



An  
Bord  
Pleanála

## Inspector's Report ABP-310400-21

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<b>Question</b>	Whether the construction of a 31sq.m patio and a 1.2m high glass wall is or is not development or is or is not exempted development.
<b>Location</b>	41 Carrowhubbock Village, Enniscrone, Co. Sligo.
<b>Declaration</b>	
Planning Authority	Sligo County Council
Planning Authority Reg. Ref.	ED 421
Applicant for Declaration	Kyran Hurley.
Planning Authority Decision	Is not exempted development
<b>Referral</b>	
<b>Referred by</b>	Kyran Hurley.
<b>Owner/ Occupier</b>	Katherine Heffernan.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	19 <sup>th</sup> April 2022.
<b>Inspector</b>	Bríd Maxwell

## 1.0 Site Location and Description

1.1. This referral relates to a residential property, No 41 Carrowhubbuck Holiday Village, Enniscrone Co Sligo. The holiday village comprises a scheme of 41 holiday homes and is located to the northern side of Enniscrone, east off Pier Road. The dwellings comprise a mix of detached, terraced and semi-detached houses initially developed in the 1980s as a holiday village now apparently mixed in terms of permanent semi-permanent and holiday home residential use. The village has an open plan layout with communal parking areas provided adjacent to the access roadway.

The referral site is occupied by a two storey dwelling the western elevation of which presents as the front of the dwelling. The dwelling includes an elevated deck structure, which is the subject matter of this referral, located to the front of the dwelling consisting of a 31sq.m deck area set at a level up to 0.7m above adjacent ground level. The deck is enclosed by a mix of timber and glass panel walls with vertical timber supports ranging from 2m to 1.7m above ground level (1.5-1.2m above deck level).

## 2.0 The Question

2.1. The question to be addressed within this referral is whether the construction of a 31 sq.m raised timber deck and surrounding boundary fences and supporting pillars constructed to the front of No 41 Carrowhubbock Village, Enniscrone is or is not development or is or is not exempted development.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

The Planning Authority by order dated 7<sup>th</sup> May 2021 declared that :

*“ A raised timber deck and surrounding boundary fences and supporting pillars constructed at the front (west side) of No 41 Carrowhubbock Village, Enniscrone Co Sligo would constitute development and is not exempted development for the following reasons:*

*The construction of a 31 sq.m patio to the west elevation of the structure at No 41 Carrowhubbuck Holiday Village is an element of the development permitted under PL 15-23 and is therefore authorised.*

*The construction of a 1.2m high glass panel wall along the (front) western edge of the permitted patio is development and is exempted development,*

*The Construction of a 1.45m high timber fence along the northern edge of the permitted patio is development and is not exempted development.*

*The construction of a 1.25m high timber fence along the southern edge of the permitted patio is development and is not exempted development.*

*Pursuant to Section 5 of the Planning and Development Act 2000 as amended, Sligo County Council hereby decides that the proposed works as submitted to the Planning Authority on 12<sup>th</sup> April 2021 relating to a raised timber deck and surrounding boundary fences and supporting pillars constructed at the front (west side) at No 41 Carrowhubbuck Village, Enniscrone, Co Sligo and is not exempted development for the reasons set out above.”*

### **3.2. Planning Authority Reports**

#### **3.2.1. Planning Reports**

The Planner’s report asserts that the “patio element” is an authorised element of permitted development 15/23. The construction of a 1.2m high glass panel wall along the front / western edge of the permitted patio is development and is exempted development. The construction of a 1.45m high timber fence along the northern edge of the permitted patio is development and is not exempted development. The construction of a 1.25m high timber fence along the southern edge of the permitted patio is development and is not exempted development.

### **4.0 Planning History**

15/23 – Permission was granted 11<sup>th</sup> March 2015 for development consisting of the construction of a 66.5sq.m extension to the rear (east) and side (south) of existing holiday home. The submitted plans detail the proposed extension to comprise a

sunroom, utility, bathroom and bedroom and extended bedroom on the ground floor. At first floor level a TV room on the east side of the house and an open balcony area on the south side of the house with access to first floor by an external hardwood stair leading from the ground floor to the west side of the house. The submitted plans noted a "proposed patio" on the western (front) of the house.

Correspondence from the applicant to the Planning Authority received on 17<sup>th</sup> January 2019 requested approval for revisions to the permitted extension including omission of the proposed balcony to be replaced by low pitched roof. Permission of the dormer type roof and external stairs and door, amendments to roof and pattern of fenestration. The Planning Authority by letter dated 7<sup>th</sup> February 2019 advised that the proposed modifications "consisting of omission of balcony and external stairs, together with the revised roof and fenestration, can be considered minor amendments which do not require planning permission."

## **5.0 Policy Context**

### **5.1. Development Plan**

The Sligo County Development Plan 2017-2023 refers.

### **5.2. Natural Heritage Designation**

The site is within 250m of the Killala Bay/Moy Estuary SPA (Site Code 004036) and within 350m of the Kilalla Bay/Moy Estuary SAC (Site Code 000458).

## **6.0 The Referral**

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

The referral is submitted by Kyran Hurley, 7 Rathasker Heights, Naas, chairman of the Carrownhubcock Management Company. Grounds of referral are summarised as follows:

- It is submitted that the Council was incorrect in declaring that this is exempted development within the meaning of the Act and Regulations.

- Carrowhubbock Holiday Village resolution passed at AGMs seek to protect uncluttered common open areas. Resolution passed at AGM 2002 specifically stated that no wall are permitted around house on basis that it infringed clauses on purchase contract.
- The construction of the deck structure commenced in late June 2020 almost 12 months after completion of an extension approved under Planning Reference PL15/23.
- There is no indication on the planning application or approval document that the patio or timber decking was other than at ground level.
- 'Minor alterations' could not be regarded as being minor.
- Tracey v An Bord Pleanála [2010] IEHC 13 MacMenamin J emphasised that the Planning Authority in agreeing points of detail is confined to considering what has already been decided in the parent permission. The Council has agreed to a radically altered set of proposals contrary to condition 1.
- Failure by the local authority to require the submission of a planning application deprived the management company and third parties of the opportunity to inspect, review and understand the material alterations that were submitted and approved without public advertisement.
- While alterations proposed in 2019 did indicate timber decking at the west there was no indication that this would be other than at ground level and not surrounded by timber and glass walls. No consideration was given to the effects on third parties.
- Neither the initial permission in 2015 nor the changes in 2019 are deemed to include permission for a raised deck structure only made in May 2021.
- The passage of time from the date on which the Council consented to the 2019 changes does not make what occurred correct or legal and it has now implications for further development on the site viz the raised timber decking and surrounding walls and supports which have become a precedent for other owners to seek similar developments.

- Council's error in agreeing to a significantly revised proposal from that permitted in the permission has now been further compounded by accepting that the raised decking was permitted under Planning Reference 15/23.
- The council appears to be depending on unclear and inconsistent drawings.
- The council's declaration on May 2021 refers to the construction of a 31 sq.m patio being authorised but what is constructed is a raised timber deck elevated 0.5m to 0.7m above ground level. Declaration refers to a "patio" whereas the Council's letter of March 2021 refers to a "patio /decking area"
- Council's letter subsequent to declaration notification, dated 20<sup>th</sup> May 2021 confirms that the alteration of the fences on the northern and southern edges (from the existing 1.4m high and 1.24m high respectively) to 1.2m high would "bring it within the limitations of exempted development".
- It is the referrer's submission that the 1.2m high glass panel wall along the front (western) edge of the raised deck structure and the raised patio decking and other features do not constitute exempted development for the purpose of the Planning Act and Regulations as 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" and "consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use" (Article 9(1)(a)(i) and Article 9(1)(a)(vii) of the Regulations.
- The Council has erred in making the determination regarding exempted development. The entire structure should be subject of a separate planning submission and no part of it should be considered exempted development.
- The entire development, the patio decking, the timber panel walls, the glass panel wall, the balustrades, the steps are not exempt development and the decision of the Council relies on an error in approving revised proposals without a formal assessment of those changes and especially their potential effects on third parties.
- The development does not comply with the exemptions provided for under the Acts and Regulations.

- As there is a general duty to obtain planning permission to carry out development there is an onus on the developer to demonstrate that the development is in fact exempted development. An exemption is considered a privilege than so a development must come clearly and unambiguously within the terms of the Regulations. (Dillon v Irish Cement, Supreme Court 26 November 1982) The development carried out at no 41 does not meet this test.
- Timber decking and associated development (walls, support piers, etc) at no 41 involve alterations which do materially affect the external appearance of the structure and render it inconsistent with the character of the structure and of neighbouring structures.
- The development works required permission and any use following those works does not enjoy the benefit of any exemption under Section 4(h)(j).
- The benefit of exemptions under regulations is dependent on the restrictions on exemption set out in Article 9. If the carrying out of such development would contravene a condition attached to a permission under the Act or would consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use. The elevated decking at no 41 does not comply with these restrictions therefore does not enjoy the benefits of the exempted development provisions.

## 6.2. Planning Authority Response

The response of the Planning Authority asserts that Sligo County Council Planning Authority has no further comments to make.

## 6.3. Owner/ occupier's response

Submission by Catherine Heffernan co-owner of 41 Carrowhubbock Holiday Village is summarised as follows:

- North side fence has been lowered to 1.2m and Southside fence will be lowered to 1.2m.
- First fix of extension was completed in July 2019 and second fix and internal work was not completed till September October 2019. Building work was delayed by builder availability, inclement weather and covid restrictions.
- House was purchased circa 2007. Resolution made in 2002 is not contained in covenants or rules.
- Many of the houses have added extensions including patios decks. Glass greenhouse type conservatories wooden fencing surrounds etc.
- Houses are no longer just holiday homes but permanent residences for some people and semi-permanent for others.
- Significant investment made in extension and decking area and owner only became aware of the Management Board's objection after the event.
- Drawings shown patio at same level as extensions.
- Decking without a safety rail would be dangerous.
- Alterations were fundamentally less than originally approved i.e. no outside staircase on the front deck and no balcony and balustrade above the sunroom on the southside.
- Owner occupier was unaware that plans required approval by the management company.
- There were two timber side fences in the original drawing which was drawn at lounge level. The more expensive option of glass safety balustrade was chosen.
- Wooden fences and posts to be painted a cream or white colour as indicated on photoshop proposals.
- House was purchased with 10ft of land on all 4 sides. Permission was granted to build on three sides. Proposal will have no impact on boundary of 39.
- Reference to patio / decking interchangeable.



- Steep slope to the front of the house necessitates a safety balustrade on the deck.
- Not the first house to have a raised deck nor the first to have glass balustrade.
- If the owner occupier had proceeded to build the original extension approved in 2015 which included the decking at lounge level plus a staircase leading to a balcony over the conservatory in the south plus 2 side wooden fences would the management board be requiring removal?

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

7.1.1 The following statutory provisions are relevant in this case:

Section 2(1): In this Act, except where the context otherwise requires

“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.”

“Structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and (a) where the context so admits, includes the land on, in or under which the structure is situate,”

Section 3(1) “In this Act “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 structure or other land.

Section 4(1) Sets out developments that shall be exempted development for the purposes of the Act.

Section 5(1): If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of the Act, any

person, may, on payment of the prescribed fee, request in writing from the relevant planning authority any information necessary to enable the authority to make its decision on the matter.

5.(1)(4) Notwithstanding Subsection (1) a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.”

## **7.2. Planning and Development Regulations, 2001**

7.2.1 Article 6(1) of the Planning and Development Regulations, 2001 states that “Subject to Article 9 development of a class specified in Column 1 and part 1 of Schedule 2 shall be exempted development for the purpose of the Act.”

9(1)(a)(i) 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.

## **8.0 Assessment**

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

8.1.1. Section 2 of the Planning and Development Act 2000, as amended, defines works as “any act or operation of construction, excavation, demolition, extension, alteration or renewal”. Clearly the construction of a decking area and surrounding boundary fence is works as it is “an act of construction, extension and alteration”. Section 3(1) of the Act, defines development as the carrying out of works, in or under land or the making of any material change in the use of any such structures or other land. I am satisfied that the decking and surrounding boundary fence is works, and such works were carried out on land therefore the subject matter of the referral constitutes “development” as per section 3(1) of the Planning and Development Act 2000, as amended.

## 8.2. Is or is not exempted development

8.2.1. I note that the merits or otherwise of the decking structure are not a matter for consideration in this referral rather the matter to be addressed is whether or not the works that have been carried out constitute permitted or exempted development such as to render the decking and fencing an authorised structure. The Planning Authority issued a declaration indicating that

*“ A raised timber deck and surrounding boundary fences and supporting pillars constructed at the front (west side) of No 41 Carrowhubbock Village, Enniscrone Co Sligo would constitute development and is not exempted development for the following reasons:*

*The construction of a 31 sq.m patio to the west elevation of the structure at No 41 Carrowhubbock Holiday Village is an element of the development permitted under PL 15-23 and is therefore authorised.*

*The construction of a 1.2m high glass panel wall along the (front) western edge of the permitted patio is development and is exempted development,*

*The Construction of a 1.45m high timber fence along the northern edge of the permitted patio is development and is not exempted development.*

*The construction of a 1.25m high timber fence along the southern edge of the permitted patio is development and is not exempted development.*

*Pursuant to Section 5 of the Planning and Development Act 2000 as amended, Sligo County Council hereby decides that the proposed works as submitted to the Planning Authority on 12<sup>th</sup> April 2021 relating to a raised timber deck and surrounding boundary fences and supporting pillars constructed at the front (west side) at No 41 Carrowhubbock Village, Enniscrone, Co Sligo and is not exempted development for the reasons set out above.”*

8.2.2 The owner and the Planning Authority contend that the decking structure is an element of the permitted development 15/23. The third party referrer contests this outlining that the plans submitted with the application 15/23 while showing a proposed patio to the west front of the dwelling never suggested a raised deck structure. Furthermore, the plans submitted requesting approval for “minor alterations” substitute ‘timber decking’ on ground floor plan and “fit timber decking”

on south side elevation, however the alteration is not detailed nor described in the accompanying cover letter. The referrer also notes the time lapse between grant of permission (11<sup>th</sup> March 2015) construction of the extension (completed circa September 2019) and commencement of construction of deck structure (June 2020). I am inclined to concur that the raised decking was not envisaged or represented nor included in the description within the planning application 15/23.

8.2.3 The timber decking as constructed constitutes works, and does not come within the scope of Exempted Development as set out in section 4(1) of the Planning and Development Act, 2000. In the context of Section 4(1)(h) the decking could not be classed as development consisting the carrying out of works for the maintenance, improvement or other alteration of a structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.” Having visited the site and context I am satisfied that the decking is material in terms of its visual impact. Furthermore the timber decking area as constructed does not come within the scope of Class 6(b)(i) of the Planning and Development Regulations, 2001 as the decking area is not located to the rear of the house. The boundary fencing and glass panel walls are elements of the deck structure, as opposed to a standalone structures, and it is therefore inappropriate to regard these in isolation.

8.2.4 On the basis of the foregoing it is clear that the decking structure and surrounding boundary fences and supported pillars to the front of No 41 Carrowhubbock Village, Enniscrone, Co Sligo, is development and is not exempted development.

## 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 as constructed 31sq.m decking area set at a level up to 0.7m above adjacent ground level enclosed by mix of timber and glass panel walls with vertical timber supports constructed to the front of No 41 Carrowhubbock, Holiday Village, Enniscrone, Co Sligo is or is not development or is or is not exempted development:

**AND WHEREAS** Kyran Hurley on behalf of Carrohubbock Management Company CLG requested a declaration on this question from Sligo Council and the Council issued a declaration on the 7th day of May, 2021 stating that the matter was development and was not exempted development:

**AND WHEREAS** Kyran Hurley on behalf of Carrohubbock Management Company CLG referred this declaration for review to An Bord Pleanála on the 2<sup>nd</sup> day of June, 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) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 1 and 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,

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

- (a) The decking does not form part of permitted development 15/23.
- (b) The decking does not come within the scope of Section 4(1) of the Planning and Development Act
- (c) The decking does not come within the scope of Class 6(b)(1) of the Planning and Development Regulations 2001 as the decking area is not located to the rear of the house

**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 as constructed 31sq.m decking area set at a level up to 0.7m above adjacent ground level enclosed by mix of timber and glass panel walls with vertical timber supports constructed to the front of No 41 Carrowhubbock, Holiday Village is development and is not exempted development.

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Bríd Maxwell  
Planning Inspector  
27<sup>th</sup> April 2022