



An
Bord
Pleanála

Inspector's Report ABP-311048-21

Question

Whether a change of use of residential units at Dargan Hall, Station Road, Bray, Co. Wicklow permitted under PRR 18/1166 from 10% Part V units (i.e. 7 units) to 100% Part V units (i.e. 71 units) is or is not development or is or is not exempted development.

Location

Dargan Hall, Station Road, Bray, Co. Wicklow.

Declaration

Planning Authority

Wicklow County Council

Planning Authority Reg. Ref.

37/2021

Applicant for Declaration

Denis O'Sullivan.

Planning Authority Decision

Is not development

Referral

Referred by

Denis O'Sullivan.

Owner/ Occupier

Glenveagh Homes Ltd.

Observer(s)

No observers.

Inspector

Elaine Sullivan

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1.0 Site Location and Description

- 1.1. The subject site has a stated area of 0.1617ha and is located within the town of Bray, directly opposite Bray Dart station. It is a corner site which is bounded on three sides by Florence Road, (also known as Station Road) to the east, Adelaide Road to the west and Florence Road to the south.
- 1.2. The site currently comprises a completed four to six storey, mixed-use development which was permitted under PA Ref. 18/1166. The development has commercial units at ground floor level with residential apartments above and an underground car park. The area around the site to the east, west and north has a mix of residential and commercial development. To the south of the site, the prevailing character of development is two-storey residential.

2.0 The Question

- 2.1. The question before the Board relates to whether a change to Condition No. 5 of PA Ref. 18/1166, (which required that 7 residential units, (10%), be provided for Part V use), to provide 71 residential units, (100%), to Part V use constitutes development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

A declaration of exempted development was approved for the following reasons:

- A development comprising of 10% Part V units (whereby 7 of the 71 permitted units are for Part V housing), provides for the needs of the general public.
- A development comprising of 100% Part V units (whereby 71 of the 71 permitted units are for Part V housing) provides for the needs of the general population.
- Both types of accommodation provide for the housing needs of the general population. The type of accommodation is the same and the user group is the same.

- Therefore, there is no material change of use and ‘development’ is not carried out.
- The Planning Authority considers that a change of use of the residential units permitted under PRR 18/1166 from 10% Part V units (i.e. 7 units) to 100% Part V units (i.e. 71 units is NOT development).

3.2. Planning Authority Reports

3.2.1. Planning Reports

The planning report reflects the decision above and can be summarised as follows:

- The query raised was considered under the legislative context of Section 2 and Section 3 of the Planning and Development Act 2000 (as amended) in order to determine if ‘development’ occurred and if so, whether or not this constituted exempt development.
- Permission was granted under PRR 18/1166 for a mixed-use development comprising 71 residential units.
- Section 96 of the Planning and Development Act 2000 requires that where permission is granted in respect of a residential development on certain zoned lands, a condition be imposed requiring the applicant to enter into an agreement with the Council for the provision of social and affordable housing.
- Essentially the question being asked is whether a change of use of the residential units permitted under PRR 18/1166 from 10% Part V units (i.e. 7 units) to 100% Part V units (i.e. 71 units) is ‘development’.
- The permitted and proposed use of the relevant floor area is for residential use.
- Both types of accommodation provide for the housing needs of the general population. Both types of accommodation are essentially the same and the user group is essentially the same.
- No material change of use has occurred and the change of use does not constitute ‘development’ under the Act.
- The Planning Authority considers that it is not development.

3.2.2. Other Technical Reports

- No reports on file.

4.0 Planning History

- **18/1166** – Planning permission granted by the PA on the 23rd day of January 2019 for a development comprising the demolition of all existing buildings on a site of c. 0.1617ha and the construction of a mixed use development, ranging from 4 to 6 storeys comprising 72 no. apartments, (reduced to 71 under further information), consisting of 34 no. one bedroom, 36 no. two bedroom and 2 no. three bedroom units, three ground floor retail units (total c.375.1sqm) and one office unit (c.101.8sqm). Parking spaces for 50 cars and 162 bicycles would also be provided along with new vehicular and pedestrian access from Adelaide Road an ESB substation, refuse storage, plant, landscaping, private open space, boundary treatment work and provision of all ancillary site development works and services. The development was amended under further information and one unit was omitted.

Condition No. 5 of this permission states the following:

Before any development commences, the applicant or any other person with an interest in the land to which the application relates shall enter into an agreement with the Planning Authority in accordance with the County Development Plan and in accordance with Section 96 of the Planning and Development Act 2000, as amended.

Reason: *In the interest of proper planning and sustainable development and having regard to the objective of the County Development Plan and the Housing Strategy.*

- **ABP300645-18** – Under Section 9 (3) of the Urban Regeneration Housing Act 2015, the Board determined on the 11th of June 2018, that the site is a vacant site within the meaning of the Act and that the site be added to the Vacant Sites Register.

- **Section 5 Referrals:** No Referrals were found on the Boards database that relate to a similar question.

5.0 Policy Context

5.1. Development Plan

The operative Development Plan for the subject site is the Wicklow County Development Plan 2016-2022.

The site is also located within the Bray Municipal District Local Area Plan 2018-2024 and the site is zoned GTH – Town Gateway and Transportation Hub, the objective of which is *'To provide for the development and improvement of appropriate gateway and transport hub uses'*.

The following section of the Development Plan is of relevance to the referral:

4.2 Wicklow County Housing Strategy

While the Housing Strategy has found that there is rationale for seeking 10% of eligible residential development be reserved for social housing during the strategy period of 2016-2022, this only addresses social housing needs that will arise during the 2016-2022 period and does not take into account the considerable demand for such housing that has built up over the currency of the previous strategy. It is also clear that the combination of the Council's own construction programme (which is severely curtailed at present) and Part V will only cater for a proportion of the population experiencing affordability problems in the County. The Council must continue to utilise all policy avenues open to it and any new schemes that become available to ensure the greatest delivery of social housing possible and to ensure a regionally equitable balance of housing delivery.

5.2. Natural Heritage Designations

- No designations apply to the subject site.

6.0 The Referral

6.1. Referrer's Case

The issues raised by the referrer can be summarised as follows:

- Planning permission was granted for the development on the 4th March 2019.
- The Council received a Commencement Notice on the 12th August 2019.
- A letter from the Council's Housing Department dated '2020' confirms that an agreement was reached with the developer, Glenveagh Homes, for the provision of 7 units within the Dargan Hall development and that Condition 5 of PRR 18/1166 had been complied with.
- It is unclear when the agreement was made but it is assumed that it was made prior to the lodgement of the commencement notice as per Section 96(2) of the Act.
- The works were completed in 2020. In May and June 2021, the Council confirmed that 100% of the units would now be used for social and affordable housing.
- It is submitted that a new agreement changing the number of apartments used for social and affordable housing to 71, or any number other than 7, is a new and different development from the one in the original permission based on the following facts –
 - Condition No. 5 states that a decision must be made prior to the commencement of development.
 - An agreement was made, presumably before the 12th of August in accordance with Section 96(2) of the Act.
 - A new agreement was made subsequent to the commencement of development.
 - This new agreement was made contrary to the express requirements of Condition No. 5.

- It is contended that once an agreement is made in accordance with a planning condition and that agreement is broken, it results in non-compliance with the condition. In turn this results in non-compliance with the permission.
- The carrying out of such development would be a new and different development requiring a new permission. In the absence of such a permission the development would be unauthorised.
- The primary reason for the council's decision in its declaration is that the change from 10% social and affordable units to 100% is not development because both types of accommodation provide for the needs of the general population and that the type of accommodation is the same and the end user group is the same.
- It is contended that the end 'user group' is not the same, by virtue of the fact that Part V distinguishes between those who are able to afford market value housing and those who are not.
- A PA's requirement to provide social and affordable housing is based on its Housing Strategy as set out in Section 94, (3), (b), (c) and (d), which differentiates between, '*persons who have different levels of income*', '*the special requirements of elderly persons and persons with disabilities*', and '*persons of different social backgrounds*'.
- Furthermore, the avoidance of segregation is a primary objective as set out in, Section 94(3)(d) and 95(1)(d) of the Act and Section 19(4)(a) of the Housing (Miscellaneous Provisions) Act 2009. The new agreement to increase the number of social and affordable units from 10% to 100% is an exercise in segregation.
- The new agreement providing for an increase in the number of apartments used for social and affordable housing results in a breach of condition 5, which is development.

6.2. Planning Authority Response

- No further responses from the PA.

6.3. Owner/ occupier's response

A response was received from the owner and includes the following:

- The referral relates to a development that has been fully approved through the statutory planning process and is currently nearing completion of construction on site. It refers to a matter of compliance with a condition which requires agreement between the PA and the developer.
- The agreement between the parties is not an interpretation of planning law or regulations. As such, it is submitted that the application of Section 5 of the Planning and Development Act 2000, (as amended), is entirely inappropriate.
- It is evident that no development has occurred and that the enhanced lease for the remaining 64 no. units on top of the agreed 7 no. Part V units is fully within the terms of the permission granted.
- The subject Section 5 Referral queries whether 'development' has occurred. No question is raised around the 'works' carried out, rather, the query relates to 'use' and whether a material change of use has occurred based on the class of person using the units.
- The use of the 71 units in Dargan Hall is 'residential'. This remains the case irrespective of the social status of the occupants.
- The Planning Acts do provide for limited circumstances whereby permission can be restricted to use by persons of a specific class or description as per Section 39(2) of the Acts. Such restrictions are embodied in an agreement under Section 47 of the Acts, attached as a condition of permission.
- No such condition is attached to PRR 18/1166 and therefore there is no restriction on the occupancy of the development beyond the initial Part V agreement. The Section 5 referral is therefore, without basis.
- Regarding compliance with Condition 5 of the permission, to enter into a Part V agreement in advance of the commencement of development, this condition has been complied with and in no way restricts the use of the remaining apartments by a particular social class, as suggested.

- The terms of the Condition 5, Part 5 agreement have been met and do not serve to restrict occupancy of the remaining apartments to individual purchasers.
- With regard to the timing of the agreement, an agreement was reached between *‘the applicant or any other person with an interest in the land to which the application relates and the Planning Authority’*, before any development commenced. This is clearly documented on the planning file.
- However, this does not entail that any additional arrangements within the scope of the planning permission, (i.e. to lease additional units), would render that there is *‘non-compliance with a condition’*, and that subsequently, there is no permission.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2, the following interpretation of “works”:

“...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...”

Section 3 (1), states the following:

“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 structures or other land.”

Section 4 (1) (a)- (i) set out what is exempted development for the purpose of the Act

Section 4 (2) (a) states-

“The Minister may by regulations provide for any class of development to be exempted development for the purpose of the Act”.

Section 5 (1) states –

If any question arises as to what, in any case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment

of a prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

Part V – Section 94 (1) (a) states –

Each planning authority shall include in any development plan it makes in accordance with section 12 a strategy for the purpose of ensuring that the proper planning and sustainable development of the area of the development plan provides for the housing of the existing and future population of the area in the manner set out in the strategy.

Section 94 (4) (a) (c) and (d) states –

(a) A housing strategy shall include an estimate of the amount of—

(i) housing for the purposes of the provision of social housing support within the meaning of the Housing (Miscellaneous Provisions) Act 2009,

(ii) housing for eligible applicants within the meaning of Part 2 of the Affordable Housing Act 2021, and

(iii) cost rental housing,

required in the area of the development plan during the period of the development plan and the estimate may state the different requirements for different areas within the area of the development plan.

(c) Subject to paragraph (d), a housing strategy shall provide that as a general policy a specified percentage, not being more than 20 per cent, of—

(i) the land zoned for residential use, or for a mixture of residential and other uses, and

(ii) any land which is not zoned for residential use, or for a mixture of residential and other uses, but in respect of which permission for the development of houses is granted, shall be reserved under this Part for the provision of housing for the purposes of one or more of subparagraphs (i), (ii) and (iii) of paragraph (a).

(d) Paragraph (c) shall not operate to prevent any person (including a local authority) from using more than 20 per cent of land in respect of which permission for the

development of houses is granted for the provision of housing to which paragraph (a) applies.

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

Part 2 – Exempted Development

Section 2, (1) of the Act states that *'house' means a building or part of a building which is being occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building.*

8.0 **Assessment**

8.1. **Is or is not development**

8.1.1. The question put forward by the referrer relates to whether changing an agreement made under Condition No. 5 of PA Ref. 18/1166, which relates to the provision of Part V units, is, or is not, development.

8.1.2. Condition No. 5 required that 10% of the 71 units permitted under PA Ref. 18/1166 following:

Before any development commences, the applicant or any other person with an interest in the land to which the application relates shall enter into an agreement with the Planning Authority in accordance with the County Development Plan and in accordance with Section 96 of the Planning and Development Act 2000, as amended.

Reason: *In the interest of proper planning and sustainable development and having regard to the objective of the County Development Plan and the Housing Strategy.*

8.1.3. A letter on the public file, dated 2020, confirmed that the PA had reached an agreement with the developer for the provision of 7 units in respect of the development at Dargan Hall, Adelaide Road, Bray and as such Condition No. 5 had been complied with. A subsequent agreement was entered into between the PA and the developer to provide an additional 64 units, (100%) of the development for the purposes of Part V.

8.1.4. The referrer states that an agreement was made under the requirements of Condition No. 5. In the absence of any information on the date of the agreement, it is assumed to have occurred prior to the commencement of development in accordance with the condition, and with Section 96 (2) of the Planning and Development Act 2000, which requires that Part V agreements be entered into prior to the lodgement of a commencement notice. However, any subsequent agreement to provide additional Part V units has resulted in non-compliance with the condition and the requirements of Section 96 (2). Furthermore, by entering into a new agreement to change the number of apartments to be used for social and affordable housing from 7 to 71, this constitutes a new and different development from the one in the permission.

8.1.5. In response to the issues raised, the developer has stated that Condition No. 5 was complied with in full and that no mechanism within the Act or the Planning and Development Regulations prevents the details of the conditions being revised or altered under agreement.

8.1.6. The Planning Act and Regulations are silent on whether the terms of a condition that requires agreement with the PA can be amended to alter the agreement. However, I note that Section 94 of the Planning Act sets out the requirements of the PA to prepare a Housing Strategy to facilitate the delivery of social and affordable housing. Section 94, (4), (c), states that

‘Subject to paragraph (d) a housing strategy shall provide that as a general policy a specified percentage, not being more than 20 per cent, of –

(i) the land zoned for residential use, or for a mixture of residential and other uses, and

(ii) any land which is not zoned for residential use, or for a mixture of residential and other uses, but in respect of which permission for the development of houses is granted,

Section 94, (4), (d), states that –

Paragraph (c) shall not operate to prevent any person (including a local authority) from using more than 20 per cent of land in respect of which permission for the

development of houses is granted for the provision of housing to which paragraph (a) applies.

- 8.1.7. I am satisfied that as per the information available on the public file, that Condition No. 5 was complied with and that an agreement was made between the developer and the PA to provide 7 residential units for the purposes of social and affordable housing. Any further agreements made does not change the status of the compliance. If such a question were to arise regarding non-compliance with a condition, the appropriate action to take would be through Part VIII of the Planning and Development Act 2000, which falls within the remit of the Planning Authority and is the mechanism whereby alleged breaches of planning or unauthorised development can be investigated.
- 8.1.8. Within the context of the Section 5 process, I therefore consider that the relevant question is not whether Condition No. 5 was complied with, and a subsequent agreement represented non-compliance, but instead whether the change from 7 units within a development for use as social and affordable housing to 71 units within the development for use as social housing is, or is not development, and whether it is, or is not exempt development.
- 8.1.9. Section 3(1) of the Act defines 'development' as the '*carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land*'. In terms of determining whether development has occurred, the relevant tests to apply is to establish whether 'works' were carried out or whether there was a material change in the use of the structure or land.
- 8.1.10. I am satisfied that the use of an additional 64 residential units for social and affordable housing does not involve the carrying out of any additional 'works' as defined in Section 2 of the Act. The residential units have been constructed as permitted and would require no physical alterations, by virtue of the definition of 'works', as a result of an agreement to provide them as social and affordable units.
- 8.1.11. In order to determine whether a material change of use has occurred consideration is given to the permitted use and the proposed use. Under the parent permission, (PA Ref. 18/1166), all of the 71 units were permitted for residential use. The provision of all of the residential units for use as social and affordable housing under

the requirements of Part V does not alter their originally permitted use as residential units.

- 8.1.12. Residential use is not defined in the Act or in the Regulations. However, under section 2 (1) of the Act, a 'house' is defined as, *'a building or part of a building which is being occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building'*. As the provision of a 'house' can generally be intended for residential use, I am satisfied that the permitted development and the proposed use would both comply with the definition of a 'house' and therefore are intended for the same use.
- 8.1.13. In its assessment of this Section 5 query, the decision of the PA states that the residential units permitted would be for the housing needs of the general population regardless of whether they were to be in private ownership or available for use as social and affordable housing. The referrer argues that there is a difference between the end users by virtue of the fact that Part V distinguishes between those that are able to afford market value housing and those that are not. I note, however, that the planning permission does not contain any conditions which restricts the end users of the residential units.
- 8.1.14. The proposed use of the residential units for housing under Part V would not, in my opinion, give rise to any material planning issues that would be separate or additional to the originally proposed development. The proposed use would also not intensify the original use by virtue of additional or extra impacts or planning issues than those already associated with the original development.
- 8.1.15. I am satisfied that the use of an additional 64 residential units for social and affordable housing under the provisions of Part V does not constitute a material change of use. The units were permitted for residential use and will remain in residential use regardless of whether they are owner-occupied or whether they are used for social and affordable housing. I therefore do not consider that any change of use has occurred.

8.2. Is or is not exempted development

8.2.1. Development within the context of Section 3 (1) of the Planning and Development Act 2000, (as amended), has not been carried out. Therefore, the questions of whether it is or is not exempted development is not relevant in this case.

8.2.2. Notwithstanding the information as set out above, in the event that the Board do not agree, and consider that the proposed use of the permitted residential units as Part V housing is development, the following is my assessment of whether the proposal is or is not exempt development.

8.2.3. Section 4 (1) of the Planning and Development Act 2000 states that the following shall be exempted development for the purposes of this Act,

(h) - development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;

Should the Board be of the opinion that the proposal constitutes development by virtue of 'works', I am satisfied that it would constitute exempt development under Section 4, (1), (h) of the Planning and Development Act 2000.

8.3. EIA Screening

8.3.1. The development is not within the thresholds for EIA.

8.4. Appropriate Assessment

8.4.1. The project is not directly connected with or necessary to the management of a European Site and therefore it needs to be determined if the development is likely to have significant effects on a European site(s). The proposed development is examined in relation to any possible interaction with European sites designated Special Conservation Areas (SAC) and Special Protection Areas (SPA) to assess whether it may give rise to significant effects on any European Site in view of the conservation objectives of those sites.

8.4.2. The subject site is approximately 1km from the closest European site, which is Bray Head SAC, (Site code 00714). Having regard to the nature and scale of the proposed development, it's location in a serviced urban area with no direct link to the nearest European site, no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether a change in the use of 64 residential units to social and affordable housing is or is not development or is or is not exempted development.

AND WHEREAS Denis O'Sullivan requested a declaration on this question from Wicklow County Council and the Council issued a declaration on the 14th day of July, 2021 stating that the matter was not development.

AND WHEREAS Denis O'Sullivan requested a declaration on this question from Wicklow County Council and the Council issued a declaration on the 14th day of July 2021 stating that the matter was not development:

AND WHEREAS Denis O'Sullivan referred his declaration for review to An Bord Pleanála on the 6th day of August 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) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The use of an additional residential 64 units for social and affordable housing within a mixed-use development permitted under PA Ref. 18/1166 does not constitute development by virtue of the fact that it would not require the carrying out of 'works' as defined under Section 2(1) of the Planning and Development Act, and would not constitute a material change in the permitted use of the units.

- (b) **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 use of an additional residential 64 units for social and affordable housing within a mixed-use development permitted under PA Ref. 18/1166 is not development.

Elaine Sullivan
Planning Inspector

9th May 2022