



An
Bord
Pleanála

Inspector's Report ABP-312301-21

Question

Whether the material alteration to fenestration and the provision of a substantial deck/platform is or is not development and is or is not exempted development.

Location

Fanaghans, Inver, Co. Donegal.

Declaration

Planning Authority

Donegal County Council

Planning Authority Reg. Ref.

S5 21/38

Applicant for Declaration

Paul Hayden

Planning Authority Decision

Development, which is exempted development

Referral

Referred by

Paul Hayden

Owner/ Occupier

Jonathan & Claire McMorrow

Observer(s)

None

Date of Site Inspection

14th April 2022

Inspector

Hugh D. Morrison

Contents

1.0 Site Location and Description	4
2.0 The Question	4
3.0 Planning Authority Declaration.....	4
3.1. Declaration.....	4
3.2. Planning Authority Reports	4
4.0 Planning History.....	5
5.0 Policy Context.....	6
5.1. Development Plan.....	6
5.2. Natural Heritage Designations	6
6.0 The Referral.....	6
6.1. Referrers' Case	6
6.2. Planning Authority Response	8
6.3. Owner/occupier's response.....	9
6.4. Further Responses.....	10
7.0 Statutory Provisions.....	11
7.1. Planning and Development Act, 2000	11
7.2. Planning and Development Regulations, 2001	11
7.3. Other	14
8.0 Assessment.....	14
8.1. The Question.....	14
8.2. Is or is not development	14
8.3. Is or is not exempted development	15
8.4. Restrictions on exempted development	18
9.0 Recommendation.....	19

1.0 Site Location and Description

- 1.1. The site is located 1.9 km to the south-west of Inver, a scattered settlement on the N56 between Donegal Town and Killybegs. This site is accessed off the local road network, which runs between the national primary road and the coastline. It is one of six sites which are elevated in relation to the coastline and the adjacent local road. Each site accommodates a single storey dwelling with sea views.
- 1.2. The dwelling on the site was originally a traditional cottage. It has been extended on its north-eastern side and to the south-east to its rear. The latter extension is accompanied by a deck/platform, which runs along the south-eastern elevation of the rear extension and wraps around the south-western side elevation and the south-western side elevation of the original cottage. The seaward edge of the deck/platform is enclosed by means of a glass balustrade.

2.0 The Question

- 2.1. Whether the material alteration to fenestration and the provision of a substantial suspended deck/platform at Fanaghans, Inver, Co. Donegal is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority declared that the material alteration to fenestration and the provision of a substantial deck/platform are development and that the former is exempted development, under Section 4(1)(h) of the Planning and Development Act, 2000 – 2001, and the latter is exempted development under Classes 1 and 6 of Part 1 of Schedule 2 to Article 6 of the Planning and Development Regulations, 2001 – 2021.

3.2. Planning Authority Reports

3.2.1. Planning Reports

- The case planner’s report considers that the alterations to the fenestration permitted under 20/51402 would meet the test set out in Section 4(1)(h) of the Act. It also considers that the provision of a substantial deck/platform comes within the ambit of Class 6, including the condition/limitation that “The level of the ground shall not be altered by more than 1 metre above or below the level of the adjoining ground.”

3.2.2. Other Technical Reports

None

4.0 Planning History

- **20/51402**

(i) Construction of a single storey extension to the south-east of the existing dwelling,

(ii) Decommissioning of existing septic tank and percolation area,

(iii) Installation of a new wastewater treatment system,

(iv) All associated site works including connection to existing on-site services.

Permission granted on 6th January 2021, subject to 5 standard conditions.

- **21/50566**

Alterations to the single storey extension to the existing dwelling previously approved under 20/51402. Alterations to include:

(i) Demolition of existing garage,

(ii) Provision of an increase in floor area to the east of the previously approved extension in lieu of demolished garage, and

(iii) Elevational changes and all associated site works.

Application withdrawn on 5th August 2021.

5.0 Policy Context

5.1. Development Plan

Under Map 7.1.1 of the Donegal County Development Plan 2018 – 2024 (CDP), the site is shown as lying within an area of especially high scenic amenity.

5.2. Natural Heritage Designations

- Donegal Bay SPA (004151)
- St. John's Point SAC and NHA (000191)

6.0 The Referral

6.1. Referrer's Case

- The referrer requests that, under Section 5(3)(a) of the Act, the Board review the Planning Authority's declaration of the subject case.
- The subject case entails the following elements:
 - The construction of a substantial elevated deck/balcony/viewing platform to the rear of the extension permitted under 20/51402, and
 - The substitution of large, glazed sliding doors in place of the fixed glazing in the rear elevation of the extension permitted under 20/51402. (These doors afford access between the living room in this extension and the deck/balcony/viewing platform).
- The structure, which is the deck/balcony/viewing platform, is c. 1.8m wide and c. 20m long. When originally erected, it was c. 1.5 – 1.8m above the steeply sloping ground underneath it. (Originally the ground had been lower again). Since then the ground in question has been raised, although it has begun to slip.
- The referrer summarises the planning history of the site. The above cited elements were not included in the original application 20/51402 and, while

they were included in the subsequent 21/50566, this application was withdrawn. Nevertheless, the elements are now *in-situ*.

- Both elements are indisputably development.
- With respect to the alteration in fenestration, this is material and so not exempted development. With respect to the deck/balcony/viewing platform, if the original height of the ground underneath it is taken as the relevant height, then it is not exempted development. Alternatively, if it is considered to be exempted, then the site's inclusion in an area of especially high scenic amenity means that it is de-exempted under Article 9(1)(a)(vi) of the Regulations.
- The referrer draws attention to pre-planning advice from the Planning Authority, which drew attention to the "extension of the rear building line vis-a-vis the very steep fall to sea level beyond the existing boundary fence." The extension appears to breach this fence line and the deck/balcony/viewing platform extends this breach further.
- Attention is drawn to the following provisions of the CDP: Policies NH-P-6, RH-P-1 & 2, and Appendix 4, especially Section 2.1, which addresses coastal sites.
- Attention is also drawn to the referrer's submission to 21/50566, which raised concerns over the environmental and amenity impacts of the development, especially the deck/balcony/viewing platform, and concerns over slope stability.
- The design intent and chronology of the development were outlined in the RTE 1 television programme, "My Bungalow Bliss", which was aired on 15th December 2021.
- The referrer acknowledges that legal interpretations of exempted development can differ. In this case, they contend that the aforementioned CDP provisions, impacts, and what is reasonable to ensure the amenity value of the extended dwelling in question should be taken into account.

6.2. Planning Authority Response

- The rationale for the Planning Authority's declaration is set out in the case planner's report.
- The owners/occupiers have submitted detailed plans and sections of the "as constructed" development. These show, amongst other things, the following:
 - A 1.1m high balustrade to the deck,
 - A height of 1m between the pre-existing ground level and the underside of the deck,
 - Fenestration changes:
 - The glazing in the south-western elevation of the extension is shorter than permitted,
 - A 550mm wide timber clad insertion to the south-eastern elevation has been omitted in favour of glazing, and
 - The eastern corner glazing has been reduced in height by the insertion of a 500mm high wall beneath the glazing.
- The Planning Authority considers that the fenestration changes are exempted under Section 4(1)(h) of the Act.
- The Planning Authority considers that the suspended deck/platform is exempted development under Class 6(a)(i) of Part 1 of Schedule 2 to Article 6 of the Regulations, which refers to the construction of any path and the carrying out of any landscaping works within the curtilage to the rear of a dwelling provided ground levels are not altered by more than 1m.
- The Planning Authority also considers that the location of the development to the rear of the original cottage would not interfere with the character of the residential area, which lies within an area of especially high scenic amenity, and that, on balance, it does not have significant adverse impacts on neighbouring properties.

6.3. Owner/occupier's response

- The owners/occupiers of the extended dwelling set out the planning history of the subject site and their contacts with the Planning Authority's enforcement officer and the referrer.
- The minor alterations to the fenestration of the extension should be considered to be exempted development, as they neither affect the aesthetic of this extension nor the amenities of neighbouring properties.
- The referrer's contention that the original level of the ground underneath the suspended deck was lower than 1m is challenged on the basis of submitted photographs and a topographical survey of the site prior to construction.
- Had the extension been prefabricated, the opportunity to walk to the rear of the dwelling would have continued to exist (cf. drawing nos. 2020-025-P01.1, 2 & 3).
- The extension is not prefabricated, and so substantial earthworks were undertaken to provide it with a c. 3m deep foundation to its rear (seaward) elevation. With the addition of the suspended deck, the ground level is now 1m below it. (The intention behind this deck and its glazed balustrade is that from within the extension uninterrupted views of the sea are available and so an architectural floating illusion is created).
- The suspended deck is considered to be exempted development, under Classes 5 and 6 of Part 1 of Schedule 2 to Article 6 of the Regulations. Particular attention is drawn to the references in Class 6 to "the construction of any path within the curtilage of a house" and "the provision to the rear of the house of a hard surface for use for any purpose incidental to the enjoyment of the house as such." The condition/limitation of not altering ground levels by more than 1m is met.
- Based on the above understanding, the owners/occupiers could have extended the path around their entire extended dwelling. Likewise, they could have laid a concrete path and enclosed their curtilage boundary with a 2m high fence, works that would be far less sympathetic to the area and neighbouring amenities than those which have been undertaken.

6.4. Further Responses

(a) The referrer

The referrer has responded to the owners/occupiers' response to their case. He begins by countering the submitted commentary on contact between himself and the owners/occupiers. He then responds to substantive points raised in this response as follows:

- Insofar as Class 5 of Part 1 of Schedule 2 to Article 6 of the Regulations refers to a maximum height of 2m, the 1.1m high balustrade, when aggregated with the 1m height above ground level, would exceed 2m. More fundamentally, the description of the exempted development set out in Class 5 does not encapsulate the structure in question.
- Insofar as Class 6 of Part 1 of Schedule 2 to Article 6 of the Regulations refers to a 1m change in ground levels, with the slippage in the slope in the vicinity of the structure in question which has already begun, this height is likely to be exceeded.
- Furthermore, the structure in question goes beyond what is envisaged in the description of exempted development in Class 6 of Part 1 of Schedule 2 to Article 6 of the Regulations. Thus, it impacts upon the coastline and the referrer's amenities, so much so that he is contemplating reorganising his rear garden in a bid to safeguard his privacy.
- The fenestration changes described by the owners/occupiers do not refer to the installation of large sliding doors in the south-eastern (rear) elevation of the extension, which facilitate the deck being used in conjunction with their living room. Such usage ensures that the adjoining deck, which overlooks the referrer's rear garden is overlooked. Consequently, these doors are not a minor alteration. Indeed, it is this combined usage, facilitated by them and the deck, that formed the substance of the referrer's submission to 21/50566, only for this application to be withdrawn and the works to proceed anyway. (By contrast, the fenestration changes, which are described by the owners/occupiers, are not particularly contentious).

(b) The Planning Authority

No additional comments.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 3(1): Development

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 2(1): Interpretation

“use”, in relation to land, does not include the use of the land by the carrying out of any works thereon;

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

Section 4(1): Exempted development

The following shall be exempted developments 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;

7.2. Planning and Development Regulations, 2001

Article 6(1): Exempted development

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided

that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Class 5 of Part 1 of Schedule 2 to Article 6

<p><i>The construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or wooden fence or a wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</i></p>	<ol style="list-style-type: none"> <i>1. The height of any such structure shall not exceed 2 metres or, in the case of a wall or fence within or bounding any garden or other space in front of a house, 1.2 metres.</i> <i>2. Every wall other than a dry or natural stone wall bounding any garden or other space shall be capped and the face of any wall of concrete or concrete block (other than blocks with decorative finish) which will be visible from any road, path or public area, including public open space, shall be rendered or plastered.</i> <i>3. No such structure shall be a metal palisade or other security fence.</i>
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Class 6 of Part 1 of Schedule 2 to Article 6

<p><i>(a) The construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house.</i></p> <p><i>(b) Any works within the curtilage of a house for—</i></p> <p><i>(i) the provision to the rear of the house of a hard surface for use for any</i></p>	<p><i>The level of the ground shall not be altered by more than 1 metre above or below the level of the adjoining ground.</i></p>
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<p><i>purpose incidental to the enjoyment of the house as such, or,</i></p> <p><i>(ii) the provision of a hard surface in the area of the garden forward of the front building line of the house, or in the area of the garden to the side of the side building line of the house, for purposes incidental to the enjoyment of the house as such</i></p>	<p><i>Provided that the area of the hard surface is less than 25 square metres or less than 50% of the area of the garden forward of the front building line of the house, or 50% of the area of the garden to the side of the side building line of the house, as the case may be, whichever is the smaller,</i></p> <p><i>or</i></p> <p><i>if the area of the hard surface is 25 square metres or greater or comprises more than 50% of the area of the garden forward of the front building line of the house, or 50% of the area of the garden to the side of the side building line of the house, as the case may be, it shall be constructed using permeable materials or otherwise allow for rainwater to soak into the ground.</i></p>
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Article 9: Restrictions on exemption

(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act— (a) if the carrying out of such development would—

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

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new

development plan, in the draft variation of the development plan or the draft development plan,

7.3. **Other**

None

8.0 **Assessment**

8.1. **The Question**

8.1.1. The question originally raised was expressed by the Planning Authority in its declaration to be as follows:

Whether the material alteration to fenestration and the provision of a substantial suspended deck/platform at Fanaghans, Inver, Co. Donegal is or is not development and is or is nor exempted development.

8.1.2. I have reviewed the submissions from the parties, and I consider that the question should, in the interests of clarity, be revised as follows:

8.1.3. Whether (a) the alterations to the fenestration of the rear extension, including the installation of sliding glazed doors, and (b) the provision of a substantial suspended deck/platform with a glazed balustrade to the rear of the extended dwelling at Fanaghans, Inver, Co. Donegal is or is not development and is or is nor exempted development.

8.2. **Is or is not development**

8.2.1. The dwelling on the site was the subject of planning application 20/51402 for, amongst other things, the construction of a single storey extension to the south-east of the existing dwelling. During the construction phase of the project, changes were introduced. Several of these changes are the subject of the current referral. They can be summarised below as follows:

- With respect to the fenestration in the extension,
 - The glazing in the south-western elevation of the extension is shorter than permitted,

- A 550mm wide timber clad insertion to the south-eastern elevation has been omitted in favour of glazing,
- The eastern corner glazing has been reduced in height by the insertion of a 500mm high wall beneath the glazing, and
- Two sliding glazed doors have been installed in the south-eastern elevation.
- With respect to the rear of the extension and the rear of the patio to the side of the extension, the provision of a substantial suspended deck/platform with a 1.1m high glazed balustrade.

8.2.2. The authorised extension constituted development that was not exempted development. Thus, under Section 3(1) of the Planning and Development Act, 2000 – 2021, (hereafter referred to as the Act), this extension entailed works on and in land, and, under Section 2(1), these works entailed acts or operations of at least construction, excavation, and demolition.

8.2.3. The fenestration changes cited above are integral to the extension, as constructed. As such they entailed acts or operations of construction and so they constitute “works” and hence “development”.

8.2.4. Likewise, the owners/occupiers have outlined how the design concept of the deck/platform is integral to the design of the extension as it evolved further from what was authorised for planning purposes. As such it entailed acts or operations of construction and so it constitutes “works” and hence “development”.

8.2.5. I conclude that (a) alterations to the fenestration of the rear extension, including the installation of sliding glazed doors, and (b) the provision of a substantial suspended deck/platform with glazed balustrade to the rear of the extended dwelling at Fanaghans, Inver, Co. Donegal is development.

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

8.3.1. The project to extend the dwelling on the site was authorised for planning purposes under planning application 20/51402. A subsequent planning application 21/50566 was made, which shows the majority of the changes that are the subject of the current referral. However, this application was withdrawn, and the owners/occupiers

have responded to the referrer's Section 5 application concerning these changes by contending that they are exempted development.

8.3.2. From the information before me, the project to extend the dwelling has been a single continuous project, albeit one that has evolved as it has progressed. As already indicated, the changes to the fenestration and the provision of a deck/platform are integral to the extension, which has been constructed.

- Thus, the changes to the fenestration are inherent to the extension and the installation of glazed sliding doors in the south-eastern elevation presuppose the addition of the deck/platform, i.e., they afford access/egress to it, which otherwise would not have arisen, as the rear elevation coincides with the top of the adjoining slope. Critically, there is no suggestion that the authorised fenestration was installed, only at some later date to have been altered to incorporate the changes that are the subject of this referral.
- Likewise, the underside of the deck/platform is supported by cantilevered steelwork which projects from the lower wall/foundation to the rear elevation of the extension. Photographs submitted by the referrer illustrate that this steelwork was installed as part of the construction of the lower wall/platform. Furthermore, photographs submitted by the owners/occupiers illustrate that the extension and the deck are designed to not only be used jointly, but the intended architectural floating illusion is created by this very combination, i.e., views from the extension over the deck omit any of the intervening coastline, thereby conveying a sense of being at sea.

8.3.3. Given my understanding of the project as a single continuous project, I do not consider that it is capable of being disaggregated into elements that may or may not be capable of being regarded as exempted development were they to be undertaken as separate, discreet projects. The extension to the dwelling constitutes development that is not exempted development. Insofar as this extension evolved to incorporate different and additional elements to those that were authorised, the appropriate means of addressing these elements was by means of the planning application, 21/50566, which the owners/occupiers made, only to withdraw.

8.3.4. Notwithstanding the above considerations, if the Board considers that the project is capable of being disaggregated into the aforementioned elements, then the question

arises as to whether they would in isolation be capable of being regarded as exempted development.

8.3.5. Firstly, the changes in fenestration. The first three of these changes set out above have only the slightest effect upon the emerging aesthetic of the extension and so I consider that they would come within the ambit of Section 4(1)(h) of the Act. The fourth change, too, has only the slightest effect upon the emerging aesthetic. However, as discussed above, the installation of sliding glazed doors in the south-eastern elevation presupposes the presence of the deck/platform and so they cannot reasonably be assessed in isolation from this deck/platform and the resulting pattern of access/egress/usage that they afford.

8.3.6. Secondly, the deck/platform is, as discussed above, a suspended structure, the main purpose of which is to afford sea views either directly from it or indirectly over it from the extension itself. The owners/occupiers state that it should be regarded as exempted development under Classes 5 and 6 of Part 1 of Schedule 2 to Article 6 of the Regulations. This position can be critiqued on the following grounds:

- The Classes cited are only operative within curtilages. The owners/occupiers appear to assume that the deck/platform is sited within the curtilage of the dwelling. However, they have not established that this is so. *Prima facie* the former presence of a ranch style fence may have marked the south-eastern extent of the curtilage that served the un-extended dwelling. The deck/platform projects beyond the line of this fence, as illustrated in drawing no. 2020-025-P01.2, and so it is sited in a position outside the curtilage.
- The deck/platform is suspended above ground level and its primary use is for viewing. As such it has the character of a balcony, rather than a path or a hard surface as cited in Class 6. By the same token, its seaward side is enclosed by means of a glazed balustrade, rather than a railing, wall or fence as cited in Class 5. Accordingly, the deck/platform with its glazed balustrade do not come within the ambit of the descriptions of development in Classes 6 and 5.

8.3.7. I have reviewed the other Classes in Part 1 of Schedule 2 to Article 6 of the Regulations, and I conclude that none of these are applicable to the sliding glazed doors or the deck/platform with its glazed balustrade.

- 8.3.8. I conclude that the elements, which are the subject of this referral, have not been authorised for planning purposes and yet they are integral to the extension, which has been constructed. Consequently, it is inappropriate to consider these elements in isolation from the one continuous project that has occurred on site to construct the extension and so the question as to whether these elements in isolation would be exempted development does not, in my view, arise.
- 8.3.9. Notwithstanding, the aforementioned conclusion, if the Board considers that the elements can be considered in isolation, I conclude that, while the minor alterations to glazing would be capable of being considered exempted development under Section 4(1)(h) of the Act, the installation of sliding glazed doors in the south-eastern elevation of the extension and the provision of a suspended deck/platform with a glazed balustrade would be incapable of being considered exempted development under either the Act or the Regulations.

8.4. Restrictions on exempted development

- 8.4.1. The only permission pertaining to the extension in question is that which was granted to application 20/51402 on 6th January 2021, subject to five conditions, the first of which stated that “Development shall be carried out strictly in accordance with lodged plans and details, submitted on 30/09/2020 save as hereinunder otherwise required.” The accompanying reason stated, “To define the permission.” The remaining four conditions did not require changes to the extension and so the submitted plans of this extension were the ones that were authorised.
- 8.4.2. The extension as constructed incorporates the changes in fenestration discussed above and the addition of a deck/platform with a glazed balustrade. These elements were not shown in the lodged plans and details submitted under application 20/51402 and so they have not been authorised. The only permission obtained is subject to a condition requiring that it be implemented “strictly in accordance with lodged plans and details”.
- 8.4.3. If the Board were to regard any of the aforementioned elements as exempted development, then under Article 9(1)(a)(i) of the Regulations, they would contravene the first condition attached to the permission granted to application 20/51402 and so they would be de-exempted by virtue of such contravention.

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) the alterations to the fenestration of the rear extension, including the installation of sliding glazed doors, and (b) the provision of a substantial suspended deck/platform with a glazed balustrade to the rear of the extended dwelling at Fanaghans, Inver, Co. Donegal is or is not development and is or is not exempted development:

AND WHEREAS Paul Hayden requested a declaration on this question from Donegal County Council and the Council issued a declaration on the 9th day of December 2021 stating that the matter was development and was not exempted development:

AND WHEREAS Paul Hayden referred this declaration for review to An Bord Pleanála on the 21st day of December 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, as amended
- (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) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, and

(f) the planning history of the site:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The alterations to the fenestration of the rear extension, including the installation of sliding glazed doors, and the provision of a substantial suspended deck/platform with a glazed balustrade are integral to the project to construct this extension to the dwelling at Fanghans, Inver, Co. Donegal.
- (b) Only one continuous project has transpired and so, as this project is development that is not exempted development, all of its component parts, including the alterations to its fenestration and the provision of a deck/platform, are development that is not exempted development.

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 (a) the alterations to the fenestration of the rear extension, including the installation of sliding glazed doors, and (b) the provision of a substantial suspended deck/platform with a glazed balustrade to the rear of the extended dwelling at Fanaghans, Inver, Co. Donegal is development and is not exempted development.

Hugh D. Morrison
Planning Inspector

26th April 2022