the hostel for use by homeless people did not constitute a material contravention of the relevant development plan. Under the development plan use as a 'residential hostel' was normally permitted whereas 'hostel where care is provided' was only 'open for consideration'. The court held that for the purpose of Section 178 of the PDA 2000 both uses were permissible under the relevant zoning objective and did not therefore represent a material contravention.
 - The High Court in *Carman's Hall Community Interest Group V DCC* [2017] IEHC 544 found that the development proposed in that case did involve a material contravention as it was a policy under the development plan that all proposals to provide or extend temporary homeless accommodation or support services shall be supported by information demonstrating that the proposal would not result in an undue concentration of such uses nor undermine the existing local economy, resident community or regeneration of an area.
- The referrer highlights that pursuant to *Carman's Hall Community Interest Group v DCC* [2017] IEHC 544, the developer (Brimwood Ltd) or the leasee Dublin City Council is not entitled to rely on Section 179(6)(b) of the Act, as the change of use materially contravenes the Dublin City Development Plan 2016-22. Similarly, they are not entitled to rely on section 4(1)(f) of the Act by reference to Part 8, Article 80(k) of the Planning and Development

Regulations '*requirements in respect of specified development by, on behalf of, or in partnership with local authorities*'.

- Furthermore, DCC cannot rely on 4(1)(f) as an exemption as it is ultra vires the power of the planning authority to materially contravene the Dublin City Development Plan 2016 - 2022 without observing due process (including public consultation).
- The referrer also states that they believe that intensification of use has occurred, as internal changes have been implemented which have increased the number of bedroom units from 17 to 21 units and the provision of 40 bed spaces.
- The referrer invites ABP to overturn DCC's declaration and confirm that the proposed hostel use is development and is not exempt development on the basis that a material change of use has occurred at the premises.
- The use implemented at 15/17 Drumcondra Rd Lower is a hostel for homeless accommodation defined under Class 9 of the Planning Regulations and fundamentally the Regulations accept the planning consequences of change of use from residential to a '*hostel where care is provided is a material change of use*' and ABP's declaration under PL-03.307064 unequivocally confirms this finding.

6.2. Planning Authority Response

- The planning authority did not respond to the referrer's submission.

6.3. Owner/ occupier's response

6.3.1. A response to the referral was received on 30th November 2020 from the agent for the property owner. The owner sought to address the issues raised and provided background information on the subject site and evidence of a contract with DCC and the DRHE. The following salient points are made:

- The subject site was previously used as a long-term multiple unit residential building before being converted to a 21-bedroom house with kitchen, dining room and bathroom facilities. (Reference to drawings is made, however none

have been submitted with the response). It is submitted that this residential use on site falls within the permissible uses outlined and that the current use of the building is within the parameters of the Z2 zoned lands.

- All works carried out to date and use of the building as a single residential unit are considered exempted development pursuant to Section 4 (1) of the Planning and Development Act 2000, as amended.
- Internal building works are classified as exempted development pursuant to Section 4(1)(h) of the 2000 Act.
- A contract between the owner and the DRHE has been agreed and under this agreement the building continues to be used as a long-term residential building. As it is submitted that the use of the building has not changed, planning permission for change of use is not required in this instance.
- Furthermore, the owner states that they note the provisions of Section 4(1)(f) of the Act which states that development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity shall be exempted development.
- The landowner refers to South Dublin County Council case ref. ED18/0040 for the use of a monastery as a hub/hostel for homeless families at the Carmelite Monastery, Firhouse. SDCC concluded that the development was exempt development. The decision was subsequently referred to the Board ABP. Ref. 303392-19 who upheld the decision. This case is particularly relevant to the current case as it raises issues with regard to material contravention and also Section 4(1)(f). The owner notes that this precedent demonstrates that there are certain circumstances whereby development is considered exempted development when a contract has been entered into by the Local Authority and the Applicant.
- The letter dated 10th April 2020 attached to Appendix A of the submission confirms that a contract exists between the DRHE and Brimwood Ltd. for the provision of emergency accommodation for single homeless adults commencing on 1st May 2020. This letter details that a contract of services for

a period of 5 years under a commercial agreement between the DRHE and the property owners Brimwood Limited has been agreed. The property is to be managed directly by the owners under a commercial arrangement whereby the property is made available to accommodate 40 single adults requiring accommodation, who are experiencing homelessness, until alternative longer term housing solutions via social housing or HAP are available for them. The property is to be managed by staff on site 24/7. The average length of time an individual will reside there is envisaged to be between three and six months. This letter also states that the property is not a hostel and that there will be no NGO involved in the management.

- This letter also states that management have met with the owner of the neighboring house on the 14th of May 2020 and further meetings with a wider group of residents was being arranged at the time. The letter states that it was not practical or prudent to initiate local consultation on such projects prior to acquiring or leasing such properties because without doubt it would quickly become a very controversial and divisive issue and put such projects in jeopardy.
- The owner states that the works to the property were carried out as a prerequisite for the contract agreed between DHRE and Brimwood Ltd. and it is clearly in line with Section 4(1)(f) and also the Act does not state that a local authority cannot avail of the exemption unless they act as the developer (as the referrer suggests).
- The owner notes the referrer's argument that the development cannot avail of Article 80(1)(k) of the P&D Regulations 2001, as amended, as the lease of the property exceeds €126,000. The owner states that in a legal opinion prepared by Kevin Bell B.L it was noted that the Regulations are secondary legislation and are therefore limited in their powers over the Act. The Barristers opinion regarding this case has been attached to Appendix B of the submission. The case of Carman's Hall Community Interest Group v. DCC [2017] IEHC 544 was examined in this case.
- In addition it is submitted that the proposed use of the entirety of No.15/17 Drumcondra Road Lower in long term residential use is considered to be

exempt from the requirement to obtain planning permission, as it does not come within one of the classes of development set out at Article 80 of the Regulations therefore Section 4(1)(f) of the Planning and Development Act 2000, as amended, is applicable in this instance. Furthermore, it has been declared by DCC and the DRHE that an emergency exists enormous combination due to the need to ensure compliance with COVID-19 guidance.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 (as amended)

7.1.1. Section 2(1) of the Act states the following:

- 'development' has the meaning assigned to it by Section 3;
- 'structure' means any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined;
- 'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal'

7.1.2. Section 3(1) of the Act states that:

- '*development*' means, *except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land*'.

7.1.3. Section 4(1) of the Act sets out various forms and circumstances in which development is exempted development for the purposes of the Act, including:

- **Section 4(1)(f)** providing for '*development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity*'.
- **Section 4(1)(h)** '*development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect*

the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structure's;
and

7.1.4. **Section 4(2)** of the Act provides that '*the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations 2001, as amended*'.

7.2. **Planning and Development Regulations, 2001 (as amended)**

7.3. **Article 5** states "care" means personal care, including help with physical, intellectual or social needs;

7.4. **Article 6 (1)** states:

Subject to Article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

7.5. **Article 10 (1)** states:

Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not—

(a) involve the carrying out of any works other than works which are exempted development,

(b) contravene a condition attached to a permission under the Act,

(c) be inconsistent with any use specified or included in such a permission, or

(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

7.6. **Part 1 of Schedule 2** sets out exempted development class for exempted development general to which Art 6(1) refers:

Change of use

CLASS 14

Development consisting of a change of use from use as 2 or more dwellings, to use as a single dwelling, of any structure previously used as a single dwelling.

- 7.7. **Part 4 of Schedule 2** sets out exempted development class of use to which Art 10(1) refers:

CLASS 9

Use—

- (a) for the provision of residential accommodation and care to people in need of care (but not the use of a house for that purpose),*
- (b) as a hospital or nursing home,*
- (c) as a residential school, residential college or residential training centre.*

8.0 Assessment

8.1. Introduction

- 8.1.1. The purpose of this referral is not to determine the acceptability or otherwise of the matters raised in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development within the meaning of the relevant legislation.

8.2. Is or is not development

- 8.2.1. The initial matter to consider is the nature of the former use of the premises, based on the information and submissions on the file. The referrer asserts that the subject site was used as a multiple unit residential building up until approx. February 2020 before being converted to a 21no. bedroom house for the emergency accommodation of homeless persons. This claim is not contested by the planning authority and a submission received from the landowner Brimwood Ltd confirms that use of the property (15/17 Drumcondra Road Lower) for the provision of emergency accommodation for single homeless adults commenced on 1st May 2020.

- 8.2.2. Section 3 (1) of the Planning and Development Act, 2000 (as amended) states that development “*means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land*”. Based on the information provided works have occurred internally to increase the number of bedrooms from 17 to 21 bedrooms and this includes for an associated increase in the number of shower rooms for the facility. In addition it can be seen that since the most recent available Street View imagery (dated September 2019, source: Google Maps) improvement works have been carried out to the front of the building and the windows have been replaced on the front elevation and painting of the building has also occurred. In the case of the items that are the subject of this referral, it is quite evident that they involve the carrying out of works and hence constitute development insofar as the carrying out of works on the land has occurred within the meaning of the Act.
- 8.2.3. The subject site was until recently used as a long-term multi-unit residential building. Following an examination of the information submitted by the agent acting on behalf of the property owner (received by the Board on 30th November 2020) I note that a contract was agreed between the property’s owner (Brimwood Ltd.) and the Dublin Region Homeless Executive (DRHE) for a period of 5 years and that under this agreement the building would be used for the provision of emergency accommodation for single homeless adults (40 individuals in total). It is also confirmed that the property has been used as such since the 1st May 2020.
- 8.2.4. Section 3 of the Planning and Development Act, 2000, requires that in order for change of use to constitute development, it must be a material change of use. There is no statutory definition of ‘material change of use’; however, it is linked to the degree of a change and the associated impacts which are determined on the individual merits of a case. I note the test proffered by Barron, J in *The County of Galway v Lackagh Rock Ltd* [1984 21 MCA] in the determining of whether or not a material change of use has occurred. In this case, Barron, J considered that ‘*in determining whether or not a present use was materially different from a use being made on the appointed day one must look at matters which the planning authority would take into consideration if a planning application were made on both dates and if these matters were materially different then the present use must be equally materially different.*’

8.2.5. In this case it is clear that a material change of use has occurred on site i.e. from use as a multi-unit residential development to use for the accommodation of single homeless adults. In my opinion this use is determined under Class 9 of Schedule 2 Part 4 of the Planning and Development Regulations 2001 (as amended) - '*for the provision of residential accommodation and care to people in need of care (but not the use of a house for that purpose)*'.

8.2.6. Accordingly, I consider the change of use from '*residential*' to a use '*for the provision of residential accommodation and care to people in need of care*' is considered a material change of use and that this together with the associated works to the buildings at no.15 and no.17 Lower Drumcondra Road would constitute development as defined for the purposes of the Act.

8.3. **Is or is not exempted development**

8.3.1. The works carried out internally fall within the stipulations outlines under Section 4(1)(h) and I am satisfied that those works that were carried out externally (the replacement of windows and painting) do not materially affect the external appearance so as to render it inconsistent with the character of neighbouring structures. These works can be therefore classified as exempt development pursuant to Section 4(1)(h) of the Planning and Development Act 2000 (as amended).

8.3.2. The referrer references correspondence with the Chief Executive, Mr. Owen Keegan, stating that DCC has entered into a contract (5 years) with the owner of 15/17 Lower Drumcondra Road to use the property as emergency accommodation for homeless single persons with a max. of 40 individuals to be accommodated. In addition, the referrer states that same correspondence stated that as part of the contract agreement the owner will continue to manage the property under the supervision of the DRHE. Further correspondence referred to by the referrer states that the residents of Drumcondra Road Lower also received correspondence on foot of the original complaint made to the enforcement section of DCC in April 2020, and the Council's letter noted that 'the facility is managed onsite 24 hours a day'. Appendix A of the submission received from the property owner, in response to the referral, confirms these facts and details that a negotiated contract is in place between the

DRHE/DCC and the property owner Brimwood Ltd., however details of the contract are not publicly available for commercial sensitivity reasons.

- 8.3.3. The planning officer in their report makes reference to a change of use from Class 1 (residential) to Class 9 (hostel where care is provided)(or accommodation for homeless person) but provides no examination of these classes or the change of use between same.
- 8.3.4. The referrer argues that the development (material change of use) does not fall within the scope of any exemptions on development provided for under the Planning Act or the Regulations. He states that the previous use on site was residential use in the form of a multi-unit residential building and that this has now changed. The property owner contests this however stating that under the contract between the owner and the DRHE the building continues to be used as a long-term residential building and that as the use of the building has not changed, planning permission for change of use is not required in this instance.
- 8.3.5. Article 10(1) of the Regulations states that development, which consists of a change of use within one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act. Therefore, the change from one use to another within the same use class does not require planning permission. In terms of the exemption claimed, I have examined the use in terms of the provisions set out under of Articles 5, 6, 9 and 10 the Regulations, including Parts 1 and 4 of Schedule 2 to the Regulations. The only exemption under Part 1 of Schedule 2 in relation to 'Change of use' which may be of relevance is listed under Class 14 (e) *'from use as a house, to use as a residence for persons with an intellectual or physical disability or mental illness and persons providing care for such persons'* with listed conditions and limitations *'The number of persons with an intellectual or physical disability or a mental illness living in any such residence shall not exceed 6 and the number of resident carers shall not exceed 2'*. I note under Article 5 (1) *"care" means personal care, including help with physical, intellectual or social needs'*. However, having examined this exemption in light of the current case this is not considered relevant, as the current residence/accommodation for the homeless is not limited to 6 persons (40 residents has been detailed in the submission received) and therefore this class has been ruled out from further consideration.

- 8.3.6. In this case, I consider the current use of property (for homeless accommodation) outlined in the referrer's submission and emergency accommodation for single homeless adults, as outlined in the property owner's submission, includes for the provision of care to residents, which would fall within the scope of Class 9 of Part 4 of the Second Schedule to the Planning and Development Regulations 2001, as amended, namely '*the provision of residential accommodation and care to people in need of care (but not the use of a house for that purpose)*'.
- 8.3.7. The development constitutes a change of use between two classes, from the former use (residential) to its current use for the provision of residential accommodation and care to people in need of care (Class 9 of Part 4 of the 2nd Schedule), which in my opinion is a material change of use by reason of providing a different service (homeless accommodation) to a different user group (homeless persons). In my view this material change of use would not come within the scope of Article 10(1) of the Planning and Development Regulations 2001, as amended, as it does not constitute a change of use within any one class and therefore would not be considered exempt development.

8.4. Material Contravention of the Dublin City Development Plan 2016-2022

- 8.4.1. The planning authority are of the opinion that the proposed development is exempted by reference to Section 4(1)(f) of the Act, by reason of the fact that the provision of emergency accommodation for the homeless constitutes development being carried out on behalf of the local authority, pursuant to a contract entered into on behalf of Dublin City Council. The DCC planner's report supports this assumption and makes reference to Section 4(1)(f) and the fact that the 'hostel' is the subject of a contract entered into on behalf of DCC and therefore considers the change of use exempted development under this section. The property owner in their submission details a previous appeal ABP Ref.303392, where a similar case arose regarding contracts between that respective property owner and another local authority (South Dublin County Council). This case was also comparable in that the referrer believed that the development which had taken place 'use of a monastery as a hub/hostel for homeless families' constituted a material contravention of the Development Plan. The current referrer also raises this issue.

- 8.4.2. In my opinion the interpretation of Section 4(1)(f) in this case requires an examination of the zoning on site, as well as an examination of any other policies within the Dublin City Development Plan 2016-2022, that may restrict the nature of the development on site. This is further investigated in the sections below.
- 8.4.3. The submission made on behalf of the property owner states that the current use on site, remains as 'residential' use and is therefore within the parameters of Z2 zoned lands and is listed as a 'permissible' use. The referrer raises issues regarding the Z2 zoning on the subject site and argues as part of his submission that while residential use is permissible, a 'hostel' use is not listed under either 'permissible' or 'open for consideration' under the zoning objective.
- 8.4.4. I do not share the referrer's conclusion on the above and also note the use of the word 'hostel' in this case. In my opinion the use on site should be referred to as a hostel for the provision of homeless accommodation or as Dublin City Council describe it within Appendix A of the property owner's response submission 'the provision of emergency accommodation for single homeless adults', in any case this can be classified as a use where care is provided. I would refer the Board to the list of 'permissible' uses stated under Z2 which includes '*Buildings for the health, safety and welfare of the public*'. Appendix 21, Section 21.1 of the Development Plan provides Land-Use Definitions and outlines the uses of Buildings for the Health, Safety or Welfare of the Public as follows:

Use of a building as a health centre or clinic or for the provision of any medical or health services (but not the use of a house of a consultant or practitioner, or any building attached to the house or within the curtilage thereof, for that purpose), hospital, hostel (where care is provided), retirement home, nursing home, day centre and any other building for:

- *The provision of residential accommodation and care to people in need of care (but not the use of a dwelling house for that purpose).*

Therefore, in my opinion the use as a '*hostel (where care is provided)*' '*for the provision of residential accommodation and care to people in need of care*' is covered under this use and therefore acceptable under this land-use zoning objective Z2.

- 8.4.5. However, when other requirements listed in the Development Plan are examined and in particular *Section 16.12 Standards- Institutions/Hostels and Social Support Services* and *Policy QH30*, I have concerns regarding the current use on site. Policy QH30 which addresses Homeless Services is clear in its requirements with regard to temporary homeless accommodation stating that *'All such applications shall include: a map of all homeless services within a 500 metre radius of the application site, a statement on the catchment area identifying whether the proposal is to serve local or regional demand; and a statement regarding management of the service/facility'*. I note that the required supporting information has not been provided as part of the current proposal for this temporary homeless accommodation
- 8.4.6. In relation to the above, I note that in the case of *Carman's Hall Community Interest Group & Ors V Dublin City Council [2017] IEHC 544*, the High Court found Dublin City Council had breached its own development plan and had not given any consideration at all to the question of whether or not the change of use of the building would lead to an undue concentration of such homeless accommodation facilities in the area.
- 8.4.7. The referrer argues that whether or not the change of use is made pursuant to a contract entered into by the local authority concerned (referred to under Section 4(1)(f)), it does not give a public authority the right to do what so ever it pleases. The referrer states that clearly Section 4 of the Planning and Development Act is subject to a significant number of limitations provided for under the Planning Regulations Part 8, not least Section 80 (1) (k) and other status re-enactments such as the Roads Acts and regulations. The referrer highlights that the property is in private ownership (Brimwood Ltd.) and it is far from clear that Dublin City Council as a tenant can rely on its emergency powers to allow Brimwood Ltd. to avoid its statutory planning obligations.
- 8.4.8. In addressing the above issue, I note under Section 178 (2) of the Planning and Development Act 2000 (as amended) it is stated that *'The council of a city shall not effect any development in the city which contravenes materially the development plan'*. In addition, I note that in the case of *Carman's Hall Community Interest Group & Ors V Dublin City Council case [2017] IEHC 544*, the High Court noted in its ruling that even where works constitute exempt development, and even if an emergency situation for the purposes of Section 179(6)(b) of the Act exists, that does not entitle

the local authority to undertake development in contravention of its own development plan. Therefore Section 4(1)(f) is limited by the operation of Section 178 of the Act. While I note that some consultation has occurred with surrounding landowner regarding the development (accommodation for the homeless) and some details in relation to the management of the facility has been outlined in the property owner's submission, this is not considered sufficient to address the requirements outlined under Policy QH30 or Section 16.12 of the current Dublin City Development Plan 2016-2022. While the property owner's submission makes reference to the previous determination made by the Board under ABP. Ref. 303392-19, I note that this determination was made under a different local authority and therefore a different development plan and its associated policy. The current case and the High Court judgement above in the case of Carman' Hall have many similarities most notably that they both query the same use in connection with the provision of homeless accommodation and both fall under the jurisdiction of Dublin City Council and the current Development Plan 2016-2022.

8.5. Conclusion

- 8.5.1. In conclusion what has been determined under this referral is that the current use as accommodation for the homeless, which falls under Class 9 of Part 4 of the Second Schedule to the Planning and Development Regulations 2001, constitutes a change of use from the former exclusively residential use, and in my opinion this constitutes a material change of use by reason of providing a different service, to a different user group and this material change of use would not come within the scope of Article 10(1) of the Planning and Development Regulations 2001, as amended, as it does not constitute a change of use within any one class. In view of the foregoing, I am of the opinion that the works carried out constitute development, that is not exempted development and no restrictions can be reasonably applied.

8.6. Restrictions on exempted development

- 8.6.1. There are no other exemptions available for this material change of use within existing legislation.

8.7. Environmental Impact Assessment

8.7.1. Having regard to the limited nature and scale of the development, as referenced in the questions above, and the absence of any connectivity from the referral site to any sensitive location, there is no real likelihood of significant effects on the environment arising from the development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

8.8. **Appropriate Assessment**

8.8.1. Having regard to the existing development on site, the minor nature of the development referenced in the questions above, the location of the referral site in a serviced area and the separation distance to the nearest European site, no Appropriate Assessment issues arise, and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

9.0 **Recommendation**

9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether a change of use from residential use to a hostel for homeless accommodation at 15/17 Lower Drumcondra Road, Dublin 9 is or is not development or is or is not exempted development:

AND WHEREAS Anthony Corbett requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 29th day of September, 2020 stating that the matter was development and was exempted development:

AND WHEREAS Anthony Corbett referred this declaration for review to An Bord Pleanála on the 27th day of October, 2020:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1), 3(1), 4(1)(f), 4(1)(h) and 178 of the Planning and Development Act, 2000, as amended,
- (b) Articles 5, 6, 9 and 10 of the Planning and Development Regulations 2001, as amended
- (c) Class 14 (e) of Part 1 of the Second Schedule to the Planning and Development Regulations 2001, as amended,
- (d) Class 9, of Part 4 of the Second Schedule to the Planning and Development Regulations 2001, as amended,
- (e) The definition of ‘care’ as set out in Article 5 of the Planning and Development Regulations 2001, as amended
- (f) the provisions of the Dublin City Development Plan 2016-2022,
- (g) the submissions on file, and
- (h) the planning history of the site, the nature of the uses previously and currently on site and the pattern of development in the area.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the change of use from a multi-unit residential accommodation use on site comprising 17 bedrooms to the current use on site as accommodation for the homeless comprising of 21 bedrooms with 40 bed spaces constitutes development;
- (b) the current use constitutes a change of use from residential use to a use for the provision of residential accommodation and care to people in need of care as defined under Class 9 (a) of Part 4 of Schedule 2 of the Planning and Development Regulations 2001, as amended, which is a material change of use by reason of providing a different service to a different user group;

- (c) the provision of the support described above falls within the scope of 'care' as defined at Article 5 of the Planning and Development Regulations 2001, as amended, namely personal care including help with social needs;
- (d) this material change of use would not come within the scope of Article 10(1) of the Planning and Development Regulations 2001, as amended, as it does not constitute a change of use within any one class;
- (e) there are no other exemptions available for this material change of use within existing legislation.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5 (3) (a) of the Planning and Development Act 2000, as amended, hereby decides that the change of use from residential use to a hostel for homeless accommodation is development and is not exempted development.

Máire Daly
Planning Inspector

22nd February 2021