



An
Bord
Pleanála

Inspector's Report ABP-309873-21

Question

Whether the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people is or is not development and whether development constitutes exempted development or does not constitute exempted development.

Location

16 Hollybrook Road, Clontarf, Dublin 3

Declaration

Planning Authority

Dublin City Council

Planning Authority Reg. Ref.

0049/21

Applicant for Declaration

Mark McCaughey & Others

Planning Authority Decision

Undetermined

Referral

Referred by	Mark McCaughey & Others
Owner	Copperwhistle Ltd.
Observer	Copperwhistle Ltd.
Site Inspection	15 th December 2021
Inspector	Stephen Ward

1.0 Introduction

This is a referral case under the provisions of Section 5 of the Planning and Development Act 2000 (as amended). **It should be read in conjunction with ABP Ref. 310505-21, which is a concurrent referral case on the same question.** I will refer to both cases throughout this report.

2.0 Site Location and Description

- 2.1. The subject site is located at a prominent position at the northern end of Hollybrook Road, in close proximity to its junction with Howth Road c. 130m to the northwest of the site. The area is mainly comprised of a mix of mature residential properties, with a limited extent of commercial/hospitality uses in the wider surrounding area. The adjoining property to the west (No. 14) would appear to be in use as a guest house/hostel which also accommodates homeless people.
- 2.2. The site is occupied by a large semi-detached two-storey building which is a Protected Structure in the Dublin City Development Plan 2016-2022. It is described in the National Inventory of Architectural Heritage (NIAH) as a semi-detached complex-plan two-storey house, built c. 1900.

3.0 The Question

- 3.1. The question referred to the planning authority pursuant to Section 5(1) of the Planning and Development Act, 2000, as amended (“the Act”) and subsequently referred by referrer to the Board, pursuant to Section 5(3)(b) of the Act is, as follows:

‘Whether the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people is or is not development and whether development constitutes exempted development or does not constitute exempted development’.

4.0 Planning Authority Declaration

4.1. Declaration

By letter dated 11th March 2021 the Planning Authority advised that, as the applicant under the concurrent referral (EXPP0025/21 & ABP Ref 310505) had not responded to the further information request, the planning authority was not in a position to make a declaration as per s. 5(2)(ba)(i) of the Act.

4.2. Planning Authority Reports

4.2.1. Planning Reports

The report of the Senior Executive Planner (9th March 2021) outlines the legislative context and the planning history of the site, as well as the positions held by various parties in previous cases. The assessment conclusion can be summarised as follows:

- It is already agreed that, if 'care' is not being provided, then any continued use of the premises as a guesthouse does not breach its overall permitted use (as a guesthouse).
- The guesthouse use is not de-exempted from its use as defined by Class 6 of the Planning and Development Regulations 2001 ('the Regulations') given that the operation would not be under the management of an Approved Housing Body (AHB) or related Non-Governmental Organisation (NGO).
- There is nothing within planning legislation that restricts the use of a guesthouse by any socio-economic group, or for that matter, who provides funds for stays in the guesthouse.
- None of the limitations under Article 10(1) of the Regulations apply as the use remains unchanged.
- The limiting conditions attached to the parent permission do not limit the length of stay for guests, as is the case with any hotel or B&B.
- If the 'proposed' use remains unchanged from the permitted use (i.e. Class 6), there would be no material impacts on the area.

- The 3rd Party submission claims that the property was never used as a guesthouse, but rather as residential accommodation.
- Under the other concurrent referral (0025/21), in order to address the limitations contained in Article 10 (1)(d), the owner was requested to provide evidence that the property was used as a guesthouse and when it was last used as such. The owner has not yet responded to this request and accordingly the planning authority is not in a position to make a declaration on the applicant's submission as per s. 5(2)(ba)(i) of the Act.
- There is no facility under s. 5 of the Act to accept 3rd Party comments.
- Exempted development legislation is not bound to have regard to Development Plan zoning objectives and policies.
- Class 6, Part 1, Schedule 2 (Article 6) of the Regulations does not apply.
- The applicants' references to other national legal/regulatory and registration regimes for guesthouses etc. but same does not come within the scope of the s. 5 process under national planning legislation.
- It is recommended that the applicant be advised that as the applicant under the concurrent referral (EXPP0025/21 & ABP Ref 310505) had not responded to the further information request, the planning authority is not in a position to make a declaration as per s. 5(2)(ba)(i) of the Act.

5.0 Planning History

5.1. Referral Site:

P.A. Reg. Ref. Expp 0025/21 & ABP Ref. 310505-21: This is the concurrent case before the Board on the same question. This Section 5 application made by the owner was not determined by the planning authority and was subsequently referred to the Board by DCC under the provisions of Section 5 (4) of the Act.

P.A. Reg. Ref. Expp 0405/20: Section 5 application on whether or not the change of use of the property from a guesthouse to a residential facility for accommodation of the homeless, is or is not development, and is or is not exempted development.

The DCC decision declared that the change of use is considered to be 'development' and that the change of use from a guesthouse to a residential facility for accommodation of the homeless where care is provided is not exempted development as per Article 10(1) and Class 6, Part 4, Schedule 2 of the Regulations.

P.A. Reg. Ref. Expp 0371/20: Section 5 application relating to various repair and improvement works to the Protected Structure.

The DCC decision declared that the works were exempted development, except for the repair and replacement of extant historic timber panelling to the entrance hall.

P.A. Reg. Ref. Expp 0297/20: Section 5 application relating to various repair and improvement works to the Protected Structure.

The DCC decision declared that the works were exempted development.

P.A. Reg. Ref. 2428/15: Permission granted (7th August 2015) for conversion of 14 bedroom long stay guest house to 4 one-bedroom and 2 two-bedroom apartments with associated works: re-ordering of rooms, new partitioning, facilities and services, roof-mounted solar thermal collectors, dry-lining walls and insulating ceilings, alteration to windows and new balcony on east elevation, extension of sheds to provide apartment stores and boiler room, associated site-works, landscaping and removal of greenhouse.

P.A. Reg. Ref. 2161/96: Permission granted (8th January 1997) for construction of 2 storey extension to rear and first floor extension over existing garage for use as guest house bedrooms at existing house.

P.A. Reg. Ref. 1586/96: Split decision (22nd October 1996) granted permission for change of use of existing Grade 2 listed house to guest house and additional car parking spaces and refused permission for construction of 2 storey extension to rear and first floor extension over existing garage to side.

5.2. Other Relevant Referrals

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

- ABP Ref. 308540 – In April 2021 the Board decided that the change of use from residential to a hostel for homeless accommodation is development and

is not exempted development. It should be noted that the case involved a situation whereby Dublin City Council had entered into a contract (5 years) with the owner to use the property as emergency accommodation for homeless single persons and that the owner would continue to manage the property under the supervision of the Dublin Regional Homeless Executive.

The Board considered that the new use for the provision of residential accommodation and 'care' (as defined in Article 5 of the Regulations) was defined under Class 9 (a) of Part 4 of Schedule 2 of the Regulations and was a material change of use by reason of providing a different service to a different user group. It considered that the material change of use would not come within the scope of Article 10(1) of the Regulations as it does not constitute a change of use within any one class.

Furthermore, the Board considered that, in the absence of evidence of the application of Policy QH30 and section 16.12 of the Dublin City Development Plan 2016-2022 in considering the proposal to develop and change the use of the premises, the Council in entering into the contract, effected development in the city which contravenes materially the development plan contrary to the provisions of section 178(2), by failing to comply with the specific procedures for such developments, and, therefore, any exemption which might have been available under the provisions of section 4(1)(f) cannot be availed of.

- 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. Again, the Board considered that the use as a homeless hostel involved the provision of 'care' and came under Class 9 (a) of Part 4 of Schedule 2 of the Regulations.

- ABP Ref. 305515 – In February 2020, the Board decided that the change of use from a nursing home to use as a homeless accommodation facility is development and is exempted development.

The Board considered that the material change of use would come within the scope of Article 10(1) of the Regulations, being a change of use within Class 9 of Part 4 of Second Schedule, from Class 9(b) to Class 9(a).

- 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.

The Board considered that the material change of use took place on behalf of South Dublin County Council (a local authority) pursuant to a contract entered into by the local authority (and a service provider) acting in its capacity as a housing authority, which comes within the scope of the exemption provided for under Section 4(1)(f) of the Act.

- 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.

The Board considered that the material change of use would come within the scope of Article 10(1) of the Regulations, being a change of use within Class 9 of Part 4 of Second Schedule, from Class 9(b) to Class 9(a).

6.0 Policy Context

6.1. Development Plan

- 6.1.1. The site is zoned Z2 Residential Neighbourhoods (Conservation Area) with a stated objective '*to protect and/or improve the amenities of residential conservation areas.*'
- 6.1.2. **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.

6.1.3. **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.*

6.1.4. **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.*

6.2. **Natural Heritage Designations**

None relevant.

7.0 The Referral

7.1. Referrer's Case

7.1.1. The referral is largely based on a submission of 10th February 2021 which was not accepted by DCC under P.A. Reg. Ref. 0025/21. The relevant issues raised can be summarized as follows:

- The present use is not as a guesthouse and the proposed bed and breakfast use would be development and would not be exempted development.
- Use as a guesthouse appears to have commenced around 2000 and ceased before 2007 with the ratable valuation being updated in 2013 to reflect the effective residential use.
- A 2015 planning application (P.A. Reg Ref 2428/15) described the property as a 'long stay guest house' and described the individual rooms as bedsits (attention is drawn to the application letter and photo survey). It was effectively in use as a multiple occupation residential development and DCC granted permission for the continuation and redevelopment of the residential use. The residential use continued but the redevelopment works were not carried out. Accordingly, the current use appears to be residential use, as bedsits.
- The 3rd Party referrers are residents of the area and would be affected by the proposed use.
- The 3rd Party's view in the first Section 5 application (P.A. Reg. Ref. 0405/20) was based on an assumption that the guesthouse use continued, and that the apartment use pursuant to P.A. Reg Ref 2428/15 had not commenced. This now appears to be incorrect based on the investigations indicating that the property:
 - Is not registered for rates in the valuation office, indicating that the guesthouse use did not commence or has elapsed
 - Was registered with the Residential Tenancies Board (RTB) in the period after 2015, thereby indicating a residential use

- Was issued with a series of Eircodes for a series of apartments
 - Was not registered as a guesthouse with Failte Ireland (pursuant to the Tourist Traffic Acts 1939 to 2016) as far back as 2003, indicating that the guesthouse use did not commence or has been extant for some time.
- The site is zoned 'Z2 Residential Conservation'. The Development Plan classifies 'Bed and Breakfast', 'Guest House' and 'Hotel' as separate uses, reflecting their different planning impacts. The submission outlines that only a 'Bed and Breakfast' is categorized as 'open for consideration' in the Z2 area.
- The distinctions between the above tourist uses are based on definitions in the Tourist Traffic Acts 1939-2016. Compared to a 'Bed and Breakfast' (i.e. a premises with 2 to 6 bedrooms operated by the owner who lives on site), a 'guesthouse' is described as a more formal structure with 7 to 30 guest bedrooms providing touristic accommodation for travelers. A guesthouse must be registered under the Acts and it is an offence to describe a building as a guesthouse unless it is registered. A 'bed and breakfast' is not subject to mandatory registration, but the premises must be a private home where the owner lives, and the purpose of Failte Ireland and the 'bed and breakfast scheme' is to increase the contribution of tourism to the economy.
- It is incorrect for the owner to assert that guesthouse use is compatible with the zoning for the property because 'bed and breakfast' use is within the Z2 zoning matrix. Section 16.11 of the Development Plan implies that:
 - Permission is required for the enlargement of a 'bed and breakfast' or creation of a guesthouse
 - There are material planning considerations when tourist accommodation is enlarged/created, including impacts on neighbour's amenity, the standard of accommodation, parking and advertising, and
 - Tourist accommodation is not the same as residential accommodation, or lodgings for non-tourists.
- The present use of the property is unclear. For reasons previously outlined it does not appear to have been registered/rated as a guesthouse. The previous

application (PA Reg Ref 2428/15) indicates that the property was not used for overnight accommodation but for long term residential use, which, in effect, was an unauthorized residential use. Indications are that the residential use has commenced or continued under that permission (Ref 2428/15), although condition no. 1 (requiring works to be completed in accordance with plans and particulars submitted) has not been complied with and constitutes unauthorized development. Accordingly, the present use appears in fact to be residential, not a guest house. It is also not used as a 'bed and breakfast' as there are too many rooms and the owner does not live in the property.

- The proposed use would not be a guest house as it would not be used by tourist travelers and would not be available to such travelers if it is block booked by the DRHE. The proposed use is not residential as it does not provide a home for homeless people, but merely a transitory resting place. What is proposed is short term lodging for people from night to night.
- The existing use is different to the proposed use. Use as a residential apartment development is different to use as overnight accommodation. Use as a guest house for tourist travelers is different to use as overnight accommodation for people who are neither tourists nor travelers.
- The change of use is material. Different planning considerations apply to the proposed new use by virtue of Development Plan Policy QH30 which aims to ensure that homeless accommodation should be spread out across the city and not concentrated in one area. The presence of the existing homeless accommodation at No. 14 Hollybrook Park would lead to a concentration of such uses and could undermine the existing resident community, which is a matter for determination in the course of a planning application, not a section 5 declaration.
- If it is held that the established use is in fact as a guest house, it is submitted that the proposed use would not be a continuation of that use. It would be used for tourist travelers in accordance with registration regulations and would be a material change of use having regard to the different planning implications associated with the concentration of homeless accommodation and the issues outlined in section 16.11 of the Development Plan.

- In addition to that already outlined, the submission refutes certain arguments advanced by the owner's submission under P.A. Reg Ref. 0025/21 as follows:
 - There is no significance to the suggested 'socio-economic class associated with the inhabitants' as homelessness is not limited to a particular class. What is significant is that the occupants will change all the time and will not be tourist travelers
 - Block booking is relevant in this instance as the booking of a large number of rooms over a prolonged period will effectively make the property unavailable for bona fide tourist travelers. The predominant use will be as transient accommodation for homeless people, which would be contrary to guesthouse regulations which require a predominant use for tourist travelers. It would not operate like any other guesthouse as will not in fact routinely accept bookings from individuals for a day or two while visiting Dublin.
 - The conditions of the guesthouse permission require that the property be used for 'overnight' accommodation, which conflicts with the long-term residential use as indicated in the application for apartments (PA Reg Ref 2428/15).
 - The precedent of the adjacent property (No. 14) casts doubt over the activities there rather than to confirm what is proposed for No. 16.

7.1.2. The submission requested that the Council require the owner and 3rd Party residents to submit information relating to the property rates, registration, tax and title, and that both parties be given the opportunity to comment on all material submitted. It is also requested that the two section 5 applications be referred to the Board for determination together.

7.2. Owner's Response

7.2.1. The owner has made a submission in response to the current 3rd Party referral case. In addition to the owner's case as set out under ABP 310505-21 (see section 7.3 below), the submission can be summarised as follows:

- The referral asks the Board to determine whether the present use is as a guest house or a residential building, which is completely different to the question being referred.
- In response to the allegation that the guesthouse use ceased in 2007, it is stated that the building's current and authorised use, pursuant to the permission granted under Reg Refs 1586/96 & 2161/96, is that of a guesthouse. The future use will remain as a guesthouse and the claim that the guesthouse use ceased in 2007 is not valid.
- It is not contested that the property did not operate as a guesthouse temporarily, but the property was sold and purchased as a guesthouse.
- The information submitted from The AA does not confirm that the guesthouse use ceased at the property and membership of The AA is not mandatory.
- The correspondence from the Rate Valuations office confirms that the property does not have a rateable valuation and that there is no link between the rate process and planning

7.3 Owner's Case (ABP Ref. 310505 / P.A. Ref 0025/21)

7.3.1. The original application to DCC included a Planning Report prepared by Hughes Planning and Development Consultants. The report sets out the owner's case and can be summarised as follows:

- It is intended to continue the permitted use of the property as a guest house (as per P.A. Reg. Ref. 1586/96). Heads of Terms have also been agreed with Dublin Region Homeless Executive (DRHE) to provide emergency accommodation to homeless families for a 12-month period. Rooms will be leased on a nightly basis. The owner will be responsible for the provision of guesthouse services (i.e. linen, breakfast and cleaning) and staff.
- No element of 'care', be it social, physical or emotional will be provided to guests and no AHB or NGO will be involved.
- The property contains 14 bedrooms and communal kitchen and laundry facilities. It is currently vacant but was most recently used as a guest house.

- Works associated with permission for the conversion of the property to apartments (P.A. Reg. Ref. 2428/15) did not commence and the permission has now expired.
- Works associated with other Section 5 Declarations (P.A. Reg. Ref.'s Expp 0371/20 & Expp 0297/20) were for building condition improvements only and do not affect the use of the property.
- The permitted guesthouse use is consistent with the Z2 zoning objective for the site and is therefore compliant with the Development Plan.
- In order to determine the materiality of a change of use, and with reference to various case law, the practical impacts of the change and whether it would lead to materially different planning considerations are considered. It is submitted that there will be no discernible change to the use of the property other than the socio-economic class of the inhabitants. This factor should not be taken into account as evidenced by the Supreme Court decision in *Corporation v. Moore* (1984, ILRM 339).
- The planning authority would not attach conditions to a guesthouse permission prohibiting the accommodation of persons of a particular socioeconomic background or the block booking of rooms. The guesthouse will operate like any other guesthouse in the city and offer rooms to members of the public for a rate. The rooms will be advertised on the guesthouse website where bookings can be made by members of the public and block bookings can be made by individuals/groups for a specific event or occasion.
- The guesthouse permission (P.A. Reg. Ref. 1586/96) does not include conditions about the length of stay, class of guest, or block bookings. The continued/proposed use will comply with the conditions of the permission.
- The continued/proposed use will have no material effects on the area with regards to proper planning and sustainable development or the amenity of local residents. Therefore, no material change of use will occur and that change of use is exempted development.
- Precedence for the use of a guesthouse to accommodate homeless people exists at No. 14 Hollybrook Park. A DCC Planning Enforcement investigation

(Reg. Ref. E0931/10) concluded that the building use did not materially change, and the enforcement file was closed.

7.3.2. After DCC requested further information on the previous use of the property as a guesthouse, the owner's response can be summarised as follows:

- The property was purchased by Ms Frances Campbell in 1998 before being sold to Mr Gerry Gannon in 2004. It operated as a guesthouse between 1998-2004 and was registered with Bord Failte during this time. Accompanying affidavits from Ms Campbell and Mr Robin Campbell (a relative) state that the property served as a guesthouse during this period. They also state that, between the approximate period of 2000 to 2004, DCC leased rooms on a nightly basis to accommodate homeless persons while the property continued to operate as a guesthouse.
- The provisions of Article 10 (1) of the Regulations, including subsection (d), do not apply as there will be no change of use.
- The proposal does not involve the resumption of an abandoned use and various case law is referenced on the concept of 'abandonment of use'. And with reference to further case law, it is contended that a use that has been expressly granted by planning permission, as applies to this case, cannot be abandoned. Therefore, it would be legally impossible for the applicant to have abandoned the use of the property as a guest house, notwithstanding that the premises were not used as a guesthouse between 2004 and today.
- There was never any objective sign of a decision not to continue the guesthouse use. The property has been physically maintained as such and no works or alterations have taken place that would be inconsistent with that use or have evidenced any intention to cease the use. There was never any planning application for an alternative use, or any other evidence of an intention not to recommence the guesthouse use in due course.
- Photographs are included to show that the design and layout of the property is consistent with a guesthouse in terms of furniture, room numbering, en-suite bathroom facilities, guest pay-phone services, and signage.

7.4. 3rd Party submission (ABP Ref. 310505 / P.A. Ref 0025/21)

7.4.1. A DCC letter on this file indicates that it refused to accept a submission on 10th February 2021 from Martin & Grove Solicitors. However, the DCC file does contain a later submission (dated 20th May 2021) from the same company. The company's clients are not clearly stated on the submission. However, it does also refer to P.A. Reg. Ref. Expp 0049/21 (i.e. the subject case under ABP Ref. 309873). The submission refers to the further information submitted on behalf of the owners (see section 7.3.2 above) and can be summarised as follows:

- The submission confirms the residents' view that the current use of the property is residential rather than a guesthouse use.
- The cases cited relating to abandonment are irrelevant. What is occurred is that the former owners were carrying out a residential use some years before the purchaser applied for permission to redevelop the residential use. The grant of permission for a residential development locked in the residential use, preventing the resumption of any former guesthouse use.
- The affidavits allegedly showing guesthouse use in fact show that the premises were in use as an early form of 'shared living' accommodation. Particular reference is made to the shared cooking facilities which are incompatible with guesthouse use as defined by Bord Failte/Failte Ireland.
- The statutory declaration by Frances Campbell that the property was used on a nightly basis to provide accommodation for homeless persons is inconsistent with the redevelopment permission which states that it was in use as long term accommodation.
- No evidence of registration with Bord Failte has been provided.
- In light of the contradictory statements by successive owners, these matters need to be tested through an oral hearing. An Bord Pleanala can provide such a hearing, which reinforces the residents' request that DCC refer the matter to the Board so that both applications can be determined together.

8.0 Statutory Provisions

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

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

- ‘development’ has the meaning assigned to it by Section 3;
- ‘works’ includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

8.1.2. 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’.*

8.1.3. 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’.*

8.1.4. 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.

8.2. Planning and Development Regulations, 2001 (as amended)

8.2.1. Article 5 states

“care” means personal care, including help with physical, intellectual or social needs;

8.2.2. **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.

8.2.3. **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.

8.2.4. **Part 1 of Schedule 2** sets out exempted development to which Art 6(1) refers:

Change of use

CLASS 14

(h) Development consisting of a change of use as a hotel, motel, hostel, guesthouse, holiday accommodation, convent, monastery, Defence Forces barracks or other premises or residential institution providing overnight accommodation, or part thereof, or from the change of use specified in paragraph (i) of the said premises or institution, or part thereof, to use as accommodation for protected persons.

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

CLASS 6

Use as a residential club, a guest house or a hostel (other than a hostel where care is provided)

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.

9.0 Assessment

9.1. Preliminary Matters

- 9.1.1. 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.
- 9.1.2. Consistent with the approach in my report thus far, I propose to carry out a cumulative assessment of all the issues raised in the two relevant cases currently before the Board i.e. ABP. Refs 310505-21 and 309873-21.
- 9.1.3. The question to be determined by the Board relates only to the ‘use’ of the property and does not include the carrying out of any ‘works’. I note that referrals relating to certain repair and improvement works have been addressed by DCC under P.A. Refs 0371/20 and 0297/20, but I am satisfied that these works do not form part of the current question.
- 9.1.4. The owner’s case clearly contends that the guesthouse will continue to operate like any other guesthouse in the city and offer rooms to members of the public for a rate. However, I am not satisfied that this is sufficiently clear from the wording of the question itself. Accordingly, I suggest that the Board should re-phrase the question as follows (suggested amendments are in bold):
- ‘Whether the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to **the public and also to** Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people is

or is not development and whether development constitutes exempted development or does not constitute exempted development'

9.2. The Existing Use

- 9.2.1. The initial matter to establish is the nature of the existing use of the premises. It is clear that planning permission was granted for the extension and conversion of the former house to use as a guesthouse under P.A. Reg. Refs 1586/96 (22nd October 1996) and 2161/96 (8th January 1997). The Statutory Declarations submitted on behalf of the current owner state that the property was used as a commercial guesthouse from 1998 until 2004.
- 9.2.2. Based on the information submitted on behalf of the applicant, namely the Hughes Planning & Development Consultants further information response (19th April 2021), it would appear that the property has not been used as a guesthouse since 2004. On page 2 of that submission the Consultants confirm this by stating '*...notwithstanding the fact that the premises were not used as a guesthouse between the sale of the property in 2004 until today*'.
- 9.2.3. Accordingly, based on the information submitted on behalf of the applicant, the property operated as a guesthouse between the years of 1998 to 2004 only, while the 3rd Party referral (Martin & Grove Solicitors cover letter of 1st April 2021) contends that '*Use as a guest house appears to have commenced about 2000 and ceased before 2007*'. The use of the property as a guesthouse is also supported by file correspondence from The AA, which confirms that the premises '*was at some stage accredited by The AA for the provision of Guest Accommodation*'.
- 9.2.4. The owner's case has presented limited information on the use of the property during the period from '*2004 until today*', except to refute allegations that the guesthouse use ceased or was abandoned. The owner's case contends that:
- there was never any objective sign of a decision not to continue the guesthouse use,
 - the property has been physically maintained as such and no works or alterations have taken place that would be inconsistent with that use or have evidenced any intention to cease the use,

- there was never any planning application for an alternative use,
- there was no other evidence of an intention not to recommence the guesthouse use in due course.

9.2.5. In contradiction of some of the above points, I have noted that there was indeed an application granted (7th August 2015) for an alternative residential apartment use and associated works under P.A. Reg. Ref 2428/15. I note that the cover letter associated with that application stated that the 14 bedrooms *'have effectively been used as long-stay bedrooms similar to apartments but with communal cooking and laundry facilities'*, and that the survey drawings/photos showed that the property comprised 1 no. 3-bedroom ground floor apartment/bedsit, 1 communal kitchen, 1 communal living room, and 10 no. single-room bedsits. Furthermore, two written submissions were made on that application from residents/tenants of the building using addresses at 'Apt 10 Hollybrook Park' and 'Apt 11 Hollybrook Park', which included concerns about various works that had or had not taken place at the property in the period 2012 to 2014. Given the nature and content of their submissions, it is reasonable to conclude that they were residents/tenants of the property during that 2012-2014 period.

9.2.6. The 3rd Party referral also outlines a view that the current use of the property is residential rather than a guesthouse use. I note that the Eircode website contains multiple addresses for '16 Hollybrook Park', including 10 separate apartments. The Eircode national postcode system was only introduced in July 2015, which would support the view that there were long-stay tenancies in place in the property at that time and/or afterwards.

9.2.7. I note the 3rd Party contentions regarding the historical rateable valuation of the property. However, I would accept that the rateable status of the property is not necessarily an accurate indication of its use and/or planning status and I do not consider that definitive evidence has been submitted in this regard that would clarify the extent of the residential use of the property since 2004.

9.2.8. In summary regarding the recent use of the property, I am satisfied that it was used as a guesthouse for several years during the approximate period of 1998 to 2004. The use of the property from 2004 to 2012 is unclear and, according to the details contained in the 2015 planning application, it would appear to me that the property

was in use as long-stay residential accommodation during the 2012 to 2015 period. Importantly, I would acknowledge that the 'residential' use during this period was not of a conventional nature. The property still mainly consisted of single-room bedrooms with communal kitchen/living areas and shared some of the concepts of 'shared-living' accommodation that would later emerge but could have been considered *sui generis* at the time. The use of the property between 2015 and today is unclear, except that on inspection of the site (15th December 2021) I can confirm that the property is currently vacant.

9.2.9. Given that the permitted use of the property is as a guesthouse for overnight guest accommodation, I consider that it's subsequent use as long-stay residential accommodation would likely have constituted a material change of use (i.e. 'development') which would not be exempted development. However, that is not the relevant question before the Board. At this stage, I consider that the Board must determine whether or not the permitted overnight guesthouse use was abandoned by reason of the evident use of the property as long-stay residential accommodation during the period 2012 to 2015. As outlined in 'Environmental and Land Use Law' (Yvonne Scannell, Thomson Round Hall, 2006), I accept that the doctrine of abandonment is a very complex concept and determining whether or not a use has been abandoned can be difficult. In this regard, I propose to discuss Scannell's suggested tests as follows:

- (i) The intention to abandon or not to abandon

9.2.10. I consider that the change of use to long-stay residential accommodation would have required particular actions by or on behalf of the owner, including different advertising, management and rental arrangements. That being said, the introduction of such changes would not also necessarily equate to an intention to abandon the original guesthouse use.

9.2.11. I accept that the 2015 planning application to carry out the re-ordering of rooms and partitioning to create 6 standard apartments is evident of an intention to abandon the guesthouse use. However, as outlined by Egan J. in *McGrath Limestone Works Ltd v Galway County Council*¹, a use is not abandoned just because planning permission has been granted for a different use on the same planning unit. The permission must

¹ (1989) I.L.R.M. 602

be implemented. Contrary to the 3rd Party contentions, I do not consider that the 2015 permission was implemented in any way. There is no evidence that any of the works associated with that permission have been implemented. Similarly, I consider that the long-stay residential use of the property already existed at the time of the making of the application and, accordingly, I do not accept that the 2015 permission was partially implemented by reason of a change of use.

(ii) The period during which the use was discontinued

9.2.12. As previously outlined, it would appear that the permitted guesthouse use was discontinued during the period 2012 to 2015. Full details of the property usage are unclear and therefore this period may have been longer, or there may have been significant periods when the property was vacant. However, on the basis of the evidence available to me, I do not consider it reasonable to assume that the period was any longer than the 2012-2015 period. Although this itself would be a significant period of time, I would contend that it is relatively short period in the context of the overall period since the apparent commencement of the guesthouse use in 1998.

(iii) Whether or not there have been any intervening uses

9.2.13. As previously outlined, it would appear that the property was used for long-stay residential accommodation during the period 2012 to 2015. This residential use was of an unconventional nature. It retained some characteristics of the original guesthouse use, particularly given that the accommodation predominantly consisted of single-room bedsits. It included common kitchen/living/dining areas which would be consistent with guesthouse use, albeit that the residents would likely be responsible for their own food preparation rather than being served as would be the case in a guesthouse. From the details available, it would appear that some residents may have stayed in the property over a period of several years. However, I would accept that the layout and living standards within the property were not conducive to permanent residential accommodation and it is likely that many of the tenancies were for shorter, temporary periods.

(iv) The physical condition of the land or structure

9.2.14. From the details available it would appear that only minor repair, improvement, and/or alteration works have been carried to the property since the major works associated with the guesthouse permissions (P.A. Reg. Refs 1586/96 and 2161/96)

were implemented. As previously outlined, the long-stay residential use appears to have predominantly retained the room layout of the previous guesthouse use. Having inspected the property, I can confirm that the property (currently vacant) is mainly comprised of en-suite bedrooms, along with shared kitchen/dining/living areas at ground floor level. Accordingly, it would appear to me that the physical condition of the structure has been maintained in a state that is consistent with the permitted guesthouse use.

9.2.15. Having considered points (i) to (iv) above, I consider that the long-stay residential use of the property was of an unusual nature that was neither consistent with the use of a guesthouse nor a conventional residential use. And while a material change of use may have occurred over a temporary period and planning permission was granted for apartments in 2015, I do not consider that this necessarily equates to an abandonment of the permitted guesthouse use. I am of the opinion that the extent of physical and operational changes to the property are key factors in this regard and I consider that no significant physical alterations have been carried out that would be inconsistent with the permitted guesthouse use. And while the long-stay residential use involved operational changes over a temporary period, I consider that significant operational characteristics of the guesthouse use would still have been retained and that the guesthouse use could have been readily resumed at any stage.

9.2.16. I would also highlight that the guesthouse permission was the last permission implemented for the property and consider that the legal case of *Molloy v. Minister for Justice*² is relevant in this regard. In this case Gilligan J. stated that:

'It accordingly appears to follow that where a use of land is permitted under a valid planning permission, the use of the land cannot be abandoned as the permission enures for the benefit of the land and can presumably only be extinguished if abandoned as per Lord Scarman's exceptions in Pioneer..'

9.2.17. The 'Pioneer' case refers to *Pioneer Aggregates (U.K.) Ltd. V. Secretary of State for the Environment (1985) 1 A.C. 132*, and Lord Scarman's exceptions can be summarised as follows:

² (2004) I.E.H.C. 74, (2001) 2 I.L.R.M. 343, High Court, April 2004

- Where the original use did not have the benefit of a valid planning permission, but rather was an ‘existing use’
- Where the original use is lost by reason of a new development which was the subject matter of a valid planning permission
- Where there are two valid planning permissions affecting the same land.

9.2.18. I am satisfied that none of these exceptions apply to the current case and that the current case is quite comparable to the case of *Molloy v. Minister for Justice*. The judgment in that case goes further to state even that:

‘...where a material unauthorised change of use has taken place and has been carried on even for a period in excess of twenty years and notwithstanding that there may have been no complaint raised by any adjoining interested party in respect of the material unauthorised change of use and no enforcement action has been taken by the appropriate Planning Authority, where in circumstances that the original planning permission is capable of being implemented and by this concept I mean where there has been no material structural alteration to the land or property which would render the original planning permission for use incapable of being implemented, I hold that the original valid planning permission cannot be lost or abandoned.’

9.2.19. It follows accordingly that in the particular circumstances of this case, the 1996/97 permissions for the use of the property as an overnight guesthouse are extant and valid and have not been lost or abandoned by reason of the material unauthorised change of use to long-stay residential use.

9.3. **The Proposed Use**

9.3.1. Subject to my suggested amendments to the questions, both current referral cases relate to the use of the property as ‘a guest house which provides rooms on a nightly basis offering Bed and Breakfast to the public and also to Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people’. Regarding the nature of the proposed use, the main elements of the owner’s case outline that:

- It is proposed continue the permitted use of the property as a guesthouse while also providing temporary emergency accommodation to the DRHE
- Rooms will be leased on a nightly basis and the owner will be responsible for the provision of guesthouse services and staff
- No element of 'care', be it social, physical or emotional will be provided to guests and no AHB or NGO will be involved
- The guesthouse will continue to offer rooms to the public.

9.3.2. The 3rd Party referral contends that the proposed use would not in fact be as a guesthouse as it would not provide touristic accommodation for travelers and would not be available to such travelers if it is block booked by the DRHE. It contends that what is proposed is short term lodging for people from night to night.

9.3.3. The 3rd Party case also appears to suggest that a 'bed and breakfast' use may be proposed and contends that this would be development and would not be exempted development. I acknowledge that the referral question refers to the offer of 'bed and breakfast'. However, I consider that this is simply a reference to the actual services offered rather than any suggestion that the property would operate as a 'Bed and Breakfast' in the conventional understanding of such premises i.e. private homes that also include bedrooms for overnight guest accommodation.

9.3.4. The owner's case has emphasised the fact that no 'care' will be provided as part of the proposed use. The Regulations define 'care' as *'personal care, including help with physical, intellectual or social needs'*, which is an important distinction with regard to the classes of use set out in Part 4, Schedule 2, of the Regulations. Class 6 includes *'Use as a residential club, a guest house or a hostel (other than a hostel where care is provided'*, while Class 9 (a) includes use *'for the provision of residential accommodation and care to people in need of care (but not the use of a house for that purpose)'*.

9.3.5. The Board will be aware that several similar referral cases, some of which are referenced in section 5 of this report, have hinged on the question of whether or not 'care' is provided, and, by extension, whether or not the use comes within Class 9 (a). I consider that the owner's case has been explicit and deliberate in this regard by unequivocally stating that no 'care' will be provided. I am not aware of any evidence

to suggest otherwise and, accordingly, I am satisfied that the proposed use would not come under Class 9 (a).

- 9.3.6. With regard to the 3rd Party concerns on the availability of the property for tourism/travellers, I would highlight that the owner proposes that the property will continue to be available for booking by members of the public, and, accordingly, it would continue to be available for tourism purposes and the accommodation of travellers. Secondly, I note that Article 4.5 of the Registration and Renewal of Registration Regulations for Guest Houses 2003 states that such premises shall be used primarily (my emphasis) for the lodging or sleeping of travellers, which clearly does not exclude use for purposes other than tourism or by persons other than travellers. Furthermore, while I acknowledge that the 3rd Party position is largely based on tourism-related legislation, I would argue that a wider interpretation of a 'guesthouse' would apply in a planning context. For example, I consider that guesthouses would commonly be occupied by workers or students who may need an accommodation base away from home for periods of time.
- 9.3.7. I acknowledge that the owner's case has not provided a proportioned breakdown for the allocation of homeless accommodation and other accommodation, whether by block-booking or otherwise. However, I would accept that this would be difficult to define given that the demands of various users would be likely to vary over time. Again, I do not consider that the issue of block-booking would be uncommon for guesthouses. This would regularly occur in cases, for example, where a group of workers require accommodation associated with a specific project, where an educational institution requires additional student accommodation, or indeed where a tourism/travel-related client requires a booking for a large group. As previously outlined, I have suggested that the question should be amended to accurately reflect the owner's case that the property would be used by both the public and the DRHE.
- 9.3.8. Having regard to the above, I am satisfied that the proposed use is accurately described as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to the public and also to Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people.

9.4. Is or is not development

- 9.4.1. 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*”. As previously outlined in this report, this referral is not concerned with the carrying out of ‘works’ and I propose to focus on the question of ‘use’ only.
- 9.4.2. In this regard, I have previously outlined my opinion that the ‘existing’ use of the property should be taken as a ‘guesthouse’, and that the proposed use should be seen as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to the public and also to Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people. Given my acceptance of the continuation of the ‘guesthouse’ use, it would generally follow that no change of use would occur. However, I would accept that, in limited circumstances, material changes can occur within a particular use class, for example through intensification of use. For that reason, I will examine the specific differences between the existing and proposed uses in more detail.
- 9.4.3. Section 3 of the Planning and Development Act, 2000, requires that in order for a 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 materiality of the associated impacts which are determined on the individual merits of a case. In this regard, I consider that the owner’s case has cited relevant case law on his matter, which is also accepted by the 3rd Party case (see section 7 of submission of 10th February 2021). Relevant excerpts from these case judgements include the following:

Galway County Council v. Lackagh Road Ltd (1985) I.R. 20

‘To test whether or not the uses are materially different it seems to me that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use’.

Westmeath County Council v. Quirke (1996) I.C.L.Y. 750

'Many alterations in the activities carried out on the land constitute a change of use, however, not all alterations will be material. Whether such changes amount to a material change of use is a question of fact as explained in Monaghan County Council v Brogan (1987) IR 339. Consideration of the materiality of a change in use means assessing not only the use itself but also its effects'.

Esat Digifone v South Dublin County Council (2002) 3 I.R. 585 (2002) 2 I.L.R.M. 547

Quoting from Galligan³, states that *'The consideration to be taken into account in determining materiality must at least be relevant to 'proper planning and development and the preservation of amenities' which are the twin objectives of the preamble to the legislation. The question is whether there were sufficient planning considerations raised by the change in activity to justify its submission to development control'.*

- 9.4.4. I have also considered relevant precedent cases from the Board, some of which are outlined in section 5 of this report, the most relevant of which would be ABP Ref. 307064 involving the change of use from a commercial guesthouse (owned by Clare County Council) to a homeless person's hostel managed by an approved housing body (Mid-West Simon). In all the cases I have cited, I note that the Board has determined that the proposed homeless accommodation would constitute 'development' and that this was largely based on the Board's opinion that the proposal would involve the provision of a 'different service' to a 'different user group'.
- 9.4.5. The current case differs to all the other cited cases by the fact that it is not proposed to provide 'care'. The other cases involved the provision of dedicated institutional homeless accommodation facilities/hubs which were managed and supported by competent bodies with the responsibility for the provision of 'care'. I acknowledge that the DRHE has an interest in the current case, but this has been limited to the agreement of 'Heads of Terms' for the use of the property as guesthouse accommodation, rather than the provision, management, or supervision of services. The property will be managed and staffed by guesthouse owner and the services

³ Irish Planning Law and Procedure (1997, p60)

provided will be limited to those consistent with normal guesthouse use. Accordingly, I am satisfied that the proposal would not involve the provision of a 'different service'.

- 9.4.6. Ultimately, I consider that the main issue raised in this question comes down to the 'user group'. I note that the Statutory Declaration from the previous owner (Frances Campbell) outlined that between the years 2000 to 2004 the guesthouse was concurrently used as both a commercial guesthouse and for lease of rooms on a nightly basis by DCC for the accommodation of homeless persons. It is the current owner's case that those user groups will continue to apply. However, given the apparent agreement of the DRHE to use the property, I would accept that the proportion of homeless persons accommodated may increase on that which may have previously occurred. Therefore, the question that the Board must determine is effectively whether or not the use of the property for overnight guesthouse accommodation by homeless persons would result in materially different effects to those associated with other user groups such as tourists, travellers, workers or students.
- 9.4.7. I consider that the booking arrangements for homeless persons would effectively be similar to those of other groups, except that arrangements would be made through the DRHE prior to arrival at the property. I do not consider that there would be any additional signage or advertising associated with the homeless accommodation given that the booking arrangements would be separately managed by the DRHE. In terms of transport to and from the facility, I consider it reasonable to suggest that homeless persons are less likely to own a private car and the extent of associated traffic and parking impacts are therefore likely to be considerably reduced. I would accept that the homeless user group can be associated with particular vulnerabilities and needs. However, I do not believe that it can reasonably follow that homeless persons would cause any adverse impacts on the amenities of the area by reason of disturbance, behaviour or otherwise.
- 9.4.8. With reference to Development Plan provisions, the site is zoned as Z2 Residential Neighbourhoods (Conservation Area) with a stated objective '*to protect and/or improve the amenities of residential conservation areas*'. I note that a 'guesthouse' use is not included as being 'permissible' or 'open for consideration' as per section 14.8.2 of the Plan. However, I would highlight that the established guesthouse use has the benefit of an extant valid permission and this use would be continued under

the current proposal. Accordingly, I do not consider that any changes associated with the proposal, including those relating to the user groups, would be affected by the Z2 land-use zoning objective for the site or section 14.8.2 of the Plan.

9.4.9. In section 6 of this report I have previously outlined other Development Plan provisions, including Section 5.5.11 and Policy QH30 in the 'Quality Housing' chapter, and Section 16.12 of the 'Development Standards' chapter. I am aware that these were key elements in the case of *Carman's Hall Community Interest Group & Ors V Dublin City Council [2017] IEHC 544*, wherein Mr. Justice Binchy held that the failure of Dublin City Council to apply policy QH30 and s. 16.12 of the Development Plan in considering the local authority's own proposal to change the use of a former 'Parish Centre' to provide accommodation for persons experiencing homelessness was a material contravention of the Development Plan.

9.4.10. In this regard, I am of the opinion that these provisions relate to institutional facilities where 'care' and/or 'support services' are provided, for the following reasons:

- Section 5.5.11 sets out the context for policy QH30. It is headed 'Homeless Services' and clearly refers to the provision of such services/accommodation by the '*City Council and other statutory agencies*'.
- Section 5.5.11 refers to an 'over-concentration of institutional accommodation'
- Section 16.12 is headed 'Institutions/Hostels and Support Services' and again refers to an 'over-concentration of institutional hostel accommodation, homeless accommodation and social support institutions'.
- Policy QH30 and Section 16.12 set out requirements to submit information on the existing/proposed concentration of such facilities, including details of 'all homeless services', 'all homeless services and other social support services' and 'a statement regarding management of the service/facility'.

9.4.11. I accept that some of the other wording used in policy QH30 and s. 16.12 is somewhat looser, including various terms such as 'all proposals to provide or extend temporary homeless accommodation or support services', 'all applicants', 'any proposal for homeless accommodation or support services' and 'all such applications'. However, I consider that a reasonable contextual reading of these provisions would establish that they relate to institutional facilities where support

services and/or care is provided, as was the case in *Carman's Hall Community Interest Group & Ors V Dublin City Council* which involved a local authority development. The subject question involves the continuation of a guesthouse use, would not involve the provision of care or support services, and would not be managed by any institution or body with responsibility for homeless services. It would simply involve an arrangement whereby the DRHE would avail of the use of the property for overnight guesthouse accommodation, as commonly happens in various guesthouses and hotels throughout the city, and it would not be reasonable to apply the 'over-concentration' test in such cases as per policy QH30 and s. 16.12 of the Development Plan. Accordingly, I do not consider that the provisions of policy QH30 or s. 16.12 of the Development Plan apply to this case.

9.4.12. If the Board wishes to explore the question of over-concentration further, I note that the 3rd Party case highlights the existence of homeless accommodation at No. 14 Hollybrook Park and the potential cumulative undermining effects on the resident community. In addition to impacts on the resident community, I note that policy QH30 also refers to impacts on the local economy and regeneration. In a Z2 residential area such as this, I consider that the principal impacts relating to homeless accommodation would relate to its transient nature and the associated impact on the established residential character of the area. However, given that the current case involves an established transient use in the form of a guesthouse, a use which will continue and will not be materially affected by a different user group, I do not consider that the issue of over-concentration of transient uses would warrant further assessment.

9.4.13. Having regard to the above, I conclude that the proposal would involve the continuation of an existing guesthouse house, which would not result in material effects by reason of the accommodation of homeless persons, and which would be consistent with the terms and conditions of the extant planning permission. It would not involve a material change of use and, accordingly, would not constitute 'development'.

9.5. Is or is not exempted development

- 9.5.1. I am satisfied that the proposal would not constitute 'development' and that, therefore, the question of 'exempted development' would not apply. However, I acknowledge that my conclusions are based on interpretations of the existing and proposed uses. Should the Board conclude otherwise, it will need to consider other implications on the questions of 'development' and 'exempted development'.
- 9.5.2. In the event that the Board considers that the permitted guesthouse use was indeed abandoned, I would not consider that there is any verifiable existing use of the property given that the intervening unauthorised long-stay residential use should clearly not establish a valid use. In such an event I consider that the proposed use, or any proposed use for that matter, would constitute a material change of use which would constitute 'development', and I am not aware of any legislative provisions under which this could be considered 'exempted development' by a private owner.
- 9.5.3. Even if the Board agrees that the was guesthouse use remains extant and valid, I acknowledge that it may not agree with my conclusions regarding the proposed use i.e. that it would not continue to be used as a guesthouse and would constitute a material change of use and 'development'. In such an event, I am clearly unaware as to what the Board may define the proposed use to be, or whether the Board may consider the proposed use to be *sui generis*. In any case, I propose to outline the legislative provisions that specifically apply to the change of use from a 'guesthouse' to any other use.
- 9.5.4. 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. A 'guesthouse' is included in Class 6, along with a 'residential club' and a 'hostel (other than a hostel where care is provided)'. Therefore, to avail of the exempted development provisions of Article 10 (1) of the Regulations, the Board would have to be satisfied that the proposed use, whatever it may be defined as, comes within Class 6.
- 9.5.5. Article 6(1) of the Regulations also states that, 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. Class 14 of Part 1 relates to 'Change of use' and, in summary with regard to an existing 'guesthouse' use, prescribes that the following will be exempted development:

(h) from use as a....guesthouse...to use as accommodation for protected persons

(i) from use as a....guesthouse...to use as an emergency reception and orientation centre for protected persons.

9.5.6. The Board should note that Article 5 (1) of the Regulations effectively clarifies that a 'protected person' for the purposes of Schedule 2 is limited to refugees and asylum seekers. Therefore, Class 14 (h) and (i) of Part 1, Schedule 2 of the Regulations do not apply to this case.

9.5.7. I am not aware of any other legislative provisions that would specifically apply to the change of use from a 'guesthouse' to any other use, whether as 'exempted development' or otherwise.

9.6. Local Authority Development

9.6.1. Given the apparent interest of DRHE in this case, I propose to address the question of Local Authority development. The DRHE is provided by Dublin City Council as the lead statutory local authority in the response to homelessness in Dublin and adopts a shared service approach across South Dublin County Council, Fingal County Council and Dún Laoghaire-Rathdown County Council.

9.6.2. Section 4(1)(f) provides that 'exempted development' shall apply in the case of *'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'*.

9.6.3. However, I consider this to be a case of the continuation of an existing use by a private owner which does not constitute 'development' in the first instance. The DRHE interest in the proposal is limited to its availing of rooms on a nightly basis for emergency accommodation, rather than the provision, management, or supervision of any services. It is also my understanding that 'heads of terms' agreements are non-binding and do not involve contractual obligations. Accordingly, I do not consider that the proposal would be carried out on behalf of, or jointly or in partnership with

the local authority pursuant to a contract, or that the legislative provisions relating to local authority development apply in this case.

9.7. Restrictions on exempted development

- 9.7.1. Should the Board determine that the proposal constitutes exempted development on the basis of Part 1 of Schedule 2 of the Regulations, it will have to consider the 'restrictions on exemption' as per Article 9 of the Regulations.
- 9.7.2. If the Board considers that the proposal constitutes exempted development on the basis of a change of use within any one of the classes specified in Part 4 of Schedule 2 of the Regulations, it will have to consider whether or not it would comply with conditions (a) – (d) of Article 10 (1) of the Regulations.
- 9.7.3. In the event that the Board considers that the proposal constitutes development on behalf of, or jointly or in partnership with, a local authority in accordance with the terms of Section 4(1)(f) of the Act, it will have to consider the provisions of Section 178 (2) of the Act, whereby the council of a city shall not effect any development in the city which contravenes materially the development plan.

9.8. Environmental Impact Assessment

Having regard to the developed nature of the site and its location within a serviced area, together with the limited scope of the question to the use of the property only, 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.

9.9. Appropriate Assessment

Having regard to the developed nature of the site and its location within a serviced area, together with the limited scope of the question to the use of the property only, 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.

9.10. Conclusion

In conclusion, I have determined that the use of the property as a guesthouse benefits from an extant and valid permission, that it is proposed to continue this use without the provision of any different services, and that the accommodation of homeless people within the guesthouse would not result in effects which would materially change the use of the property. Accordingly, I am of the opinion that the proposal does not constitute 'development', and that, therefore, the question of 'exempted development' does not arise.

10.0 Recommendation

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

WHEREAS a question has arisen as to whether the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to the public and also to Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people is or is not development and whether development constitutes exempted development or does not constitute exempted development:

AND WHEREAS Mark McCaughey and Others requested a declaration on this question from Dublin City Council and the Council did not issue a declaration on the question:

AND WHEREAS Mark McCaughey and Others referred this application for review to An Bord Pleanála on the 1st day of April, 2021:

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

- (a) Section 2(1), 3(1), and 4(1)(f) 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) Classes 6 and 9, of Part 4 of the Second Schedule to the Planning and Development Regulations 2001, as amended,
- (d) The definition of 'care' as set out in Article 5 of the Planning and Development Regulations 2001, as amended
- (e) the provisions of the Dublin City Development Plan 2016-2022,
- (f) the submissions on file,
- (g) the information contained in the concurrent Section 5 referral to the Board (ABP Ref. No. 310505-21),
- (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
- (i) the report of the Planning Inspector:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the permitted use of the property as a guesthouse continues to be extant and valid, and has not been abandoned,
- (b) the permitted use of the property as a guesthouse would continue without the introduction of any different services, and
- (c) the accommodation of homeless people within the guesthouse would not result in effects which would materially change the use of the property and, therefore, would not constitute development:

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5 (3) (b) of the Planning and Development Act 2000, as amended, hereby decides that the use of the property as a guest house

which provides rooms on a nightly basis offering Bed and Breakfast to the public and also to Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people, is not development.

Stephen Ward
Senior Planning Inspector

10th January 2022