



An  
Bord  
Pleanála

## Inspector's Report ABP-310229-21

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<b>Question</b>	Whether a development of a 16 square metre pitched roof domestic shed is or is not development or is or is not exempted development.
<b>Location</b>	Kill West, Kill, Co. Kildare.
<b>Planning Authority</b>	Kildare County Council
<b>Planning Authority Reg. Ref.</b>	ED/00851
<b>Applicant for Declaration</b>	Mimi Keogh
<b>Planning Authority Decision</b>	Is development and is not exempted development.
<b>Referred by</b>	Mimi Keogh
<b>Owner/Occupier</b>	Mimi Keogh
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	6th October 2021.
<b>Inspector</b>	Fergal Ó Bric

## 1.0 Site Location and Description

- 1.1. The appeal site comprises a semi-detached dwelling located within the urban development boundary for Kill and approximately 135 metres south of Main Street, Kill, and accessed off a local county road linking Kill to Punchestown. The site is triangular in shape, being widest at the roadside ((east) of the side and narrowing to the rear (west) of the site. There are single and two-storey detached and semi-detached dwellings further east, west, north, and south of the site. There is a 1.5 metre boundary wall along the roadside boundary and hedgerows and walls along the side boundaries within the front of the dwelling and timber panels and concrete post fencing along the rear garden perimeter boundaries.
- 1.2. The front elevation of the semi-detached dwelling on site faces in an easterly direction towards the public road. Access to the site is via a vehicular entrance gate that is located on the northern side of the site road frontage. There is a hard surfaced parking area to the front of the house and a modest sized garden area to the rear of the dwelling. The rear garden space is triangular in shape, with the domestic shed located at the westerly tip of the garden area. The remaining rear garden space is grassed apart from a number of flagstones outside the rear patio sliding door.

## 2.0 The Question

- 2.1. The question posed by the referrer in the documentation submitted to the Planning Authority on the 1<sup>st</sup> day of April 2021 is as follows:

Whether the construction of a 16 square metre domestic shed within the curtilage of a house is or is not development and is or is not exempted development.

The referrer provided the following details: “The shed is constructed to the rear of the house and is 16 square metres (sq. m.) in size. The construction of the shed leaves a remainder of 32 sq. m. of private open space within the rear garden area. The shed has a timber external finish. The height of the shed is 3.27 metres which has a pitched roof. The purpose of the shed is stated to be for domestic storage only”.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

An application for a declaration was submitted by the first party (Mimi Keogh to Kildare County Council on the 1<sup>st</sup> day of April 2021. The Planning Authority issued a declaration on the 20<sup>th</sup> day of April 2021 determining that the domestic shed is development and is not exempted development. The Planning Authority determined the proposal would contravene condition number 4 of An Bord Pleanála reference number 307975-20 which sets out that development under Classes 1 or 3, Part 1, Schedule 2 shall not be carried out within the curtilage of the dwelling house on the site without a prior grant of planning permission. The question was referred to the Board for determination on the 12<sup>th</sup> day of May 2021.

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Reports

A Planning Officer report dated 20<sup>th</sup> day of April, 2021 references a number of the provisions of the Planning and Development legislation, specifically Class 3 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended), which provides for an exemption for the construction, erection or placing within the curtilage of a house of any tent, awning, shade or other object, greenhouse, garage store, shed or other similar structure. The report notes that no other domestic shed exists within the curtilage of the dwelling house. The domestic shed is considered to satisfy the conditions and limitations set out in the Regulations for Class 3 development. These include that the development would be behind the front building line of the main dwelling on site, the stated floor area of the structure would not exceed 25 square metres, the remaining private open space would exceed 25 square metres, the external finishes conform with those of the main dwelling on site, the height of a pitched roof is below the 4-metre threshold.

3.2.2. Article 9(1)(a)(i) is also referenced to as it sets out that “Development to which Article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission

under the Act. The Planners Report concluded that the domestic shed development would comply with the provisions of the planning exemptions set out under Class 3 of Part 1 of Schedule 2, of the Regulations. However, the proposals would be contrary to Article 9(1) (a) (i) as they would contravene condition number 4 of An Bord Pleanála reference number 307975-20. On this basis, the Planning Authority determined the proposal is development and is not exempted development.

## 4.0 Planning History

The following is the relevant planning history pertaining to the site:

Planning Authority reference number County Ref. 20/554 – In 2020 Kildare County Council refused retention planning permission for a two-storey extension to the rear of the dwelling and for the construction of a detached domestic shed with a floor area of 16 sq. m. This decision was appealed to An Bord Pleanála by the applicant under reference number 307975-20, where the retention of the two-storey rear extension was permitted and planning permission for the detached domestic shed was refused. The reason for refusal was as follows:

1. Having regard to the provisions set out at Table 17.5 of the Kildare County Development Plan 2017-2023 which provides for 3-bedroomed dwellings to have a minimum of 60 square metres of private open space, the configuration of the site, the extent of development to be retained on site and the residual usable private open space available, it is considered that the proposed domestic garage would result in a significant deficiency in the provision of private open space, would lead to a diminution of the residential amenity of the existing dwelling and would, therefore, result in overdevelopment of a restricted site.

## 5.0 Policy Context

### 5.1. Development Plan

The site is located on lands zoned B- existing residential and infill under the provisions of the Kill Small Town Plan, 2017-2023 where the objective is “To protect

and improve existing amenities and to provide for residential infill and to provide for new and improved ancillary facilities,

## 5.2. **Natural Heritage Designations**

The site is not located within the bounds of any European site. The closest such European site to the subject site is the Poulaphouca Reservoir SPA (site code 004063) which is located approximately 9.3 kilometres south-east of the site at its closest point.

## 6.0 **The Referral**

### 6.1. **Referrer's Case**

The submission made to the Board by the referrer essentially comprises the drawings and correspondence as submitted to the Planning Authority. The following is a summary of the main issues raised in the case made by the referrer:

- The applicant acknowledges that the domestic store constitutes development.
- The applicant states that the domestic shed was exempted development upon its construction in December 2019 and the fact that the shed was refused planning permission by An Bord Pleanála in December 2020, does not alter this exemption.
- The applicant sets out the exempted development provisions for domestic garage/storage structures as set out within Class 3, part 1, Schedule 2 of the Planning and Development Regulations 2001, (as amended).
- The applicant sets out how the domestic shed development complies with the conditions and limitations as provided for under this class of exempted development.
- The Planning Authority were aware the domestic shed was in situ at the time of making the planning application given the public notices clearly stated retention of domestic shed and this matter should have been taken into consideration when assessing the Section 5 referral, and not be reliant on the Board decision made in 2020.

- The Planning Authority should have had regard to the Keeling case, when in 2005 the Supreme Court ruled that where a developer has made an application for permission to retain a development, this will not prevent the developer from claiming at a later stage that the development is exempt from planning permission (Fingal County Council v William P. Keeling and Sons Ltd 29/07/2005, (2005) ESC.55.)

## 6.2. Planning Authority Response

The Planning Authority issued a response outlining the following:

- The Planning Authority make reference to the planning history pertaining to the site, namely the planning application made under planning reference number 20/554 to retain a domestic extension and domestic shed. The Planning Authority refused retention permission for both elements of the development
- This decision was appealed to An Bord Pleanála under reference number 307975-20, who permitted the rear extension but refused retention of the domestic shed due to the significant deficiency in the provision of private open space. The Board in their reasons and considerations determined that the retention of the domestic shed would have resulted in the overdevelopment of the restricted site and diminution of residential amenity.
- Under the Section 5 referral process, the applicant sought a declaration that the shed constituted exempted development.
- The Planning Authority determined that the shed comprised works and is not exempted development, as the development is subject to a restriction under Article 9 of the Planning and Development Regulations, 2001 (as amended).
- The Planning Authority note the content of the appeal which refers to case law, but which does not make reference to Article 9, which clearly applies in this case.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

Section 2(1) of the Act states that:

“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.

Section 3(1) of the Act states that, “development” means, except where the context otherwise requires, 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.

*required.’*

### 7.2. Planning and Development Regulations, 2001

*Article 6(1)* 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 1.

Article 9(1) states that:

Development to which Article 6 relates shall not be exempted development for the purposes of the Act—

(a) if the carrying out of such development would—

(i) Contravene a condition attached to a permission under the Act or be inconsistent with a use specified in a permission under the Act.

Class 3 of Part 1 of the Second Schedule (and the Conditions and Limitations potentially of relevance in this case) state as follows:

Exempted Development —

General Column 1

Column 2

Description of Development

Conditions and Limitations

Development within the  
curtilage of a house

CLASS 3

The construction, erection  
or placing within the  
curtilage of a house of any  
tent, awning, shade or other  
object, greenhouse, garage,  
store, shed or other similar  
structure)

1. No such structure shall  
be constructed, erected or  
placed forward of the front  
wall of a house.

2. The total area of such  
structures constructed,  
erected or placed within the  
curtilage of a house shall  
not, taken together with any  
other such structures  
previously constructed,  
erected or placed within the  
said curtilage, exceed 25  
square metres.

3. The construction, erection  
or placing within the  
curtilage of a house of any  
such structure shall not  
reduce the amount of  
private open space reserved  
exclusively for the use of the  
occupants of the house to  
the rear or to the side of the



house to less than 25 square metres.

4. The external finishes of any garage or other structure constructed, erected or placed to the side of a house, and the roof covering where any such structure has a tiled or slate roof, shall conform with those of the house.

6. The height of any such structure shall not exceed, in the case of a building with a tiled or slated pitched roof, 4 metres or, in any other case, 3 metres.

6. The structure shall not be used for human habitation or for the keeping of pigs, poultry, pigeons, ponies, or horses, or for any other purpose other than a purpose incidental to the enjoyment of the house as such.

## **8.0 Assessment**

### **8.1. Is or is not development**

- 8.1.1. The proposal concerns the erection of a domestic shed in the rear garden space of a habitable dwelling.

8.1.2. The proposal, therefore, relates to an act of construction such that works would be undertaken. The applicant accepts that the domestic shed constitutes development within Section 6.2 of their appeal submission. It is, therefore, my opinion that the proposal would constitute development as defined under Section 3(1) of the Planning and Development Act, 2000 (as amended).

## 8.2. Is or is not exempted development

8.2.1. As to whether the development is or is not exempted development, the referrer and the Planning Authority have identified the relevant provisions of the legislation, the exemptions provided for under Article 6 (1) of the Regulations, the exemptions set out under Class 3, Part I of the Second Schedule and the restrictions and limitations on the exemptions provided for under Article 9.

## 8.3. Restrictions on Exempted development

### 8.3.1. Restrictions on Class 3 Development –Domestic shed/garage

Regarding the issue of whether the domestic shed comes within the scope of the development within the curtilage of a house as listed in Class 3 of Part I of the Second Schedule, I consider that the following questions are of relevance:

- Is the structure behind the front building line of the dwelling on site?
- Would the floor area of the domestic shed exceed 25 square metres?
- Would the private amenity space to the rear of the dwelling reserved for the use of the occupants of the house to the rear of or side of the house be reduced to less than 25 square metres?
- Would the roof covering, and external finishes conform with those of the house on site?
- Does the height of the pitched roof of the domestic shed exceed 4 metres?
- Is the domestic shed used for a purpose incidental to the enjoyment of the house?

8.3.2. The domestic shed is located within the rear garden space and is therefore, located behind the front building line of the dwelling. The floor area of the domestic shed at 16 square metres, is below the 25 square metre (sq. m.) exemption threshold. The

area of rear amenity open space remaining would be approximately 32 square metres, which is in excess of the 25 sq. m. requirement for the planning exemption. The domestic shed has a timber finish, the dwelling on site has a render/dash external finish. The ridge height of the domestic shed is 3.27 metres, below the 4-metre limitation. The domestic shed appears to be in use for purposes incidental to the enjoyment of the house.

- 8.3.3. I have reviewed the conditions and limitations (associated with Class 3 of Part I of the Second Schedule and consider that these would be complied with.

***Restrictions Under Art. 9***

- 8.3.4. Article 9(1) of the Regulations sets out a number of general limitations on exemptions provided for under Article 6 and which are set out in the Second Schedule. In the case of the subject site and proposal, the most relevant provisions are Article 9(1) are 9(1) (a) (i) relating to whether a development would contravene a condition of a planning permission under the Act. I am satisfied that the planning conditions as set out by the Board under reference number 307975-20 are very clear and unambiguous. Condition number 4 specifically states that the development within Classes 1 and 3 of Part 1, Schedule 2 of the Regulations shall not be carried out within the curtilage of the dwelling house without a prior grant of planning permission, therefore de-exempting development within these classes on the site.

- 8.3.5. Consideration of Article 9

Would the domestic shed comply with the provisions of Article 9 and specifically Article 9(1) (a) (i) which sets out that development to which Article 6 relates (which would include the current proposals) shall not be exempted development if the carrying out of such development would contravene a condition of a planning permission under the Act. From the Planning History set out in Section 4 of the Report above, it is apparent that the Board set out a specific condition, number 4 under reference number 307975-20 precluding development within classes 1 or 3 of Part 1, Schedule 2 of the Regulations, without a prior grant of planning permission.

- 8.3.6. Therefore, development under classes 1 and 3 are de-exempted under that specific planning condition. The Board within its reasons and considerations made specific reference to the minimum private amenity space provisions of the Kildare Development Plan as set out within Section 17.5 of the Development Plan, whereby

a minimum of 60 sq. m. of private rear amenity space is required for three bedroomed dwellings. The Board considered that the development of the domestic shed “would result in a significant deficiency of private open space, would lead to a diminution of residential amenity of the existing dwelling and would, therefore result in overdevelopment of a restricted site” and that “the front curtilage car parking area was not satisfactory private open space and that the overall curtilage, therefore, remains deficient in the provision of the required 60sq. m. of private open space”.

- 8.3.7. I would concur with the reasons and considerations of the Board. I consider that the circumstances on the site have not altered materially since that Board decision was issued in November 2020. The applicant states that the domestic shed is in situ since December 2019, however, it is apparent that the domestic shed does not have the benefit of a grant of planning permission, as stipulated by the Board decision.
- 8.3.8. I note the referrers point that under Class 3 of Part 1 of Schedule 2 that the domestic shed would be exempt from planning permission. Even if the domestic shed represented exempted development under Class 3 as claimed by the referrer, Article 9 (1) (a) (i) also must be considered in this instance. Condition number 4 of Board decision explicitly de-exempts development within Classes 1 and 3 of Part 1 of Schedule 2 of the Planning and Development Regulations and requires the referrers to seek a grant of planning permission for any development described within classes 1 or 3 of the Regulations, regarding development within the curtilage of a house, including erection of a domestic shed/garage. I am satisfied that a Section 5 referral does not constitute a planning application and that the referrer would be required to submit a planning application to the Planning Authority on order to seek a grant of planning permission for a domestic shed/garage.
- 8.3.9. I note the applicant makes reference to the 2005 Keeling Case which was ruled on by the Supreme Court. I accept that an applicant can claim a planning exemption where they have previously made an application to retain a development. The applicant is entitled to seek a Section 5 declaration from the Planning Authority and to refer the matter further to the Board, as the referrer has in this instance. However, the Planning Authority and the Board as decision makers assess the proposal taking into consideration all of the matters submitted to them as part of the planning documentation, including any planning history that pertains to the site.

- 8.3.10. The referrer sets out that the placing of the domestic shed on site predates the decision of the Board under 307975-20. Notwithstanding this point, I refer back to the question posed in relation to the development of the 16 sq. m. domestic shed Having regard to the conditions, reasons and considerations as set out by the Board under Board reference number 307975-20 and having regard to the provisions of Article 9(1) (a) (i) of the regulations, the development of the domestic shed would contravene a condition of an An Bord Pleanála decision. On this basis, the proposal constitutes development and is not exempt development, by virtue of the de-exemption set out within condition number 4 of the Board decision.
- 8.3.11. I would concur with the reasons and considerations of the Board. I consider that the circumstances on the site have not altered materially since the Board decision in November 2020. The domestic shed is in place, but it is apparent that it does not have the benefit of a grant of planning permission.
- 8.3.12. I note the referrers point that ordinarily, under Class 3 of Part 1, Schedule 2 that the domestic shed would be exempt from planning permission. However, Article 9 (1) (a) (i) also must be considered. Condition number 4 of Board decision explicitly removes the exemption for development provided for within Classes 1 or 3 of Part 1 of Schedule 2 of the Planning and Development Regulations and requires the referrers to seek a grant of planning permission for any development under these classes of development. I am satisfied that a Section 5 referral does not constitute a planning application, and that the referrers are required to submit a planning application to the Planning Authority in order to seek a grant of planning permission for the domestic shed/garage.
- 8.3.13. Having regard to the conditions, reasons and consideration as set out by the Board under reference number 307975-20 and having regard to the provisions set out within Article 9(1) (a) (i) of the regulations, I consider that the development of the domestic shed would contravene a condition of the Boards planning decision. Therefore, the proposal is development and is not exempt development, by virtue of the de-exemption set out with condition number 4 of that decision.

#### 8.4. **Appropriate Assessment Screening**

- 8.4.1. The site is not located within any European site. The closest such European site to the subject site is the Poulaphouca Reservoir Special Protection Area (SPA) which is located c.9.3 kilometres to the south-east of the site at the closest point.
- 8.4.2. The proposal comprises the development of a 16 sqm domestic shed within the rear garden area of a dwelling.
- 8.4.3. The conservation objectives for the Poulaphouca Reservoir (004063) are to maintain the favourable conservation condition of the following qualifying interests:
- Greylag Goose (*Anser anser*) [A043].
  - Lesser Black-backed Gull (*Larus fuscus*) [A183]
- 8.4.4. The domestic shed would not generate any foul discharges or surface water pathways that would impact on the conservation objectives of the Poulaphouca SPA. Given the relatively minor nature of the works which would not require deep excavations, the degree of separation between the subject site and the European site, I do not consider that there is a clear pathway for emissions from the site arising from construction activities to reach the SPA and therefore I do not consider that there are any likely significant negative impacts arising in this regard.
- 8.4.5. Having regard to the above, the proposed development is not likely to have significant effects on the Poulaphouca Reservoir site or any other European sites, in the light of the conservation objectives of these sites.

## 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 the development of a 16 sq. m domestic shed is or is not development and is or is not exempted development:

**AND WHEREAS** Mimi Keogh requested a declaration on this question from Kildare County Council and no declaration on foot of this request was issued:

**AND WHEREAS** referred this declaration for review to An Bord Pleanála on the 12th day of May 2021:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Article 6(1) and Article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (d) Class 3 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (e) the nature of the development existing on the site and the planning and development history of the site,
- (f) the layout of development on the site and the pattern of development in the area:

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) Having regard to the provisions of Article 9 (1) (a) (i) it is considered that the development would contravene a planning condition as set out under the Planning and Development Act 2000, as amended.
- (b) Condition number 4 of An Bord Pleanála reference number 307975-20 specifically stated that development coming under Classes 1 or 3 of Part 1 of Schedule 2 of the Planning and Development

Regulations', 2001, shall not be carried out within the curtilage of the dwelling house without a prior grant of planning permission.

- (c) The domestic shed is, therefore, development, and not exempted development under Article 9(!) (a) (i) of the Planning and Development Regulations, 2001 (as amended) as it would contravene a condition of a planning permission.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the 16 sq. m. domestic shed within the rear garden space of the dwelling house is development and is not exempted development.

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Fergal Ó Bric  
Planning Inspectorate

4th November, 2021