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<b>Question</b>	Whether the use of TRC House for residential use is or is not development and is or is not exempted development.
<b>Location</b>	TRC House, Dundrum Road, Dublin 14
<b>Declaration</b>	
Planning Authority	Dun Laoghaire Rathdown County Council
Planning Authority Reg. Ref.	10521
Applicant for Declaration	Dundrum TRC Ltd.
Planning Authority Decision	Is not exempted development
<b>Referral</b>	
<b>Referred by</b>	Dundrum TRC Ltd.
<b>Owner/ Occupier</b>	Dundrum TRC Ltd.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	22 <sup>nd</sup> March 2022
<b>Inspector</b>	Susan Clarke

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## 1.0 Site Location and Description

- 1.1. The site is located at TRC House on Dundrum Road, Dublin 14, c.350m east of the Windy Arbour Luas Stop. The rear of the two-storey over basement property overlooks Glasson Court Park. The 1960's flat-roofed building has a hard surface area to the front and rear. The area to the front is used for car parking. A vehicular and pedestrian gateway to the north of the building provides access to the rear of the site.
- 1.2. Ryan's Arbour House is located to the south of the site, while a terrace of two-storey dwellings borders the site to the north. A terrace of retail and commercial property with surface car parking to the front is located to the west of the site, along the Dundrum Road.
- 1.3. At the time of my site visit in March 2022 the structure was in residential use as a shared accommodation/co-living facility comprising two units one on the Ground Floor Level and one at First Floor Level each containing four bedrooms. There is a refuse area to the rear of the property, where bicycles appeared to be parked also. There is no landscape area or patio/terrace associated with the proposal.

## 2.0 The Question

- 2.1. The application relates to the question as to *'whether the use of TRC House for residential use, as provided for under article 10(6) of the Planning and Development Regulations, 2001, as amended, is exempt development. This declaration excludes the lower ground floor area identified on Drawing No. 0213 titled 'Proposed Lower Ground Floor Plan'*.

## 3.0 Planning Authority Declaration

### 3.1. Section 5 Determination Application

Dundrum TRC Ltd. sought a Section 5 Declaration from Dun Laoghaire Rathdown County Council on 29<sup>th</sup> July 2021 as to whether the use of TRC House for residential use (two kitchens, two living rooms and 8 No. bedrooms across the Ground Floor and First Floor and a large kitchen/canteen and gym at Lower Ground Floor Level), as provided for under article 10(6) of the Planning and Development Regulations, 2001,

as amended, is exempt development. Offices and storage at Lower Ground Floor Level appear to be excluded (i.e. they are shown outside the red line boundary). Also the kitchen and gym at Lower Ground Floor Level were not occupied and did not appear to be in use at the time of my site visit.

### **3.2. Declaration**

Dun Laoghaire Rathdown County Council issued a Declaration in accordance with Article 5(2)(a) of the Planning & Development Act 2000 on 25<sup>th</sup> August 2021. Dun Laoghaire Rathdown County Council determined that the proposal is development and is not exempted development having regard to Article 10(6)(c)(iii) and Article 10(6)(d)(vi) of the Planning and Development Regulations, 2001 to 2021.

### **3.3. Planning Authority Reports**

#### **3.3.1. Planning Report (25<sup>th</sup> August 2021)**

The Planning Officer considered that the proposed development comprises a material change of use and therefore is 'development'. The Officer was satisfied that the structure was completed prior to the making of the Planning and Development (Amendment) (No. 2) Regulations 2018 on 8<sup>th</sup> February 2018 and that the property has at some time been used for the purpose of Class 2 (office).

The Report highlights that the Planning Authority is aware that development was being carried out for the provision of bedrooms and ensuite bathrooms at basement, ground and first floor levels and for the construction of kitchen, dining and living areas on 17<sup>th</sup> August 2020. The Officer stated that given the nature of the works, it is considered that these works explicitly relate to the residential use for which the Section 5 declaration is sought. Having regard to Article 10(6) and Circular Letter PL01/2018 it is the Planning Authority's strong contention that such development relates to both the change of use and the associated works as both are intrinsically linked. The Officer argued that to view (1) the works and (2) the change of use as to separate acts would negate Article 2 of S.I. No. 30/2018. The Planning Authority concluded on this point by stating that the development had already commenced on 17<sup>th</sup> August 2020 and that the subject structure had not been vacated for 2 years at that point in time (the property was vacated on 29<sup>th</sup> April 2019) and therefore, having regard to Article 10(6)(c)(iii) of

the Regulations, the proposed development is not considered to be exempted development.

Furthermore, the Planning Officer stated that the amendments to the 2018 Guidelines also include the removal of the internal standards for co-living units and therefore the dwelling floor areas and storage spaces within the subject proposal cannot comply with the minimum requirements of the Guidelines and would not be in accordance with Article 10(6)(d)(vi) of the Regulations.

The Planning Officer was satisfied that the proposal accords with the conditions and limitations set in sub-articles 10(6)(d)(x), (xi) and (xii).

#### 3.3.2. Other Technical Reports

None.

### 4.0 Planning History

- 4.1. **DLRCC Reg. Ref. 3219:** Planning permission granted for a two-storey office block at Windy Arbour on 22<sup>nd</sup> May 1967.
- 4.2. **Section 5 Declaration 8/21:** Dun Laoghaire Rathdown County Council issued a Declaration on 17<sup>th</sup> February 2021 stating that the use of TRC House for residential use as provided for under Article 10(6) of the Planning and Development Regulations 2001 as amended is considered to be development and not exempted development. The Local Authority considered that having regard to Article 10(6)(c)(iii) (i.e. a two year vacancy period) and Article 10(6)(d)(xi) the proposal was not exempted development. The Planning Authority considered that the required vacancy period had not been completed prior to the commencement of works and that an unauthorised change of use had been carried out. Furthermore, as the Declaration related to part of the basement that had planning permission for car parking but was converted into offices without the benefit of planning permission, the proposal was not compliant with Article 10(6)(d)(xi).
- 4.3. **Section 5 Declaration 62/21:** Dun Laoghaire Rathdown County Council issued a Declaration on 10<sup>th</sup> June 2021 stating that the use of TRC House for residential use as provided for under Article 10(6) of the Planning and Development Regulations 2001 as amended is considered to be development and not exempted development. The

Local Authority considered that having regard to Article 10(6)(c)(iii) and Article 10(6)(d)(vi) and (vii) the proposal was not exempted development.

- 4.4. **SA/60013:** Sub-article 6 Notification registered on 9<sup>th</sup> April 2021 for a change of use of one unit to provide one residential unit with 14 No. bedrooms. The Notification stated that works were due to commence on 12<sup>th</sup> April 2020.
- 4.5. **SA/60025:** Sub-article 6 Notification registered on 1<sup>st</sup> November 2021 for 1 unit 8 bedrooms. The Notification stated that works were due to commence on 15<sup>th</sup> November 2021.

## 5.0 Policy Context

### 5.1. Sustainable Urban Housing Design Standards for New Apartments Guidelines for Planning Authorities, (DoHPLG, 2020)

These statutory guidelines update and revise the 2015 Sustainable Urban Housing: Design Standards for New Apartments Guidelines, and the 2018 Guidelines in relation to Shared Accommodation schemes. The objective is to build on the content of the 2015 apartment guidance and to update previous guidance in the context of greater evidence and knowledge of current and likely future housing demand in Ireland taking account of the Housing Agency National Statement on Housing Demand and Supply, the Government's action programme on housing and homelessness Rebuilding Ireland and Project Ireland 2040 and the National Planning Framework, published since the 2015 guidelines.

Section 5.20 states that prior to issuing these Guidelines it was determined that there is a sufficient quantum of shared accommodation/co-living units either permitted or subject to consideration within the planning system, that may be built out to demonstrate and prove this concept, without impacting the housing system.

Specific Planning Policy Requirement 9 states:

*There shall be a presumption against granting planning permission for shared accommodation/co-living development unless the proposed development is either:-*

- (i) *required to meet specific demand identified by a local planning authority further to a Housing Need and Demand Assessment (HNDA) process;*

or,

- (ii) (ii) on the date of publication of these updated Guidelines, a valid planning application to a planning authority, appeal to An Bord Pleanála, or strategic housing development (SHD) planning application to An Bord Pleanála, in which case the application or appeal may be determined on its merits.

The standards for shared developments/co-living that were previously contained in the 2018 version of the Apartment Guidelines have been omitted from the current version (2020).

## 5.2. **Dun Laoghaire Rathdown County Development Plan 2016-2022**

The site is governed by the Dun Laoghaire Rathdown County Development Plan 2016-2022. The Dun Laoghaire Rathdown County Development Plan 2022-2028 was adopted on 10<sup>th</sup> March 2022, but does not come into effect until 21<sup>st</sup> April 2022. The site is designated Objective NC: *To protect, provide for and-or improve mixed-use neighbourhood centre facilities*, under both the current CDP and future CDP. Under this zoning objective 'Residential' is listed as a 'permitted in principle' use. Such land uses are, subject to compliance with the relevant policies, standards and requirements set out in this Plan, generally acceptable.

## 5.3. **Natural Heritage Designations**

The site is not located within a designated Natura 2000 site. There are no Natura 2000 sites located in the vicinity of the site.

## 6.0 **The Referral**

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

The Referral (dated 10<sup>th</sup> September 2021) has been submitted by Dundrum TRC freehold owner of the subject structure. The Referral includes large extracts from a legal opinion which is attached as Appendix 2. The key points from the Referral are summarised below.

## Two Year Vacancy

- Given the principle established in the Simons and Roadstone Provinces judgements that a change of use takes place when the new use commences, the change of use has not yet taken place in this case.
- TRC House is not currently resided in by anyone and is not currently used for residential purposes.
- The 'proposed development' for the purposes of Article 10(6)(b) and (c) is the change of use.
- Regardless of the question of whether the August 2020 works were works that facilitated the change of use, and regardless of whether TRC House continues to be advertised for commercial use, it cannot be disputed that the change of use has not yet taken place. As such, the 'proposed development' for the purposes of Article 10(6)(b) and (c) has not yet taken place.
- The property remained 'vacant' for the purposes of Article 10(6) throughout the period from April 2019 to the present day notwithstanding that works were carried out with effect from August 2020.
- As such, the proposed development i.e. the change of use, has not yet taken place and therefore Article 10(6)(c)(iii) is fulfilled.
- The requirement is that TRC House would need to be vacant for two years before the change of use can be carried out (in an exempted fashion). The internal works are not included within the meaning of 'proposed development' for the purposes of Article 10(6)(c)(iii).
- The Planner's Report has quoted two separate sub-sub-articles in one sentence, as if they appear as one sentence under the Regulations. Sub-article (6)(d) must be construed as relating only to the change of use.
- Due to the wording of Articles 10(6)(b) and (c) it is made clear by the wording of the statutory provision that the act of development that is exempted is the change of use and that it is this act of development that must commence at least 2 years after the period of vacancy began.



- ‘Vacant’ is not defined in either the PDA 2000 or PDRs. A property remains vacant even where works are being carried out in it.
- Circular PL01/2018 referenced in the Planner’s Report cannot be relied upon as a legal interpretation, and cannot supplement what the legislation actually provides for.

### Apartment Guidelines

- “Planning permission” does not include a declaration under section 5 as to whether a particular development constitutes development.
- It has been established in recent Court of Appeal authority that, in interpreting section 28 Guidelines, it shall be assumed that language used is intended to be consistent with the meanings provided by the PDA 2000. Section 2 of the PDA 2000 defines “permission” as “permission granted under section 34, 37G, or 37N, as appropriate.
- Section 5.21 and SPPR9 apply to decisions on applications for planning permissions under section 34, 37G, or 37 N of the PDA 2000 or under section 9 of the 2016 Act, but not to applications for a declaration under section 5 of the PDA 2000.
- The proposal meets the Apartment Guidelines 2018. The standards were removed from the 2020 Guidelines insofar as they related to a determination of an application for planning permission.
- The appropriate and reasonable approach to the requirements of Article (6)(d)(vi) is to determine compliance with the 2018 Apartment Guidelines, being the Guidelines in place at the time of the making of the coming into effect of Article 10(6) and being the only relevant standards available.
- DLRCC’s interpretation of the 2020 amendments to the Apartment Guidelines renders article 10(6) obsolete, and on that basis no proposal for co-living can ever be exempt under article 10(6).

## **6.2. Planning Authority Response**

The Planning Authority has made no further comments on the referral.

### 6.3. Further Responses

There are no further responses recorded on the Referral file.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

Section 2 (1) of the Act provides the following definitions:

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

*“alteration” includes – (a) plastering or painting or the removal of plaster or stucco, or (b) the replacement of a door, window or roof, That materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures;*

*“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, and*

*(b) in relation to a protected structure or proposed protected structure, includes—*

*(i) the interior of the structure,*

*(ii) the land lying within the curtilage of the structure,*

*(iii) any other structures lying within that curtilage and their interiors, and*

*(iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in subparagraph (i) or (iii)*

Section 3(1) of the Act defines “development” as follows:

*“In this Act, “development” means, except where the context otherwise requires, the carrying out 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(2) of the Act provides that the Minister may by regulation provide any class of development to be exempted development. The Regulations which are applicable in this case are the Planning and Development Regulations 2001 (as amended).

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

**Article 10(1)** provides that any change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development provided that they do 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;*

**Part 4 of the Second Schedule to the Regulations** states as follows:-

Exempted Development – Classes of Use

Class 2: Use for the provision of—

- (a) financial services,
- (b) professional services (other than health or medical services),
- (c) any other services (including use as a betting office),

where the services are provided principally to visiting members of the public.

Class 3: Use as an office, other than a use to which class 2 of this Part of this Schedule applies.

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.*

**S.I. No. 30 of 2018** relates to certain change-of-use from e.g. shop or office use to residential use being exempted development. Article 10(6) was inserted by the Planning and Development (Amendment) (No 2) Regulations 2018 (S.I. No. 30 of 2018) to make new provision to provide an exemption for the change of use, and any related works, of certain vacant commercial premises to residential use prior to the 31<sup>st</sup> December 2021.

**S.I. No. 75 of 2022** extends the provisions of Article 10(6) by amending the 'relevant period' from 31<sup>st</sup> December 2021 to 31<sup>st</sup> December 2025. Furthermore, the updated legislation requires that for the purposes of Article 10(6) 50 per cent or more of the existing external fabric of the building must be retained (Article 10(6)(d)(ii)(ii)). In addition, the provisions include change of use development from public house (new Class 12) to residential.

Article 10 (6) (a) defines the relevant period as "the period from the making of these Regulations until 31 December 2025.

Article 10(6)(b) states that *this sub-article relates to a proposed development, during the relevant period, that consists of a change of use to residential use from Class 1, 2, 3 6 or 12 of Part 4 to Schedule 1.*

Article 10(6)(c) states that "*notwithstanding sub-article (1), where in respect of a proposed development referred to in paragraph (b) –*

- I. The structure concerned was completed prior to the making of the Plan and Development (Amendment ) (no.2) regulations 2018.*
- II. The structure concerned has at some time been used for the purpose of its current use class, being Class 1,2,3,6 or 12 and*
- III. The structure concerned or so much of it that is the subject of the proposed development has been vacant for 2 years or more immediately prior to the commencement of the proposed development,*

*then the proposed development for residential use and any related works shall be exempted development for the purposes of the Act, subject to the conditions and limitations set out in paragraph (d).*

**Article 10(6)(d)** states as follows:

- (i) The development is commenced and completed during the relevant period.*

- (ii) Subject to sub-paragraph (iii), any related works, including works as may be required to comply with sub-paragraph (vii), shall –
  - (I) primarily affect the interior of the structure,
  - (II) retain 50 per cent or more of the existing external fabric of the building, and
  - (III) not materially affect the external appearance of the structure so as to render its appearance inconsistent with the character of the structure or of neighbouring structures.
- (iii) *Any related works for the alteration of existing ground floor shop fronts shall be consistent with the fenestration details and architectural and streetscape character of the remainder of the structure or of neighbouring structures.*
- (iv) *No development shall consist of or comprise the carrying out of works to the ground floor area of any structure which conflicts with any objective of the relevant local authority development plan or local area plan, pursuant to the Part 1 of the First Schedule to the Act, for such to remain in retail use, with the exception of any works the purpose of which is to solely provide on street access to the upper floors of the structure concerned.*
- (v) *No development shall consist of or comprise the carrying out of works which exceeds the provision of more than 9 residential units in any structure.*
- (vi) *Dwelling floor areas and storage spaces shall comply with the minimum floor area requirements and minimum storage space requirements of the “Sustainable Urban Housing: Design Standards for New Apartments — Guidelines for Planning Authorities” issued under section 28 of the Act or any subsequent updated or replacement guidelines.*
- (vii) *Rooms for use, or intended for use, as habitable rooms shall have adequate natural lighting.*
- (viii) *No development shall consist of or comprise the carrying out of works to a protected structure, as defined in section 2 of the Act, save where the relevant planning authority has issued a declaration under section 57 of the Act to the effect that the proposed works would not materially affect the*

*character of the structure or any element, referred to in section 57(1)(b) of the Act, of the structure.*

- (ix) No development shall contravene a condition attached to a permission under the Act or be inconsistent with any use specified or included in such a permission.*
- (x) No development shall relate to any structure in any of the following areas:
  - (I) an area to which a special amenity area order relates;*
  - (II) an area of special planning control;*
  - (III) within the relevant perimeter distance area, as set out in Table 2 of Schedule 8, of any type of establishment to which the Major Accident Regulations apply.**
- (xi) No development shall relate to matters in respect of which any of the restrictions set out in subparagraph (iv), (vii), (viiA), (viiB), (viiC), (viii) or (ix) of article 9(1)(a), or paragraph (c) or (d) of article (9)(1), would apply.*
- (xii) No development shall consist of or comprise the carrying out of works for the provision of an onsite wastewater treatment and disposal system to which the code of practice made by the Environmental Protection Agency pursuant to section 76 of the Environmental Protection Agency Act 1992 relates and entitled Code of Practice — Wastewater Treatment and Disposal Systems Serving Single Houses together with any amendment to that Code or any replacement for it.*

**Article 10(6)(e)(i)** where a person proposes to undertake development to which paragraph (b) relates, then he or she shall in the case of development relating to Class 1, 2, 3, 6 or 12 of Part 4 to Schedule 2, notify in writing the planning authority in whose functional area that the change of use will occur not less than 14 days prior to the commencement of the works related to the proposed change of use and any related works;

### **Circular Letter PL 01/2018**

The Department issued a Circular Letter, PL01/2018, to outline the changes and their proposed intention and refers to Action 5.9 of Rebuilding Ireland which commits to

reviewing planning legislation to allow the change of use of vacant commercial units in urban areas, including vacant to underutilised areas over ground floor premises, into residential units without having to go through the planning process..... the main objectives of the exemption are to facilitate the provision of increased and much needed housing supply, to maximise the use of vacant underutilised spaces and assist in the rejuvenation of inner-core urban area.

The Circular states that the change of use, and any related works, must occur between when the Regulations come into operation on 8 February 2018 and 31 December 2021. In other words, while the exempted development permitted will be permanent in nature, the exemption can only be availed for a temporary period, concurrent with the lifetime of Rebuilding Ireland. In addition, the existing structure or part of the structure, which is the subject of the change of use, is required to be vacant for a period of two years immediately prior to when the development takes place.

Furthermore, the Circular highlights that as with the planning system generally, neither the granting of planning permission or the provision of an exemption from the requirement to obtain planning permission, removes the requirement to comply with any other code, particularly in relation to building regulations.

### **Circular Letter PL 02/2022**

The Circular states that the Planning and Development Act (Exempted Development) Regulations 2022 (S.I. 75 of 2022) extends to 31 December 2025 the exemption given by SI 30 of 2018 and satisfies the commitment given by action 20.3 of Housing for All. Furthermore, the Circular states that in order to avail of the exemptions being provided for, the structure, or part of the structure, which is the subject of the change of use must have been vacant for at least 2 years immediately prior to the commencement of the relevant works, with such works being required to be completed by 31 December 2025.

## 8.0 Assessment

### 8.1. Preliminary Matter

- 8.1.1. A determination is sought as to whether the use of TRC House for residential use, as provided for under article 10(6) of the Planning and Development Regulations, 2001, as amended, is exempt development.
- 8.1.2. It is important to emphasise that the referral is not for the purpose of deciding on the merits of the development at issue but rather is confined to determine if the change of use and associated works amounts to development and whether or not it is exempted by reference to the legislative provisions.
- 8.1.3. In the interim period between when the determination was first sought from the Local Authority (i.e. 29<sup>th</sup> July 2021) and the time of writing this Report, there have been two key relevant changes to planning legislation and guidance:

1. The S.I. No. 30/2018 - Planning and Development (Amendment) (No. 2) Regulations 2018 has been updated by the S.I. No. 75 of 2022 - Planning and Development Act (Exempted Development) Regulations 2022, and
2. The Sustainable Urban Housing Design Standards for New Apartments Guidelines for Planning Authorities, (March 2018) have been superseded by the Sustainable Urban Housing Design Standards for New Apartments Guidelines for Planning Authorities, (December 2020), and

In summary, for the purposes of this case, the key implications of the above changes are that the provisions of Article 10(6) can be availed of until 31<sup>st</sup> December 2025 and shared accommodation/co-living units which were introduced under the 2018 version of the Apartment Guidelines are generally no longer permitted under SPPR9 of the 2020 version of the Apartment Guidelines (unless the proposed development is either (1) required to meet a specific demand identified in a HNDA or (2) the date of publication of these updated Guidelines, a valid planning application to a planning authority, appeal to An Bord Pleanála, or strategic housing development (SHD)



planning application to An Bord Pleanála, in which case the application or appeal may be determined on its merits.)

8.1.4. In carrying out this assessment, the planning referrals data base was consulted. ABP 301388-18, ABP 304765-19 and ABP 309030-20 pertaining to similar change of use proposals have informed this appraisal. A copy of the Planning Inspectors Reports together with the Boards Directions and Orders is attached to this Referral.

8.1.5. At the time of writing this Report, the structure was in residential use.

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

8.2.1. The proposed development comprises 2 different elements, namely the use of part of the basement/lower ground level and the entirety of the ground and first floor level of the structure as a co-living/shared accommodation facility and internal alterations to facilitate same. As such, the proposal constitutes development.

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

8.3.1. There are minor alterations shown between the existing drawings (Dwg. Nos. CN.131.0201, Rev. 1, CN.131.0202, Rev. 1 and CN.131.0203, Rev. 1) and the proposed drawings (Dwg. Nos. CN.131.0211, Rev. 2, CN.131.0212, Rev. 2, and CN.131.0213, Rev. 2). The key alterations include removal of an ensuite in the proposed living area at Ground Floor Level, replacement of a reception/lobby/smoking area with a canteen and kitchen and replacement of a kitchen with a gym at Lower Ground Floor Level, and kitchen fit outs and beds illustrated on the Ground and First Floor Levels. Having regard to the definition of works under Section 2 of the Act which includes “any act or operation of alteration”, it is considered that the internal alterations are likely to fall within this definition and thus constitute development.

## **8.4. Material Change of Use**

The definition of development also refers to the making of any material change in the use of any structure or other land. Article 10 of the Regulations provides for a number of categories of development that are exempted from requiring planning permission.

This Article is linked to Part 4 of Schedule 2 of the Regulations that consists of a table of use classes. Office is defined as a Class 2 or 3 use. Residential accommodation is considered a Class 9 use. Article 10(1) provides an exemption for development which consists of a change of use within anyone of the classes of use specified in Part 4 of Schedule 2. In this regard I also refer to Planning and Development Act (Exempted Development) Regulations 2022 (S.I. No. 75 of 2022). Under these amended Regulations the conversion of a Class 2 or 3 (office) use to Class 9 (residential use) is exempted under certain conditions.

## **8.5. Restrictions on exempted development**

- 8.5.1. With respect to the parameters set down in Article 10(6)(c)(i) and (ii), I am satisfied that the structure was completed prior to the making of the relevant Regulations and that it was previously used as a Class 2 or 3 use and as such I consider that these parameters are met.
- 8.5.2. As outlined above, the Planning Authority considered that the proposal was not compliant with the parameters set down in Article 10(6)(c)(iii) as the structure was not vacant for a period of 2 years or more immediately prior to the commencement of the proposed development. I understand from the documentation on file that the structure was vacant from April 2019 to November 2021. During the intervening period the subject Referral was submitted by the Applicant to the Local Authority, subsequent to two earlier Determinations (Refs. 08/21 and 61/21). In addition, two Sub-article 6 Notifications were registered; the latter stating that the 'date works will commence' would be 15<sup>th</sup> November 2021. Having regard to the information available on file, in my view it is reasonable to conclude that the structure was vacant for a period greater than two years immediately prior to its use as a shared accommodation/co-living unit.
- 8.5.3. With respect to the works undertaken in the intervening period between April 2019 and November 2021, I note that the subject works were internal to the structure. There are no material external elevational amendments arising from the internal alterations. In this regard, I consider that the works are considered exempt under section 4(1)(h) of the Planning and Development Act 2000 (as amended) being works which affect only the interior of the structure.
- 8.5.4. In the interest of clarity I reiterate the wording of Article 10(6)(b):

*This sub-article relates to a proposed development, during the relevant period, that consists of a change of use to residential use from Class 1, 2, 3 or 6 of Part 4 to Schedule 1.*

and the wording of Article 10(6)(c)(iii)

*the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development,*

*then the proposed development for residential use, and any related works, shall be exempted development for the purposes of the Act, subject to the conditions and limitations set out in paragraph (d). [Underline: my emphasis.]*

- 8.5.5. In my view, there is a distinction between the ‘proposed development’, that being a change of use to residential use, and ‘related works’ in the drafting of the legislation. As such, I concur with the Referrer’s interpretation that for the purposes of this exemption the ‘change of use’ and ‘related works’ are separate entities, irrespective if this was intentional or not.
- 8.5.6. I note that Circular PL 02/2022 states the “*in order to avail of the exemptions being provided for, the structure, or part of the structure, which is the subject of the change of use must have been **vacant for at least 2 years immediately prior to the commencement of the relevant works**, with such works being required to be completed by 31 December 2025* (bold: my emphasis), this wording is not consistent with the wording of the relevant legislation.
- 8.5.7. Furthermore, whilst not directly related to this specific exemption, I note the findings in the ruling in the Roadstone Provinces Ltd. v An Bord Pleanála [2008] IEHC case, that a change of use only occurs when the new use commences.
- 8.5.8. In conclusion, in my view, having regard to the evident available on file that the structure was vacant for a period greater than two years immediately prior to its use as a shared accommodation/co-living unit in November 2021, the proposal is compliant with Article 10(6)(c)(iii).
- 8.5.9. With respect to the conditions and limitations set down in Article 10(6)(d) and based on the submissions on file and my site inspection, in my judgement, the following can be reasonably concluded:

- 8.5.10. **Commencement / Completion of work - Article 10 (6)(d)(i)** as outlined above, having regard to the information available on file, I am satisfied that the proposal was commenced in accordance with the provisions of the subject Regulations. This provision does not expire until 31<sup>st</sup> December 2025. The provisions of Article 10(6)(d)(i) does not therefore apply.
- 8.5.11. **Interior Works - Article 10 (6)(d)(ii)** as stated above, in my view the internal works, are exempt under section 4(1)(h) of the Planning and Development Act 2000 (as amended) being works which affect only the interior of the structure and retain 50 per cent or more of the existing external fabric of the building. The provisions of Article 10(6)(d)(ii) does not therefore apply.
- 8.5.12. **Shopfronts - Article 10 (6)(d)(iii)** the proposal does not relate to a shop front and includes no external alterations to the structure. The provisions of Article 10(6)(d)(iii) does not therefore apply.
- 8.5.13. **Development Plan/Local Area Plan Objective - Article 10 (6)(d)(iv)** the site is zoned Objective NC: *To protect, provide for and-or improve mixed-use neighbourhood centre facilities.* As the structure has not been used for retail purposes nor does the Development Plan contain a specific objective relating to the site, I consider the provisions of Article 10(6)(d)(iv) does not therefore apply.
- 8.5.14. **Residential Units - Article 10 (6)(d)(v)** requires that no development exceeds the provision of more than 9 no residential units in any structure. The proposal includes for two shared accommodation/co-living units each with four bedrooms. The provisions of Article 10(6)(d)(v) does not therefore apply.
- 8.5.15. **Floor Areas and Storage Area – Article 10 (6)(d)(vi)** requires that floor areas and storage space complies with the minimum requirements as set out in the Sustainable Urban Housing Design Standards for New Apartments – Guidelines for Planning Authorities or any subsequent updated or replacement guidelines. As outlined above, SPPR 9 of the 2020 version of the Apartment Guidelines states that there shall be a presumption against granting planning permission for shared accommodation/co-living development unless the proposed development is either (1) required to meet a specific demand identified in a HNDA or (2) the date of publication of these updated Guidelines, a valid planning application to a planning authority, appeal to An Bord

Pleanála, or strategic housing development (SHD) planning application to An Bord Pleanála, in which case the application or appeal may be determined on its merits.

- 8.5.16. The Referrer argues that Section 28 Guidelines do not apply to Section 5 declarations, but in any instances should the Guidelines apply, the proposal should be assessed against the 2018 version, not the 2020 version. In my view, it is clear from the wording of Article 10(6)(d)(vi) that the Apartment Guidelines are applicable to any proposal relying on the subject exemption. I note that the Board has previously issued Section 5 declarations with specific reference to the Apartment Guidelines (see Ref. 309030). SPPR 9 aims to prohibit the development of shared accommodation/co-living units unless there is a need identified in a HNSA or a planning application for such development was made to a Local Authority or An Bord Pleanála prior to the date of publication of the 2020 Apartment Guidelines. Neither of these criteria are applicable to the subject case.
- 8.5.17. In relation to which version of the Guidelines are applicable, in my view, having regard to the wording of Article 10 (6)(d)(vi) (i.e. *the “Sustainable Urban Housing: Design Standards for New Apartments — Guidelines for Planning Authorities” issued under section 28 of the Act or any subsequent updated or replacement guidelines*) and similar to the manner in which the Board determines normal planning appeals and applications for strategic housing development and strategic infrastructure development, the relevant policy documents or guidelines, are those which are adopted at the time the Board’s Order is made. As such, in my opinion, for the purposes of this Referral the relevant version of the Apartment Guidelines is the 2020 version. I also note that this version would have been applicable at the time the Sub-article 6 Notification (Ref. SA/60013) was registered in November 2021. As stated above the standards for shared developments/co-living that were previously contained in the 2018 version of the Apartment Guidelines have been omitted from the current version (2020). Having regard to SPPR 9 of the 2020 Guidelines, I concur with the Planning Authority that the proposed development does not meet with exemption criteria in Article 6(d)(vi).
- 8.5.18. **Natural Lighting - Article 10 (6)(d)(vii)** requires that rooms for use, or intended for use, as habitable rooms shall have adequate natural lighting. The BRE “Site Layout Planning for Daylight and Sunlight: A Guide to Good Practice” describes recommended values (e.g. ADF, VSC, APSH, etc) to measure daylight, sunlight and

overshadowing impacts. However, it should be noted that the standards described in the BRE Guidelines are discretionary and not mandatory policy/criteria (para. 1.6). The BRE Guidelines also state in paragraph 1.6 that, “although it gives numerical guidelines, these should be interpreted flexibly since natural lighting is only one of many factors in site layout design”. The BRE note that other factors that influence layout include considerations of privacy, security, access, enclosure, microclimate, etc. In addition, industry professionals would need to consider various factors in determining an acceptable layout, including orientation, efficient use of land and arrangement of open space, and these factors will vary from urban to more suburban locations. In this regard the Applicant has submitted an ADF Assessment, dated July 2021.

- 8.5.19. In relation to daylight, the BRE 209 guidance, with reference to BS8206 – Part 2, sets out minimum values for ADF that designers/developers should strive to achieve, with various rooms of a proposed residential unit (2% for kitchens, 1.5% for living rooms and 1% for bedrooms). The Applicant states that 1.5% is appropriate for bedrooms in this instance as the proposal is for shared accommodation and “*occupants are likely to spend longer duration in bedrooms than would be expected in a conventional bedroom*”. The study concludes that all proposed bedrooms, living spaces and kitchens in the proposed development meet or exceed the appropriate ADF value. I am satisfied that the adequate natural light is available. The provisions of Article 10(6)(d)(vii) does not therefore apply.
- 8.5.20. Protected Structure - Article 10 (6)(d)(viii) requires that no development shall consist of or comprise the carrying out of works to a protected structure. Not applicable in this case as the building is not listed on the Record of Protected Structure. The provisions of Article 10(6)(d)(viii) does not therefore apply.
- 8.5.21. Condition - Article 10 (6)(d)(ix) requires that no development shall contravene a condition attached to a permission. I refer to the Case Planners report where it is states that the development will not contravene a condition. The provisions of Article 10(6)(d)(ix) does not therefore apply.
- 8.5.22. Restricted Areas - Article 10 (6)(d)(x) requires that no development shall relate to any structure in a special amenity area, area of special planning control or within the

relevant perimeter distance area to which the Major Accident Regulations apply. Not applicable in this case. The provisions of Article 10(6)(d)(x) does not therefore apply.

8.5.23. Restrictions - Article 10 (6)(d)(xi) requires that no development shall relate to matters in respect of which any of the restrictions set out in subparagraph (iv), (vii), (viiA), (viiB), (viiC), (viii) or (ix) of article 9(1)(a), or paragraph (c) or (d) of article (9)(1), would apply. The proposed change of use would not alter the front boundary, would not interfere with landscape / listed view or prospects and will not impact on a recorded monument. The site is not within or located adjoining any NHA and therefore will have no impact. Having regard to the nature and scale of the proposed development and its distance 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. The provisions of Article 10(6)(d)(xi) does not therefore apply.

8.5.24. Wastewater Disposal - Article 10 (6)(d)(xii) requires that no development shall consist of or comprise the carrying out of works for the provision of an onsite wastewater treatment and disposal system. Not applicable in this case. The provisions of Article 10(6)(d)(xii) does not therefore apply.

## 8.6. **Appropriate Assessment**

Having regard to the nature and scale of the proposed development and its distance 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. To reiterate, the provisions of Article 10(6)(d)(xi) does not therefore apply.

## 9.0 **Recommendation**

- 9.1.1. In view of the foregoing assessment, I consider that the change of use constitutes development that is not exempted development having regard primarily to Article 10 (6)(d)(vi) of the Planning and Development regulations, 2001, as amended.
- 9.2. 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 TRC House for residential use, as provided for under article 10(6) of the Planning and Development Regulations, 2001, as amended, is exempt development. This declaration excludes the lower ground floor area identified on Drawing No. 0213 titled 'Proposed Lower Ground Floor Plan' . :

**AND WHEREAS** Dundrum TRC Ltd. requested a declaration on this question from Dun Laoghaire Rathdown County Council and the Council issued a declaration on the 25th day of August, 2021 stating that the matter was development and was not exempted development:

**AND WHEREAS** referred this declaration for review to An Bord Pleanála on the 10th day of September, 2021:

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

- (a) Section 2, 3 and 4 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) Planning and Development (Amendment) (No 2) Regulations 2018 (S.I. No. 30 of 2018)
- (d) Sustainable Urban housing: Design Standards for New Apartments – Guidelines for Planning Authorities (December 2020)
- (e) Dun Laoghaire Rathdown County Development Plan 2016-2022
- (f) the report of the Inspector

**AND WHEREAS** An Bord Pleanála has concluded that the conversion of TRC from commercial to residential use is development and is not exempted development as it would:

- (a) the development was commenced during the relevant period in accordance with Article 10(6)(b) of the Regulations
- (b) the internal works to facilitate the residential use would constitute “works” that are “development” under Section 3 of the Planning and Development Act 2000 (as



amended) and come within the scope of section 4(1)(h) of the Planning and Development Act 2000 (as amended)

(c) the development does not come within the scope of Article 10(6)(d)(vi) whereby it is inconsistent with Specific Planning Policy Requirement 9 of the Sustainable Urban Housing: Design Standards for New Apartments – Guidelines for Planning Authorities, December 2020

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5 (3)(a) of the 2000 Act, hereby decides:

The use of the of the structure as a residential shard accommodation/co-living unit is development and is not exempted development.

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Susan Clarke  
Planning Inspector

6<sup>th</sup> April 2022