



An
Bord
Pleanála

Inspector's Report ABP-312636-22

Question

Whether work to reinstate the residential use of a derelict structure is or is not development and is or is not exempted development.

Location

Drumquill, Castleblayney, Co. Monaghan.

Declaration

Planning Authority

Monaghan County Council

Planning Authority Reg. Ref.

EX16/27

Applicant for Declaration

Patrick Carragher.

Planning Authority Decision

None issued

Referral

Referred by

Patrick Carragher.

Owner/ Occupier

John Brennan.

Observer(s)

None.

Date of Site Inspection

16th May 2022.

Inspector

Barry O'Donnell

1.0 Introduction

- 1.1. This report relates to a referral by Patrick Carragher regarding lands in the ownership of John Brennan at Drumquill, Castleblayney, Co. Monaghan. Mr Carragher submitted a Section 5 application to Monaghan County Council on 25th October 2016 and although a request for additional information was issued and responded to, the Planning Authority did not make a determination on the application.

2.0 Site Location and Description

- 2.1. The subject site is located in the townland of Drumquill, north of Castleblayney. The site is elevated above the R183, on its north side, and contains a two-storey house, large gravel hardstanding area and two hard surfaced areas. It is accessed via a stone track that rises up the incline and which serves other residential property and agricultural land in the area.
- 2.2. The house has a traditional two storey design, measuring c. 8m long x 5m wide, and it has a stone finish. The plot and house are on land that has been excavated and regraded. Available aerial photograph imagery identifies a large, detached structure to the north of the house in the area of the concrete pad, but this structure had been demolished at the time of my site visit.

3.0 The Question

- 3.1. The question which is the subject of the referral before the Board is: -
- 'Whether work to reinstate the residential use of a derelict structure of which the residential use has been abandoned is or is not development and is or is not exempted development.'*

4.0 Planning Authority Assessment of the Section 5 Application

- 4.1. A Planning Report was drafted by the Planning Authority's Senior Planner on 24th November 2016, which recommends that the third-party applicant should be requested to submit confirmation of the dereliction and abandonment of the house.

- 4.2. Following this report, a letter was issued by the Planning Authority to the applicant on 24th November 2016, requesting the following: -

‘Please submit sustainable evidence that the dwelling, as indicated in your correspondence, that had become ‘abandoned and derelict’ as indicated in your submission.’

- 4.3. The additional information request was not addressed for a number of years, until the applicant made a submission on 16th December 2021, which included a written response to the request and the submission of copies of historic reports and submissions regarding the issue. In essence, the submission contends that the Planning Authority had previously declared that reinstating the residential use of the structure was not exempted development and the updated request for additional information was questioned.

- 4.4. Following submission of this additional information response, no declaration was issued by the Planning Authority and, in accordance with Section 5(3)(b) of the Act, the applicant has therefore referred the application to the Board for determination.

4.4.1. Other Technical Reports

None.

5.0 Planning History

- 5.1. The site has a lengthy planning and referral history. Relevant history files include: -

Planning applications

21/108 – (ABP-312433-22): Current application on appeal to the Board relating to retention of reduced levels & hard surfaced area to side of house and support pillar for electricity meter housing and a proposed wastewater treatment system & percolation area and associated site works.

17/357 – (ABP-301554-18): Permission refused on 17th December 2018 for retention and completion of partially completed detached storey and a half domestic garage. Permission was refused for 1 reason, which related to the impact of the development on the visual amenities of the area.

14/217 – Permission refused on 8th April 2015 for retention and completion of a partially constructed storey-and-a-half extension to side of existing house, together with all associated site works. Permission was refused for 3 No. reasons, related to proximity to a neighbouring farm building, the absence of written consent from the adjacent farmer and the proposed scale of the extension.

There have been a number of further applications on the land that have been either invalidated or withdrawn.

Referrals

Ex 18/25 – (ABP-302878-18): Referral by Martin Molloy in relation to whether works carried out to change the level of land up to 3m in parts, leading to the destruction of a boundary hedgerow and redirection of groundwater is or is not development and is or is not exempted development. The Board determined that that the matter the subject of the referral is development and is not exempted development.

Ex 18/06 - (ABP-301312-18): Referral by Patrick Carragher in relation to: Whether (1) Installation of septic tank and percolation area (2) construction of a house connected to septic tank (3) erection of pillar box on right of way is or is not development and is or is not exempted development. The Board determined on 19th December 2018 that each of these elements is development and is not exempted development.

PL18.RL3532: Referral by Martin Molloy in relation to whether the installation of a septic tank and percolation area is or is not development and is or is not exempted development. The Board determined on 28th March 2018 that the matter the subject of the referral is development and is not exempted development.

PL18.RL3811: Referral by Martin Molly in relation to whether the construction of a pillar structure to house an electricity metre on the edge of a laneway is or is not development and is or is not exempted development. The Board determined on 28th March 2018 that the matter the subject of the referral is development and is not exempted development.

Ex 17/15 – (PL18.RL3594): Referral by Patrick Carragher in relation to whether the construction of a structure within the curtilage of an existing house and all associated site development works to include site clearance and connection to septic tank is or

is not development or is and is not exempted development. The Board determined on 28th March 2018 that the matter the subject of the referral is development and is not exempted development.

EX 16/24 - Section 5 application by Patrick Carragher in relation to (i) works to a structure, (ii) use of a derelict structure for which the residential use had been abandoned. The Planning Report recommended that the determination be made, stating (i) works carried out to the structure are exempted development under S.4(1)(h) of the Act and (ii) the use of the structure for residential use is not considered to be development under Article 10(1)(d) of the Regulations, in that the Planning Authority did not consider the use to have been abandoned given its pre-'64 status. It is unclear whether this determination was issued, as no copy of such determination was provided with the referral.

10/581: Section 5 application by Patrick Carragher in relation to refurbishment of a house. The application itself appears to be unnumbered, but the Manager's Order reference is 10/581. The question asked of the Planning Authority was reworded by the Planning Report to 'use of structure as dwelling house' and a determination issued on 19th July 2010 stating that '*on the basis of the information submitted...the application is not considered to be exempted development.*'

Other relevant referrals

ABP-301055-18 and ABP-301064-18 - Ballivor County Meath: These applications relate to the same site and the same subject matter, whether the change of use of a permitted Nursing Home (permitted under TA/140621) to a residential drug rehabilitation facility is or is not development or is and is not exempted development. Following the Board's determination on both referrals the site owner, Norconon Trust, brought judicial review proceedings against the Board's determinations (2020, IEHC25 and 2021, IECA307). Of relevance to the current referral, the Court of Appeal ruled that, '*in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination*' the Board is precluded from determining a Section 5 referral.

6.0 Policy Context

6.1. Development Plan

- 6.1.1. The site is situated in a rural, unzoned part of County Monaghan and the Core Strategy Map, Map 2.1, identifies that the site is in the 'remaining rural areas' part of the county.
- 6.1.2. Policy RHP 4 is relevant to the referral. It states: -

RHP 4: To only permit a dwelling within 100m of an agricultural building where written consent has been provided by the owner/occupier of the agricultural unit. Written consent must be signed by both parties and witnessed by a solicitor or a peace commissioner.

6.2. Natural Heritage Designations

- 6.2.1. The subject site is not located within or adjacent to a designated European site. The closest such site is Slieve Beagh SPA (Site Code 004167), which is approx. 27.5km north-west.

6.3. EIA Screening

- 6.3.1. This referral relates to works to reinstate the residential use of a derelict structure. This type of development does not constitute an EIA project and so the question as to whether or not it might be sub-threshold does not arise.

7.0 The Referral

7.1. Referrer's Case

- 7.1.1. The referrer's case can be summarised as follows: -
- This is the same question that was asked of the Planning Authority in 2010, where it was concluded that the works were development and were not exempted development.
 - The Planning Authority's decision was not referred by the site owner, John Brennan, and was not challenged in the Courts.

- Case law
 - The Planning Authority appears to have informally changed its opinion in 2015, after refusing a retention application, but the circumstances have not changed. In *Narconon Trust v An Bord Pleanala* it was held that the Board is prohibited from examining the merits of a new Section 5 application if it asks the same or substantially the same question as an earlier determined Section 5 application and there is no change in the underlying facts.
 - In informally changing its opinion on the matter in 2015, the Planning Authority acted *ultra vires*, in breach of S50(2) of the Act, which states that a person shall not question the validity of a decision made by a planning authority or the Board in performance of its function. If a decision is not challenged using the appropriate avenues, it becomes unimpeachable.
 - The Planning Authority has granted permission for a septic tank and other ancillary works serving the unauthorised house (Reg. Ref. 21/108 refers), under the assumption that the original Section 5 determination is no longer valid. This represents an indirect, collateral attack on the legally binding declaration. 21/108 is currently under appeal to the Board.
- Background to unauthorised house
 - The house was occupied until 1977. It came into the possession of Sean Brennan in 1981 and over time dilapidated and its use as a house was abandoned. The Brennan family used the house for storage and reference is made to Mr. Brennan referring to the building as a shed on application Reg. Ref. 16/235.
 - Written submissions from Thomas Greene and Martin Molloy are provided, which state that the building has been used for agricultural purposes.
 - The building was without electricity and running water for decades and never had a septic tank. The septic tank was installed in 2010.
 - Mr. Brennan began to reinstate the house in 2010, after the referrer declined to give written consent for an application to be made for 2 No. houses on the land. Following the commencement of the reinstatement works, the referrer reported the matter to planning enforcement and also submitted a Section 5

application, where it was concluded that the works were development and were not exempted development.

- Mr Brennan constructed a large extension to the house and was refused permission to retain it in 2014 (Reg. Ref. 14217). The planning file notes on the application identify that the structure was roofless between 2005-2010.
- This decision on Reg. Ref. 14217 was not appealed.
- Reference is made to a number of planning application files.

7.2. Planning Authority Response

7.2.1. None received.

7.3. Owner's response

7.3.1. A submission was received on behalf of the site owner, prepared by CMD Architects, the contents of which can be summarised as follows: -

- The question raised by the referrer was addressed by the further information response in relation to Reg. Ref. 14/217. Although the application was refused, the FI response was sufficient to prove that the house had not been abandoned. The grounds of refusal provided by the Planning Authority relate to the proposed development and not the existing development. A copy of the FI response is provided and can be summarised as follows: -
 - The house on the site is a pre-63 structure and as such is authorised given its existence prior to the coming into force of the 1963 Act. It was not derelict prior to renovation works and its use as a house was never abandoned.
 - Letters were provided from Joseph Kelly and Edward Paul Nugent Ltd. Which state that in 2004 and 2006 the house was structurally sound, if requiring work in order to be renovated, modernised and extended.
 - With reference to case law, it is contended that the use as a house was never abandoned.

- The Planning Authority granted permission for further development, under Reg. Ref. 21/108, further proving that the Planning Authority has accepted that the house is an authorised structure.
- The Planning Authority looks favourably on building restorations, with reference to Policy RHP2 of the development plan encouraging refurbishment of vernacular buildings.

7.4. Further Responses

7.4.1. None received.

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000

- 8.1.1. Section 3(1) of Planning and Development Act 2000, as amended, states – 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.
- 8.1.2. Section 2 (1) of the Act states - “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.
- 8.1.3. Section 2(1) of the Act states – “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.
- 8.1.4. Section 2(1) of the Act states - “habitable house” means a house which— (a) is used as a dwelling, (b) is not in use but when last used was used, disregarding any unauthorised use, as a dwelling and is not derelict, or (c) was provided for use as a dwelling but has not been occupied.

- 8.1.5. Section 4(1)(h) of the Act states - The following shall be exempted developments 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.
- 8.1.6. Section 50(2) of the Act states - A person shall not question the validity of any decision made or other act done by—a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act...without prejudice to the right of appeal...otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts.

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

- 8.2.1. No relevant provisions.

9.0 **Assessment**

9.1. **Background**

- 9.1.1. The subject site has a lengthy and complex planning and referral history, as I have outlined in Section 5.
- 9.1.2. The primary issue at hand is the residential use of the house on the site, and this appears to be grounded in the longstanding development plan policy that a dwelling will only be permitted within 100m of an agricultural building where written consent has been provided by the owner of the agricultural unit. The referrer owns a farmyard in the vicinity of the subject site and he states that he was approached by the site owner, John Brennan, in 2009 for written consent to build two houses within 100m of an agricultural building in his ownership and that when he declined to provide such consent, works to restore the subject house were commenced, in 2010.
- 9.1.3. Following the commencement of restoration works, the referrer first applied for a Section 5 declaration on 21st June 2010, where the works the subject of the application were described as '*refurb house for John James Brennan*'. The Planning

Authority assessed the application and issued a determination on 19th July 2010 (Manager's Order No. 10/581), which stated: -

'On the basis of the information submitted on the 21st of June 2010, the application is not considered to be exempt development.'

- 9.1.4. The Planning Authority's determination was not challenged at the time.
- 9.1.5. The referrer states that the reason for this further Section 5 application and referral is that the Planning Authority appeared to informally change its view on the matter, as part of its refusal of permission of application Reg. Ref. 14/217, and that his intent is to establish whether the Planning Authority has officially changed its view.
- 9.1.6. The referrer states that the question asked in this application is the same as that asked in the 2010 application and that the circumstances have not changed since that application.
- 9.2. Having reviewed the application and referral documents and also the site's referral history, it is my view that the key issue to be addressed is the Board's jurisdiction to make a decision on this referral, with reference to the *Narconon Trust v An Bord Pleanala* judgement, where the Planning Authority made a determination on a similarly worded Section 5 application in 2010.
- 9.3. **The Board's Jurisdiction to Determine this Referral**
 - 9.3.1. In *Narconon Trust v An Board Pleanala* (2021, IECA 307), the Court of Appeal granted an order of *Certeorari*, quashing two decisions made by the Board under Section 5 of the Act, whereby the Board decided that a change of use from a nursing home development to a residential drug rehabilitation facility is development and is not exempted development. In its conclusion, the Court stated as follows: -

"The Board was precluded from determining a section 5 referral in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination. It had jurisdiction to receive the referral and to commence its determination. Once it became apparent that the question referred was the same, or substantially the same, and in respect of the same land, and that there was no evidence of any change in the planning facts or circumstances, it ought to have

concluded that: the referral by the notice parties amounted to an impermissible attack on the 2016 declaration, which, in substance, amounted to questioning the validity of the section 5 declaration other than by way of s. 50; that such a challenge is prohibited by s. 50(2); and that for the Board to proceed further to determine the referral on the merits amounted to facilitating a breach of s. 50(2) and was, accordingly, ultra vires."

- 9.3.2. This judgement is important to the subject referral as it requires two issues to be addressed by the Board prior to a determination being made: (1) Is the question referred the same, or substantially the same, and in respect of the same land and (2) Has there been any change in the planning facts or circumstances since the previous determination was made.

(1)

- 9.3.3. The current application was submitted on 25th October 2016 and the works the subject of the application are *'work to reinstate the residential use of a derelict structure of which the residential use has been abandoned.'*

- 9.3.4. As I have outlined previously, the 2010 application described the works the subject of the application as *'refurb house for John James Brennan'*.

- 9.3.5. It is my view that the questions asked by both the 2010 application and the current referral are fundamentally the same, i.e. whether works to facilitate residential use of the building is or is not development and is or is not exempted development. I would also note that the referrer states that he has asked the same question in both applications.

(2)

- 9.3.6. Having considered the information provided as part of the referral and also having visited the site, I note that the roof that was under construction in 2010 is now complete, as are other refurbishment works such as windows and door installation, and the house appears to be occupied. An extension that was the subject of an application for retention and completion (Reg. Ref. 14/217) has been demolished and a storey-and-a-half garage that also was the subject of an application for retention and completion (Reg. Ref. 17/357) has also been demolished.

- 9.3.7. Thus, having compared the house I encountered on the site to the photograph images taken by the Planning Authority on 13th April 2010, as contained in the Planning Authority's file on Reg. Ref. 10/581, I am satisfied that it is the same, or substantially the same, as the house that was in place at the time of the 2010 Section 5 application. I therefore conclude that there has been no change in the planning facts or circumstances since the previous determination was made.
- 9.3.8. I note that the owner of the house made a submission on the referral, prepared by CMD Architects, which contains a written argument that the use of the house was never abandoned, but this does not, in my view, alter the planning facts of this case. The building is acknowledged by both the 2010 application and the current referral as a house, it is common ground amongst the parties that it was occupied as a home at some point, and the Planning Authority's determination on Reg. Ref. 10/581 was made in this context.
- 9.3.9. Therefore, in the context of the Narconon Trust v An Bord Pleanala judgement, it is my professional opinion that the Board is precluded from making a determination on this referral. The Planning Authority has previously made a determination that the development is not exempted development and it is not within the Board's jurisdiction to revisit this decision, where there has been no material change in the planning facts or circumstances.

10.0 Recommendation

- 10.1. I recommend that the Board notify the parties to the referral as follows: -

The subject referral is the same, or substantially the same, and in respect of the same land as a Section 5 application dated 13th April 2010 (Planning Authority Reg. Ref. 10/581), and there is no evidence of any change in the planning facts or circumstances underpinning the application. In these circumstances, the Board is precluded under Section 50(2) of the Planning and Development Act, 2000, as amended, from making a determination on this referral.

Barry O'Donnell
Planning Inspector

26th May 2022.