



An
Bord
Pleanála

Inspector's Report ABP-312523-22

Question

Whether the Drawing No. DoE3, elevations/fenestration pattern is materially consistent with the granted Planning PP/13/94 & 18/178 Extension of duration, is or is not development and is or is not exempted development.

Location

63 Threadneedle Road, Salthill, Galway

Declaration

Planning Authority

Galway City Council

Planning Authority Reg. Ref.

P/DC/3/25/21

Applicant for Declaration

Cormac Small & Rosemary Casey

Planning Authority Decision

Is development and is not exempted development

Referral

Referred by

Cormac Small & Rosemary Casey

Owner/ Occupier

Cormac Small & Rosemary Casey

Observers

Pat & Barbara Sheehan

Date of Site Inspection

30th September 2022

Inspector

Ian Campbell

1.0 Site Location and Description

- 1.1. This case relates to a referral submitted under Section 5(3)(a) of the Planning and Development Act, 2000, as amended, where the Planning Authority has issued a declaration on a referral and this determination is now the subject of appeal.
- 1.2. The subject of this referral is 63 Threadneedle Road, Salthill, Galway. The referral property is a recently constructed, contemporary style, detached two storey dwelling with attic accommodation. Jesus and Mary Secondary School and Saint Enda's College are located on the opposite side of Threadneedle Road to the west of the subject property. The subject site is bound to the north and south by detached dwellings.

2.0 The Question

- 2.1. The question that has been submitted in the referral is as follows:
 - Whether Drawing No. DoE3, elevations/fenestration pattern is materially consistent with the granted Planning PP/13/94 & 18/178 extension of duration.
- 2.2. Based on the documentation submitted with the referral, it appears that the changes to fenestration were made as the house was being constructed. In considering this to be the case I specifically note that the referrer states that 'Window B' was adjusted as a result of ground conditions/rock on the site and that 'Window C' was omitted in light of the 2 no. additional windows which were required on foot of Condition No 2 of PA. Ref. 13/94, making 'Window C' superfluous. I also note reference in the documentation submitted by the referrer to ongoing correspondence with Galway City Council pre and post construction regarding planning issues, and the photographs included in the observation of Pat and Barbara Sheehan, which shows the window openings on the southern and eastern elevation of the house during the construction of the house.
- 2.3. Details of the changes are as follows;
 - South Elevation (Window 'A'):
 - permitted window c. 1.8 m x c. 2.5 metres v as constructed c. 0.5 metres x c. 2.6 metres. 'Window A' is a fixed pane, non-opening window with translucent glass, serving a WC.

North Elevation (Windows 'B' & 'C')

- permitted window c. 1.2 m x c. 1 metre and c. 1.2 metres x c. 2.5 metres v as constructed c. 0.5 metres x c. 1 metre and c. 0.5 metres x c. 2.5 metres. 'Window B' is a fixed pane, non-opening window with translucent glass.
- Omission of high level window ('Window C').

East Elevation:

- Changes to size and location of windows on all floors, the omission of a window at first floor level and enlarged window at first floor level.

South Elevation of Rear Return:

- Changes to size and location of windows at ground and first floor.

2.4. In the interest of clarity, it is considered appropriate that the question referred to the Board be reworded as follows:

- Whether changes made to the fenestration of a house during the course of construction, compared that that as permitted under PA. Ref. 13/94, and extended under PA. Ref. 18/178, is or is not development, and is or is not exempted development.

I intend to proceed with my assessment on the basis of the reworded question.

3.0 Planning Authority Declaration

3.1. Declaration

On the 30th November 2021, a request for a Declaration in accordance with Section 5 of the Planning and Development Act, 2000, as amended, on the above question was received by Galway City Council from Cormac Small and Rosemary Casey.

In accordance with Section 5(2)(a) of the Planning and Development Act, 2000, as amended, Galway City Council issued a Declaration on the 14th December 2021 that the subject of the referral, that being whether, 'Drawing No. DoE3,

¹ Window B is described in singular terms however it comprises 2 separate window panes separated by plaster banding.

elevations/fenestration pattern is materially consistent with the granted Planning PP/13/94 & 18/178 Extension of duration' at 63 Threadneedle Road, Salthill, Co. Galway, is development and is not exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The report of the Planning Officer includes the following comments;

- Under Article 9, 1 (a) (i), of the Planning and Development Regulations, 2001, as amended, 'development to which article 6 relates shall not be exempted development for the purposes of the Act - if the carrying out of such development would - contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act'.
- It is considered that the alterations would not be an exempted development as they would contravene, and would be materially inconsistent with the original grant of permission, PL. Ref. No. 13/94, and the conditions attached to that permission which specified the drawings which were to be implemented.

3.2.2. Other Technical Reports

None received.

4.0 Planning History

4.1. Subject Site

PA. Ref. 13/94 – Permission GRANTED for the demolition of the existing house and outbuildings and the construction of a new two-storey with attic level accommodation house and all associated site-works.

This permission was granted an extension of duration under PA. Ref. 18/178 up to the 2nd September 2023.

Relevant Conditions:

Condition No. 1

The development shall be carried out and completed in accordance with the application made on the 28/3/13, as amended by the revised details and drawings received on the 11/7/13, but subject, however to the requirements of the further conditions hereinafter incorporated.

Reason: To ensure that the development is carried out in accordance with the permission and that effective control is maintained.

Condition No. 3

Prior to the commencement of development a revised front elevation shall be submitted to the Planning Authority for written agreement in which two additional windows shall be inserted at first floor level, similar in design to the one proposed.

Reason: In the interest of visual and residential amenity and the proper planning and sustainable development of the area.

The applicants submitted a compliance submission (Drawing No. PP Con 2 & 3) to Galway City Council which the Planning Authority considered to be acceptable. This drawing provided for 2 no. additional windows at first floor level on the front/west elevation.

4.2. Referral History

I have undertaken a review of the referrals database in order to determine if there are any history cases that relate to development of the same form as that the subject of this case.

304075-19 – The question arose as to whether the as constructed building, incorporating alterations to the elevations and changes in floor plans to that permitted, is or is not development and is or is not exempted development. The Board concluded that;

a) the changes to elevations and floor plans arose from a change of use of the building from office use to student accommodation, which involved the carrying out of works, and which was development.

(b) the development carried out differed from that for which planning permission was granted and the Board was satisfied that the deviations from the permitted development area, when taken cumulatively, were significant and material, and were not immaterial or de minimis, and were not, therefore, within the scope of the development granted planning permission.

(c) the development that has taken place involved works included in a previous permission and not those in the implemented permission, and were carried out prior to the works authorised by the implemented permission. In such circumstances and in accordance with case law (Horne vs Freeney), the subject works could not avail of the exemption provided under section 4(1)(h) of the Planning and Development Act, 2000, and

(d) there were no other exemptions in the Planning and Development Act, 2000, as amended, or in the Planning and Development Regulations, 2001, as amended, whereby such material deviations would constitute exempted development.

RL2737 - The question arose as to whether a bay window to the rear and window to the side of a dwelling house, is or is not development and is or is not exempted development. The referral site was occupied by a detached two storey dwelling, which had been recently extended at first floor level and at ground floor level to the rear. The elements of the development subject of the referral related to the enclosure to ground floor level of an oriel window at first floor level on the rear elevation and secondly to the provision of an opaque window to the northern side elevation. These departed from the detailed design as permitted. The crux of the issue was Horne v Freeney and the proviso that the benefits of S.4(1)(h) only applied to those developments that had already been completed in full accordance with the pertinent permission.

The Board has concluded that;

- the works were development and not exempted development.
- The works as described came within the scope of section 4(1)(h) of PDA, 2000, but could not benefit from this as the works were carried out when the extant

permission was being implemented and were materially different from that permitted.

5.0 Policy Context

5.1. Development Plan

5.1.1. The relevant Development Plan is the Galway City Development Plan 2023 – 2029. The subject site is zoned 'Residential' in the Galway City Development Plan 2023 – 2029.

5.1.2. The subject site is not indicated as being subject to any specific objectives relating to the protection of views or prospects.

5.2. Natural Heritage Designations

- Inner Galway Bay SPA (Site Code 004031) – c. 0.8 km south.
- Galway Bay Complex SAC (Site Code 000268) – c. 0.8 km south.
- Galway Bay Complex pNHA (Site Code 000268) – c. 0.8 km south.
- Lough Corrib SAC (Site Code 000297) – c. 2.2 km east.

6.0 The Referral

6.1. Referrer's Case

The following is a summary of the main issues raised by the referrer in the submission to the Board.

- The principal of 'de minimis' should apply to the changes.
- The house benefits from planning permission, the footprint, area, massing, finish, height and fenestration are consistent with the permission granted for a replacement dwelling, and the compliance submissions made in 2018.

- There is no planning impact from the changes to the elevations. The changes benefit neighbouring properties, with less fenestration, opal glass and fixed non-opening sections facing boundaries.
- Section 4(1)(h) of the Planning and Development Act, 2000, as amended, is considered to confer an exemption for the proposal.

6.2. Planning Authority Response

None received.

6.3. Observations

An observation has been received from Pat and Barbara Sheehan, 61 Threadneedle Road. The main points raised in the observation can be summarised as follows;

- Neighbouring parties have an expectation that a permission will be complied with. The house as built is substantially different to what was permitted. The changes were made during the construction of the house and as such the referrer has no entitlement to benefit from exempted development provisions with reference to the *Horne v Freeney* case.
- 'Window A' cannot be considered 'de minimis', and contravenes Condition No. 1 of PA. Ref. 13/94. Article 9 (1) (a) (i) of the Planning and Development Regulations, 2001, as amended, limits exempted development.
- ABP-305371-19 is referred to as a case with similarities to the current referral.
- The referral makes reference to 3 no. windows but does not include changes in the dimensions of windows on the south face of the rear return. These windows have been enlarged and face 61 Threadneedle Road.
- As built floor plans should have been submitted.
- The changes made render the house more unlike those in the adjoining area and as such Section 4(1)(h) of the Planning and Development Act, 2000, as amended, cannot be relied on.
- 'Window A' as permitted served a void and did not result in any overlooking.

- Reference in the submission of the referrer to a boundary dispute is irrelevant in the context of this referral.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2 (Works)

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

Section 3(1) (Development)

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) (h) (Exempted Development)

The following shall be exempted development for the purposes of this Act—

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;

Section 4 (4) (Environmental Impact Assessment or Appropriate Assessment)

Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

Section 177U (9) (Appropriate Assessment)

In deciding upon a declaration or a referral under section 5 of this Act a planning authority or the Board, as the case may be, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.

7.2. Planning and Development Regulations, 2001

Article 6 (1) states the following:

Subject to Article 9 the 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 conditions and limitations specified in Column 2 of the Act opposite the mention of that Class in the said Column 1.

Article 9 (1)(a) provides that development to which Article 6 relates shall not be exempted development for the purposes of the Act, if the carrying out of such development would,

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

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site.

8.0 Assessment

8.1. The purpose of this referral is not to determine the acceptability or otherwise of the proposal but rather whether or not the matter in question constitutes development, and if so falls within the scope of exempted development within the meaning of the relevant legislation.

8.2. I have examined all the documentation on the file, inspected the site, and have had regard to the legislative provisions set out in both the Planning and Development Act, 2000, as amended, and the Planning and Development Regulations, 2001, as

amended. I consider that the issues raised in the referral can be assessed under the following headings.

- Whether the proposal set out in paragraph 2.3 of this report, and entailing changes made to the fenestration of a house during the course of construction, compared that that as permitted under PA. Ref. 13/94, and extended under PA. Ref. 18/178, is or is not development, and is or is not exempted development.
- Whether the works can be considered exempted development under the provisions of the Planning and Development Act, 2000 as amended, or under the Planning and Development Regulations, 2001, as amended.

8.3. Is or is not development

- 8.3.1. Works are defined as including 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal'. The proposal consists of changes to the size of window openings, changes to the location of windows and the omission of a window opening. I consider the proposal to comprise 'works' as it entails construction.
- 8.3.2. In accordance with Section 3(1) of the Planning and Development Act, 2000 as amended, 'works' become development when they are carried out on, in, over or under land and therefore the works which are the subject of this referral are considered to comprise development.

8.4. Is or is not exempted development

- 8.4.1. Section 4 of the Planning and Development Act, 2000, as amended, sets out certain forms of development which shall be exempted development. Additionally, Schedule 2 of the Planning and Development Regulations, 2001, as amended sets out forms of development which are exempted development within specific context.
- 8.4.2. The referrer contends that the proposal is exempted development under Section 4 (1) (h) of the Planning and Development Act, 2000, as amended, which provides that *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'. Based on the documentation submitted it would appear that the proposal which is the subject of this referral was carried out during the construction of the house. In this regard I refer the Board to the case of *Horne v Freeney* [1982] IEHC 20, a case which centred around internal alterations undertaken during the course of construction of an amusement arcade. In this case it was held that the permission was indivisible, and that the planning permission should have been undertaken in its entirety. Mr. Justice Murphy considered that it was not possible to undertake alterations during construction simply because the variation would have been exempted once the building was completed. Having regard to this judgement, I do not consider that Section 4 (1) (a) of the Planning and Development Act, 2000, as amended, would confer an exemption for the proposal as to avail of exempted development under Section 4(1)(h), the parent development must first have been completed in full accordance with its authorising permission.

- 8.4.3. The referrer contends that the proposal should be considered 'de minimis' as the changes are too minor to be relevant. I note there is no specific definition of what constitutes de minimis in the Planning and Development Act, 2000, as amended, or the Planning and Development Regulations, 2001, as amended. I note that the de minimis doctrine is used in law to avoid the resolution of trivial matters that are not worthy of judicial scrutiny. In the case of *Dunne Ltd. -v- Dublin County Council*, Justice Henchy noted that the de minimis rule can only be applied where the deviation is "so trivial or so technical or so peripheral or otherwise so insubstantial". I also consider that *Cork County Council v Cliftonhall Ltd.* [2001] IEHC 85 provides some clarity around determining what constitutes material/non-material deviations from the terms of existing permission. It was held in this case that the question of material/non-material deviations should be approached from a practical and common-sense perspective, and with regard to whether the deviation is of such materiality that it would realistically impact on the rights or interests of third parties, or be such as would affect planning considerations. Noting the nature and extent of the changes, which includes the provision of larger window openings and changes to multiple windows, I consider that the proposal constitutes a material deviation compared to the development

permitted under PA. Ref. 13/94 (and extended under PA. Ref. 18/178) and as such I do not consider that the changes are 'de minimis'.

8.4.4. Furthermore, there is no provision in the Planning and Development Act, 2000, as amended, or the Planning and Development Regulations, 2001, as amended, which specifically exempts development where such development is carried out and incorporates slight deviations or otherwise from the information contained in the plans and particulars submitted as part of the planning application.

8.4.5. In summation, having regard to the case of *Horne v Freaney* [1982] IEHC 20, where it was held that in order to avail of exempted development under Section 4(1)(h) that the parent development must first have been completed in full accordance with its authorising permission, and to the nature and extent of the development, which I do not consider to be de minimis, and in the absence of provision in the Planning and Development Act, 2000, as amended, or the Planning and Development Regulations, 2001, as amended, which specifically exempts development incorporating slight deviations from the information contained in the plans and particulars submitted as part of the planning application, I consider that the development which is the subject of this referral is not exempted development.

8.5. Restrictions on exempted development

8.5.1. The restrictions provided in Article 9 of the Planning and Development Regulations, 2001, as amended, relate exclusively to Article 6 of the Planning and Development Regulations, 2001, as amended, which in turn refers to classes of development specified in Part 1, Schedule 2 of the Planning and Development Regulations, 2001, as amended. As such I note that any consideration of Section 4(1)(h) of the Planning and Development Act, 2000, as amended, would not be tempered by Article 9 and as such Article 9 is not pertinent in this instance. Furthermore, and as stated above at paragraph 8.4.4, there are no provisions under the Planning and Development Regulations, 2001, as amended, which would afford an exemption for the proposal which are the subject of this referral.

8.5.2. Regarding any issue of unauthorised development at the subject property, I note that the purpose of An Bord Pleanála in relation to Section 5 referrals is to ascertain what is and is not development and if development, whether that development is exempted

development or not. It is not the purpose of the Board to review planning permissions granted under Section 34, other than through the appeals system. An Bord Pleanála does not have a role in relation to unauthorised development, which falls under the remit of the planning authority.

8.6. **Appropriate Assessment – Screening**

8.6.1. Having regard to the nature and limited scale of the works which are the subject of this referral, the developed nature of the landscape between the site and European sites and the lack of a hydrological or other pathway between the site and European sites, it is considered that no Appropriate Assessment issues arise and that the works which are the subject of this referral would not be likely to have a significant effect either individually or in combination with other plans or projects on any European site.

8.7. **EIA - Screening**

8.7.1. The works which are the subject of this referral do not fall within a class of development set out in Part 1 or Part 2 of Schedule 5 of the Planning and Development Regulations, 2001, as amended, and therefore is not subject to EIA requirements.

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 changes made to the fenestration of a house during the course of construction, compared to that as permitted under PA. Ref. 13/94, and extended under PA. Ref. 18/178 at 63 Threadneedle Road, Salthill, Galway, is or is not development, or is or is not exempted development.

AND WHEREAS Cormac Small and Rosemary Casey requested a declaration on this question from Galway City Council and the Council issued a declaration on the 14th day of December 2021 stating that the matter was development and was not exempted development:

AND WHEREAS Cormac Small & Rosemary Casey referred this declaration for review to An Bord Pleanála on the 19th day of January 2022:

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,
- (a) Section 4(1) (h) of the Planning and Development Act, 2000, as amended,
- (b) Section 4(4) of the Planning and Development Act, 2000, as amended,
- (c) Article 6(1) and Article 9(1)(a)(i) and (viiB) of the Planning and Development Regulations, 2001, as amended,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the referral concerns changes made to the fenestration of a house during the course of construction, which comprises works, and therefore comes within the scope of the definition of development as set out at Section 3 of the Planning and Development Act, 2000, as amended;
- (b) the development carried out differs from that for which planning permission was granted under PA. Ref. 13/94, as extended under PA. Ref. 18/178, and the Board is satisfied that the deviations from the permitted development are significant and material, and are not immaterial or de minimis, and are not, therefore, within the scope of the development granted planning permission;

- (c) there are no exemptions in the Planning and Development Act, 2000, as amended, or in the Planning and Development Regulations, 2001, as amended, whereby such material deviations would constitute exempted development;
- (d) the works which are the subject of this referral are not likely to have significant effects on any European sites,
- (e) the works which are the subject of this referral do not fall within a class of development set out in Part 1 or Part 2 of Schedule 5 of the Planning and Development Regulations, 2001, as amended, and therefore are not subject to EIA requirements.

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 changes made to the fenestration of the house during the course of construction is development and is not exempted development.

Ian Campbell
Planning Inspector

27th January 2023