



An  
Bord  
Pleanála

## Inspector's Report ABP-314076-22

---

<b>Question</b>	Whether or not the change of use of a dwelling, as a principal place of residence (outside of a rent pressure zone) to a dwelling in use for short term letting purposes, is or not development and is or is not exempted development.
<b>Location</b>	31 The Rectory, Fahan, Co. Donegal F93TH73
<b>Referral</b>	
<b>Referred by</b>	Donegal County Council.
<b>Owner/ Occupier</b>	Julie Roddy.
<b>Planning Authority Reference</b>	UD20248
<b>Date of Site Inspection</b>	3 <sup>rd</sup> February 2023.
<b>Inspector</b>	Barry O'Donnell

## 1.0 Introduction

- 1.1. This report relates to a referral by Donegal County Council as to whether or not the change of use of a dwelling, as a principal place of residence (outside of a rent pressure zone) to a dwelling in use for short term letting purposes is or is not development and is or is not exempted development.
- 1.2. In its cover letter on the referral, the Planning Authority states that the subject house is a detached house in a housing estate that is being investigated as an unauthorised development. The letter further states that following receipt of a submission in response to a Warning Letter, and having reviewed the legislation, it is not apparent whether the subject matter of the referral comprises development and is or is not exempted development. The Planning Authority is therefore seeking the Board's determination on the matter.

## 2.0 Site Location and Description

- 2.1. The subject site is located at 31 The Rectory, Fahan, in north-east County Donegal. Fahan lies adjacent to the shores of Lough Swilly and has developed primarily adjacent to the R238 Regional Road.
- 2.2. The Rectory is a low-density development of detached housing. The subject site, No. 31, is centrally located within the estate. It is a traditionally designed two-storey, detached house that is bounded to the side and rear by a timber fence and has an open boundary to the front.

## 3.0 The Question

- 3.1. The question the subject of the referral before the Board is: -

*Whether or not the change of use of a dwelling, as a principal place of residence (outside of a rent pressure zone) to a dwelling in use for short term letting purposes is or is not development and is or is not exempted development.*

## 4.0 Planning History

**00/5233:** Permission granted for construction of 34 No. two-storey detached houses, including plot No. 31.

**99/4024:** Permission granted for retention and completion of site works for 51 No. houses.

**97/1240 (ABP Ref. PL05.108702):** Permission refused by the Board for development of 51 No. holiday homes.

## 5.0 Policy Context

### 5.1. Donegal County Development Plan 2018-2024

5.1.1. The site lies within the urban area of Fahan, a 'Layer 3' settlement under the development plan Core Strategy.

### 5.2. Natural Heritage Designations

5.2.1. The site is not located within or adjacent to any designated European site, the closest such sites being Lough Swilly SPA and SAC, which are c.300m south-west.

5.2.2. The Old Rectory, Fahan, c.110m west of the site, is designated as a proposed natural heritage area.

### 5.3. Environmental Impact Assessment

5.3.1. The subject matter of this referral relates to the change of use of a dwelling to a dwelling in use for short term letting purposes. 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.

## 6.0 The Referral

### 6.1. Referrer's Case

6.1.1. The Planning Authority's referral letter indicates that the subject matter is grounded in an unauthorised development complaint/investigation, which included reference to

the Board's website for Board decisions regarding similar short-term let proposals. The letter states that having reviewed the Planning and Development Act, 2000, as amended, it is not apparent whether the use of a house for short-term letting purposes, outside of a rent pressure zone, is or is not development and is or is not exempted development.

## **6.2. Owner/ occupier's response**

6.2.1. None received.

## **6.3. Observations**

6.3.1. None.

## **7.0 Statutory Provisions**

### **7.1. Planning and Development Act, 2000**

#### **7.1.1. Section 2: Definitions**

"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.

"house" means a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building;

"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.

#### **7.1.2. 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.

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

### **7.2.1. Article 6 – Exempted Development**

**6(5):** (a) Each of the following shall be exempted development:

(i) development consisting of the short term letting in a rent pressure zone of not more than 4 bedrooms in a house that is the principal private residence of the landlord or licensor concerned provided that –

(I) it is a condition of the short term letting that each bedroom that is the subject of the letting shall not be occupied by more than 4 persons,

And

(II) the development –

(A) does not contravene a condition attached to a permission granted in respect of the house under the Act, and

(B) is consistent with any use specified in any such permission;

(ii) development consisting of the short term letting in a rent pressure zone of a house that is the principal private residence of the landlord or licensor concerned provided that –

(I) the aggregate number of days during a year in which the house is the subject of short term lettings does not exceed 90 days, and

(II) the development –

(A) does not contravene a condition attached to a permission granted in respect of the house under the Act, and

(B) is consistent with any use specified in any such permission.

(b) Where a person proposes to undertake development to which paragraph (a) applies, he or she shall, not later than 2 weeks before the commencement of the development, notify the planning authority in whose functional area the proposed

development will occur of the proposed development, or cause that planning authority to be so notified, in writing.

(c) A notification under paragraph (b), shall include the following –

(i) the name of the person giving the notification, or on whose behalf the notification is being given, and documentary confirmation that the proposed development relates to the person's principal private residence;

(ii) if the person giving the notification or on whose behalf the notification is being given is not the owner of the house concerned, the consent in writing of the owner to the proposed development;

(iii) the address and eircode of the house concerned;

(iv) contact information in relation to –

(I) the person giving the notification or on whose behalf the notification is being given, and

(II) the owner of the house concerned;

(v) in the case of proposed development to which subparagraph (i) of paragraph (a) applies, a statement that the proposed development is development to which that subparagraph applies;

(vi) in the case of proposed development to which subparagraph (ii) of paragraph (a) applies, a statement that the proposed development is development to which that subparagraph applies; and

(vii) such other information as the planning authority concerned may reasonably require.

(d) A notification under paragraph (b), shall be accompanied by –

(i) such documentation as the planning authority concerned may reasonably require, and

(ii) in case the notification relates to development to which subparagraph (i) of paragraph (a) applies, a statutory declaration made by the person giving the notification, or on whose behalf the notification is being given, declaring that –

(I) the house in respect of which the proposed development is to be carried out is that person's principal private residence,

(II) not more than 4 bedrooms in that house will be subject to the short term letting concerned, and

(III) it will be a condition of the short term letting concerned that each such bedroom shall not be occupied by more than 4 persons.

(e) A planning authority shall maintain a record in writing of all information contained in a notification under paragraph (b).

(f) A person who proposes to carry out development to which subparagraph (ii) of paragraph (a) applies shall not later than 4 weeks after the commencement of each year in which he or she intends to carry out the proposed development and before the commencement of any such development in that year –

(i) complete Form No. 15 specified in Schedule 3 and give it to the planning authority in whose functional area the development will occur, and

(ii) provide that planning authority with a statutory declaration made by that person declaring that the house in respect of which the proposed development is to be carried out is that person's principal private residence.

(g) A person who carries out development to which subparagraph (ii) of paragraph (a) applies in any year shall –

(i) upon the expiration of 2 weeks after the day that is the 90th day on which such development occurs in that year, complete Form No. 16 specified in Schedule 3 and give it to the planning authority in whose functional area the development occurred, and

(ii) not later than 4 weeks after the end of that year, complete Form No. 17 specified in Schedule 3 and give it to the planning authority in whose functional area the development occurred,

and each such form shall be accompanied by a statutory declaration made by that person declaring that –

(I) the aggregate number of days during the year concerned in which the house was the subject of short term lettings did not exceed 90 days, and

(II) the house that was the subject of those short term lettings was, during the period of those lettings, the person's principal private residence.

(h) A planning authority shall enter all such information as is contained in the forms referred to in paragraphs (f) and (g) in the record maintained in accordance with paragraph (e).

(i) In this subarticle –

'principal private residence' means, in relation to a house that is the subject of a short term letting, a house in which the landlord or licensor concerned ordinarily resides;

'rent pressure zone' and 'short term letting' have the meanings assigned to them by section 3A (inserted by section 38 of the Residential Tenancies (Amendment) Act 2019 ) of the Planning and Development Act 2000 (No. 30 of 2000).

#### 7.2.2. **Article 10 – Changes of Use**

(1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would 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.

(2) (a) A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.

(4) Development consisting of the use of not more than 4 bedrooms in a house, where each bedroom is used for the accommodation of not more than 4 persons as overnight guest accommodation, shall be exempted development for the purposes of the Act, provided that such development would not contravene a condition attached



to a permission under the Act or be inconsistent with any use specified or included in such a permission.

### 7.3. Other Relevant Referrals

7.3.1. There are a number of relevant referrals to the subject case, including the following.

**RL3490 - 5-5A Crown Alley, Dublin 2:** The Board determined on 17<sup>th</sup> October 2016 that the use of a residential apartment for short-term holiday lettings is development and is not exempted development.

**ABP-302856-18, ABP-302857-18, ABP-302858-18, ABP-302859-18, ABP-302861-18, ABP-302862-18, ABP-302865-18, ABP-302866-18 – Apartments 4, 5, 7, 16, 22, 24, 26 and 30 Chancery Hall, Blackhall Place, Dublin 7:** The Board determined in each instance on 15<sup>th</sup> March 2019 that the use of the affected apartment for short-stay accommodation lettings is development and is not exempted development.

**ABP-304771-19 Units 13-18 Grattan Court East, Dublin 2:** The Board determined on 24<sup>th</sup> October 2019 that the use of the affected units as short-term letting accommodation is development and is not exempted development.

### 7.4. Case Law

**McMahon v Dublin Corporation, 1997, ILRM 227:** Barren, J held as follows:

*“in the absence of explicit reference in the planning permission to a permitted use, regard must be had to the use for which the structure is designed, i.e, the use which was objectively intended for the structure having regard to the relevant planning documentation. The purpose for which the plaintiff’s homes had been designed was private residential, whereas the use to which they were currently being put was commercial.”*

## 8.0 Assessment

### 8.1. Is or is not development

- 8.1.1. The development entailed within this referral relates to whether or not the change of use of a house to a house in use for short term letting purposes is or is not development and is or is not exempted development.
- 8.1.2. There is no suggestion within the referral documentation that 'works' have been undertaken in association with the use of the house and I did not observe any evidence of works on my visit to the site. I am therefore satisfied that the issue of development by reason of works does not arise. In this context, the question that arises relates to whether a material change of use occurred.
- 8.1.3. The subject building is a detached house, permitted under Reg. Ref. 00/5233. Permission was granted subject to 10 No. conditions, none of which specified the precise nature of the use or imposed restrictions or limitations on the use. In the context of the McMahon judgement regarding interpretation of permitted use, it is evident that the unit was designed and intended to be used as a dwelling house.
- 8.1.4. Based on the Planning Authority's referral cover letter, it is evident that the use as detailed is solely a commercial one and in the absence of occupation by a permanent resident there is no residential use and, therefore, a change of use has occurred.
- 8.1.5. In accordance with Section 3(1) of the Act, for a change of use to result in 'development', the change of use must be 'material'. Use for short-term lettings amends the duration of stay and materially changes the tenure profile of occupants, to visitors who stay at the property for as short as one night. Such use involves associated activities and issues such as traffic, maintenance, noise and disturbance which contribute to an intensification of activity on the referral site. The Board has determined in a number of cases, including those referenced at Section 7.3 of my report, that a change of use from permanent residential to short-term letting is a material change of use and I would concur with this determination.
- 8.1.6. In view of the foregoing, I consider the test for material change of use is met and the short term lettings use constitutes development.

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

- 8.2.1. I am aware that the Planning and Development Act 2000 (Exempted development) No 2 Regulations 2019 amend Article 6 (Exempted Development) by providing an exemption for short-term letting in a rent pressure zone. I am satisfied that this provision does not apply in this instance as the subject site is not located within a rent pressure zone.
- 8.2.2. I have already outlined a number of instances whereby the Board determined that a change of use from permanent residential to short-term letting is a material change of use.
- 8.2.3. Regarding exemptions for this change of use, Article 10(1) of the Regulations provides an exemption for a change of use within a class specified in Part 4 of Schedule 2. Short-term lettings use is not an identified use type under Part 4 so the potential for a change of use under this exempted development right does not arise.
- 8.2.4. I am not aware of any other exempted development provision under which the use of the subject house as short-term letting accommodation could be argued to constitute exempted development.
- 8.2.5. Therefore and in view of the foregoing, I conclude that the material change of use of the subject house from residential use to short-term holiday lettings use is not exempted development.

## **8.3. Appropriate Assessment**

- 8.3.1. The subject matter of this referral relates to the change of use of a dwelling to a dwelling in use for short term letting purposes.
- 8.3.2. The site is not located within or adjacent to any designated European site, the closest such sites being Lough Swilly SPA and SAC, which are c.300m south-west.
- 8.3.3. Having regard to the nature and scale of the development, which has not required any act of construction, I do not consider that any Appropriate Assessment issues arise.

## 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 or not the change of use of a dwelling, as a principal place of residence (outside of a rent pressure zone) to a dwelling in use for short term letting purposes is or is not development and is or is not exempted development.

**AND WHEREAS** Donegal County Council requested a determination from An Bord Pleanála on this question on the 7<sup>th</sup> day of July, 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
- (c) Article 6(1) of the Planning and Development Regulations, 2001-2022,
- (d) Part 4 of Schedule 2 to the Planning and Development Regulations, 2001-2022
- (e) the planning history of the site,
- (f) the pattern of development in the area:

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) The use of the subject house for short-term holiday lettings use is a change of use from the permitted use as a permanent residential unit, which in the light of the different matters that it raises for assessment compared to those which would have arisen for the original use as permanent residential accommodation, constitutes a material change of use and thus development, and

(b) Neither the Planning and Development Act, 2000, as amended, nor the Planning and Development Regulations, 2001-2022 recognise the said material change of use to be exempted development.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(4) of the 2000 Act, hereby decides that the change of use of a dwelling, as a principal place of residence (outside of a rent pressure zone) to a dwelling in use for short term letting purposes is development and is not exempted development.

---

Barry O'Donnell  
Planning Inspector

1<sup>st</sup> March 2023.