



An
Bord
Pleanála

Inspector's Report ABP-314088-22

Question

I wish to have a Section 5 assessment in this application for the following reasons:

- 1 The previous Section 5 did not take into account ENF14221 decision.
- 2 This area provides a safe area for customers to dine + drink in fine weather.
- 3 The residents do not have any objection to the outdoor area.
- 4 There is a outdoor defibrillator for this area for community use.
- 5 The area is now safer for customers + children with the picket fence in place.
- 6 There is now a pedestrian walkway demarcated instead of parking access.

Location

The Druids Chair, Killiney Village,
Killiney Hill Road, Killiney, Co Dublin.

Declaration

Planning Authority

Dun Laoghaire Rathdown County
Council

Planning Authority Reg. Ref.	Ref5222
Applicant for Declaration	Cosgrave Mount Merrion Limited (Mr. Paul Cosgrave)
Planning Authority Decision	Is development
Referral	
Referred by	Cosgrave Mount Merrion Limited (Mr. Paul Cosgrave)
Owner/ Occupier	Cosgrave Mount Merrion Limited
Observer(s)	Connolly Real Estate Limited
Inspector	Joe Bonner

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1.0 Site Location and Description

- 1.1. The area subject to the referral is located in the centre of Killiney village on the western side of the north-south running Killiney Hill Road (R119), c20m south of a roundabout where the R119 and Victoria Road meet adjacent to Killiney Hill Park.
- 1.2. The area subject to the referral, is located between the two storey Druids Chair (pub), and the R119 and is lined out and used as a car park. The parking spaces are accessible directly from the road, across double yellow lines, with no footpath present. The ground level falls across the site from north to south and from east to west, from the front of the pub towards the R119. Fourteen additional parking spaces associated with the Druids Chair are located on the opposite side of the R119. A hard surfaced area immediately south of the building does not form part of the site but provides access to and parking for adjacent buildings.
- 1.3. The side gable of a two-storey building that formerly accommodated the Killiney Stores shop and more recently Eleven Deli at ground level, abuts the northern boundary of the site. The unit is currently vacant.

2.0 The Question

- 2.1.1. The submitted Section 5 Application Form states that ‘the purpose of a Section 5 of the Planning and Development Act 2000, (as amended) is to establish if a particular development is or is not an exempted development within the meaning of the Act’, while question 5 requests that the referrer provides ‘details of works (where applicable) or proposed development’ and includes a note, which states, ‘Note: Only works listed and described under this section will be assessed under this Section 5 application. (Use additional sheets if required).’
- 2.1.2. Following the above, the specific question asked by the referrer, stated, verbatim:

I wish to have a Section 5 assessment in this application for the following reasons:

 - 1 The previous Section 5 did not take into account ENF14221 decision.
 - 2 This area provides a safe area for customers to dine + drink in fine weather.
 - 3 The residents do not have any objection to the outdoor area.

- 4 There is a outdoor defibrillator for this area for community use.
- 5 The area is now safer for customers + children with the picket fence in place.
- 6 There is now a pedestrian walkway demarcated instead of parking access.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On the 17th of June 2022 Dun Laoghaire Rathdown County Council decided to issue a declaration, referring to the question in 2.1.2 above, which stated:

That having regard to:

- The Plans and particulars lodged with this Section 5 referral.
- Section 3(1), Section 4(1)(h) and Section 82(1) of the Planning and Development Act 2000 (as amended)

The planning authority hereby determined that the indicated change of use and works, comprising ‘...2. This area provides a safe area for customers to dine + drink in fine weather. 3. ... The outdoor area. 5. The area is now safer for customers + children with the picket fence in place. 6. There is now a pedestrian walkway demarcated instead of parking access’, at the Druid’s Chair, Killiney Village, Killiney Hill Road, Killiney Dublin, under the Planning and Development Act, 2000 (as amended), constitutes development, and does not constitute exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The **planning officer’s report** is the basis for the determination of the planning authority, and includes the following:

- It described the site and development plan zoning, followed by planning history, including a previous Section 5 referral and three enforcement cases.
- It incorporates the report of the **Conservation Officer** which noted the site is located in Killiney ACA and stated that ‘The works that are subject to this Section

5 involved the change of use of C.75m2 of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub. To facilitate the change of use, a synthetic surface has been laid over the car parking spaces, a number of wooden picnic type benches and barrels, and a wooden picket fence has been erected along the boundary to Killiney Hill Road.

- They concluded that the works that had been undertaken detract from the streetscape character of the ACA and therefore would not be considered to be exempted development having regard to Section 82(1) of the Planning and Development Act 2000 (as amended) (hereafter PDA).

Planning Officers Comments

- 3.2.2. By reference to Sections 2(1), 3(1), 4(1)(h), 82(1) and 82(2) of the PDA, the Planning Officer's assessment addressed the following questions:

Whether the proposal constitutes works and/or development

- 3.2.3. At page 6, Under the heading of 'Planning Comment', the planning officer stated:

'Having regard to this Section 2(1), it is considered that the development that appears to include the addition of picnic type tables and chairs, and synthetic grass surfacing/ carpet, large barrels, standing tables, picket fence, and replacement of car parking bays, and the curtilage of the building; - and therefore constitutes – 'works' - as defined in the planning and development Act 2000 as amended.

Also, having regard to Section 3(1), it is considered that the proposed development may include a (material) change of use of part of the curtilage of the building, having regard to the Change of all of the subject areas, appearing to previously have been used over recent, circa 13 years, for part – 3-5 car parking spaces, and part - for some customer seating and tables, appearing to vary slightly over the years, in parking/ seating/ tables numbers, and layout.

Therefore, may constitute development'.

Exempted Development, or not Exempted Development

- 3.2.4. The referrers cover letter stated that the planning authority had previously decided the use of the outdoor area did not constitute a material change of use. Having

regard to Articles 6, 9 and 10 and to Class 14 of Part 1 and Article 10 of Part 4 to the Planning and Development Regulations 2001 (as amended), the planning officer's last paragraph before the conclusion stated that:

'The indicated Change of use - from a part - car parking area and part – patrons seating area/ beer/outdoor drinking area - to all beer/outdoor drinking area with associated works including fencing, seating and tables and new surfacing - considered as materially affecting and impacting on the ACA; is considered therefore - Not to be exempted development, and including not in accordance with Section 82(1) of the Planning and Development Act, 2000 (as amended).

3.2.5. The conclusion stated:

'Having regard to the above, it is considered that the indicated change of use and works, constitutes development, as defined in the act.

For the reasons detailed above the indicated Change of use and associated works, is considered Not to be exempted development in accordance with Section 82(1) of the Planning and Development Act, 2000 (as amended).

3.2.6. Other Technical Reports

- See Conservation Officer's report details referenced in 3.2.1 above.

4.0 Third Party Submission

- 4.1. Notwithstanding that third party submissions or observations are not permitted in respect of referrals, unless invited by the planning authority, the referral file contains a submission lodged on behalf of Connolly Real Estate Limited, who had made a previous referral Ref3522 in respect of the same area of land (Sections 5.4 - 5.5 below) and have also made a submission to the board in respect of this referral (see section 8.3 below).
- 4.2. The contents of the submission / observation are not referred to in the planning officer's report or in the planning authority decision.
- 4.3. The grounds of the submission / observation have been restated in the submission to the board and is addressed in section 8.3 below.

5.0 Planning History

5.1. Referral Site

- 5.1.1. The referral site has been the subject to three planning applications, three enforcement cases and a previous section 5 reference, which are addressed below.

5.2. Referral Site – Planning Applications

- **P.A. Reg. D07A/1146 (ABP.226230)** – Permission **refused** by DLRCC on 3rd of October 2007 for ‘New shopfront treatment to the south and east elevations, replace existing windows, new signage and external seating area’. Appeal dismissed by the board by reason of nature of the appeal/any previous permission S.138(1)(b). The seating area was to be located in a different area to the area subject to the current referral.
- **P.A. Reg. D06A/1767 (ABP.222099)** – Permission **refused** by the Board on the 13th of July 2007 to ‘replace existing guyed pole which will have 3 television antenna, 3 antennas and 1 dish for a new 3G broadband network’.
- **P.A. Reg. D05A/1487 (ABP.PL 06D.216345)** – Permission **granted** by the Board on the 14th of September 2006 for ‘retention of 13 metre high guyed pole at roof level, carrying 3 no television antennas’ subject to one condition.

5.3. Referral Site - Enforcement

- **ENF142/21** – Opened 23rd of June 2021 regarding ‘The creation of an outdoor dining area within the curtilage of the premises materially changing the use of the car park’. Case **closed** on the 10th of March 2022 (Exempt Development).
- **ENF287/21** – Unauthorised signage and pop up tents placed in car park area. Case opened 1st October 2021 and **closed** 31st March 2021.
- **ENF63/16** – Alleged works to the exterior of a structure without the benefit of planning permission. Case opened and **closed** in April 2016.

5.4. Referral Site - Previous Section 5 Referral (Ref3522)

- 5.4.1. On the 6th of April 2022, a Section 5 referral was submitted to DLRCC on behalf of Connolly Real Estate Limited, Eagle House, Killiney, seeking a declaration on the following question:

Is the change of use of c75sqm of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub development, and if so, is it exempt development.

5.4.2. The referrer stated that a change of use had taken place and estimated the affected area to be c.75sqm. Three precedents cited by the referrer are addressed in Section 5.5 below, but an extract from the board's decisions in RL2185 and RL2188, which they considered to be directly relevant, stated:

(c) The use of part of the yard of the licensed premises as a beer garden has material consequences in terms of the proper planning and sustainable development of the area, and

(d) the said use as a beer garden constitutes a material change of use, being an extension of the net floor space of the commercial activity and, consequently, an intensification of use of the land.

5.4.3. Mr. Paul Cosgrave, the current referrer, as owner of the Druids Chair, wrote to the planning authority, while it was considering the referral, but was informed he could not participate in it.

5.4.4. On the 3rd of May 2022, the planning authority decided to issue a declaration that:

The Planning Authority hereby determines that the Indicated Change of Use and works, of 'change of use of C75m2 of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub', under the Planning and Development Act, 2000 (as amended), constitutes development, and specifically under Section 82(1) of the Planning and Development Act, 2000 (as amended), **does not constitute exempted development.**

5.4.5. The determination was not referred to the board, nor was it the subject to judicial review proceedings.

5.5. Referrals Referenced in Ref 3522

5.5.1. ABP Ref.15.RL.2185 (The Hanging Head)

In 2004, the following question was referred to the Board:

- Whether the provision of a beer garden on a paved area, enclosed by fencing and partly covered by a canopy, and the provision of picnic tables thereon, to

the rear of “The Hangin’ Head” public house, Drogheda Street, Collon, County Louth is or is not development and is or is not exempted development.

The Board decided that the provision of a beer garden, paved area, fencing and canopy is development and is not exempted development.

5.5.2. ABP Ref.15.RL.2188 (Turners Cross Tavern)

On the 15th of September 2020, the board decided that the ‘provision of a beer garden, decking and three gazebos’ at Turners Cross Tavern, 1 Evergreen Road, Cork City is development and is not exempted development.

5.5.3. ABP Ref.307112-20 (The Lamplighters Pub)

On the 15th of September 2020, the board decided that ‘The construction of a smoking/beer garden to rear of pub, the use of upstairs rooms as student/short term letting, the raising of flat roof to rear by circa 600 millimetres and the construction of a two metres high fence to create an outside amenity area is development and is not exempted development’.

6.0 Other Relevant Precedents (including case law)

6.1.1. The following precedents are considered relevant to the issues arising in this referral.

6.2. ABP–301055–18 & ABP–301064-18 (Narconon Trust v An Bord Pleanála) (2021) IECA 307

6.2.1. This case is included in the observation on the referral.

6.2.2. In 2016, Meath County Council issued a Section 5 declaration that the proposed change of use from a nursing home to a residential drug rehabilitation facility was exempted development. The decision of the planning authority was not referred to the board, nor was it the subject of judicial review.

6.2.3. In 2018, two separate groups Ballivor Community Group and Trim Municipal District Council sought declarations from Meath County Council relating to the same site at Ballivor, County Meath, and the same subject matter as the 2016 referral, being whether the change of use of a permitted Nursing Home to a residential drug rehabilitation facility is or is not development and is or is not exempted development.

- 6.2.4. The Board's determined on both referrals that the change of use is development and is not exempted development, following which, the site owner, Narconon Trust, initiated judicial review proceedings (Case Ref's 2020, IEHC25 and 2021, IECA307).
- 6.2.5. The High Court quashed both determinations and the Board appealed the decisions. In its judgement in November 2021, the Court of Appeal found that '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'.
- 6.2.6. The judgement went on to state that while the Board 'had jurisdiction to receive the referral and to commence its determination', 'once it became apparent to the board that the question referred was the same, or substantially the same, and in respect of the same land, as a previous referral and that there was no evidence of any change in the planning facts or circumstances, the Board ought to have concluded that the referral 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'.

6.3. ABP-313815-22 (formerly ABP-305471-19) (Spectre v An Bord Pleanála) [2021] IEHC 745

- 6.3.1. I consider that this precedent is relevant as it addresses (1) the relevance of previous referrals on the same question (2) the importance of addressing the question asked of the planning authority or the board and not another question, that has not been asked.
- 6.3.2. In this case, three different parties had sought Section 5 declarations from Dublin City Council on the same question relating to change-of-use from 'office' to 'embassy office', and the planning authority issued declarations on the 23rd of July 2019 to Spectre (Shelbourne) Limited (the property owner), on the 21st of August 2019 to Finance Ireland Limited, and on the 18th of September 2019 to Transaction Network Services (Ireland) Limited, that the change-of-use was exempted development,.
- 6.3.3. Under ABP-305471, the board was asked by Finance Ireland Limited to determined:

- Whether the change of use of the fifth floor from offices to Embassy office is or is not development or is or is not exempted development.

6.3.4. The Board made a decision on 6th February 2020, that the change-of-use from 'office' to 'embassy office' was development and was not exempted development.

6.3.5. The building owner Spectre (Shelbourne) Limited, sought judicial review of the board's decision, and on the 11th of April 2022, the High Court (2020 No. 196 JR) quashed the decision of the board, on grounds that it erred in law, took into account irrelevant considerations and acted irrationally and unreasonably. An Order was made remitting the referral to the board, to be determined in accordance with law.

6.3.6. The observer on the current referral is of the opinion that the judgement of Narconon Trust v An Bord Pleanála restricts the ability of the board to make a decision on the current referral, by reference to the Spectre judgement. However, in paragraphs 1-4 of the judgement's conclusion (paragraph 148), the Court determined, that due to the particular circumstances, a second referral on the same question did not amount to an impermissible collateral attack on a previous unchallenged declaration.

Paragraphs 1-4 state:

(1) The applicant had locus standi to bring these proceedings notwithstanding its failure to make submissions to the respondent on the Finance Ireland referral.

(2) The request made by Finance Ireland to the first notice party for a declaration pursuant to s. 5(1) of the Act was not an impermissible collateral challenge to the s.5 First Declaration made on 23rd July 2019;

(3) The referral to the respondent pursuant to s. 5(3) of the Act made on 17th September 2019 was a valid exercise of the rights of Finance Ireland under s.5 to request a review of the Second Declaration made on 21st August 2019, which itself had arisen from a valid and permissible original request by Finance Ireland;

(4) The respondent acted within its power and authority in considering and deciding the referral made by Finance Ireland;

6.3.7. The following elements of the judgement's conclusion (paragraph 148) are considered relevant to the question asked in the current referral, as the court found the board had addressed a question that was not the subject matter of the referral, being 'embassy use' rather than 'embassy office': Paragraphs 5 and 6 stated:

(5) The respondent (An Bord Pleanála) erred in taking into account irrelevant considerations, namely precedent decisions which concerned the distinction between embassy use and office use in circumstances where the referral concerned a change of use from office to embassy office.

(6) The respondent acted irrationally and unreasonably in its determination that having regard to the nature of uses carried out in an embassy, which use was not the subject of the referral, the intended change of use to an embassy office did not constitute exempted development.

6.3.8. Paragraphs 7 and 8 of the judgement conclusions, referring to the potential for dismissing the referral, are also considered relevant:

- (7) The respondent failed to consider the exercise of its discretion pursuant to section 138 of the Act, having regard to the planning history of the subject property and, in particular, the existence of three declarations made by the authority pursuant to section 5(1);
- (8) The respondent (the Board) erred in law in its failure to take into account the case law of this Court and, in particular, the judgment in *Narconon v. An Bord Pleanála & Others*.

6.3.9. When remitted back to the Board, the referral file was assigned a new case number (ABP-313815-22). In determining the remitted referral, the board had regard to:

- Relevant elements of the Planning and Development Act and Regulations, the Judgements in *Narconon Trust v ABP* and *Spectre V ABP*, the sites planning history and precedent Section 5 declarations on change-of-use from office to embassy office, in relation to the subject property and other properties in DCC's functional area.

6.3.10. The Board concluded:

- DCC had determined a number of similar Section 5 cases relating to the same change of use, and declared them to be exempted development.
- The judgment in *Narconon Trust v An Bord Pleanála & Others*, does not have applicability in the instance of this referral – where Finance Ireland Limited had not improperly invoked the provisions of Section 5 of the 2000 Act.

6.3.11. The board **dismissed the referral**, under section 138(1)(b)(ii) of the Planning and Development Act, 2000.

6.4. **ABP-310385-21**

6.4.1. This precedent is relevant as it refers to a case where there is an existing Section 5 declaration in respect of the same or substantially the same question, which was not challenged and where no new planning facts or circumstances were presented.

6.4.2. On the 31st of January 2022, the board dismissed a referral on the following question, on the basis of the nature of appeal/any previous permission S.138(1)(b):

- Whether the proposed use of part of a golf course as a proposed GAA playing pitch is or is not development or is or is not exempted development.

6.4.3. In making its decision, the board had regard to the separate determination by the planning authority on the 8th day of February 2021, of the same or substantially the same question in respect of the same land, the fact that the planning authority's determination has not been successfully challenged by way of section 50 of PDA, and the fact that a different determination has not been made on the same or substantially the same question in respect of the same land, on the basis that a change in planning facts or circumstances had occurred,

6.4.4. The board decided that the subject referral amounted to an impermissible attack on the planning authority's section 5 declaration which, in substance, questions the validity of that declaration other than the way of section 50 of the Act, where such a challenge is prohibited by section 50 (2) of the Act.

6.5. **ABP-310287-21 and ABP-310086-21**

6.5.1. I consider that these referrals are relevant to the nature and clarity of the question asked, as this matter arises in the current referral.

6.5.2. On the 5th of October 2022, the board dismissed two separate referrals in accordance with Section 138(1)(b) that had asked whether or not the provision of an underground electricity cable, grid connection and associated works, in County Kerry is or is not development or is or is not exempted development, on the grounds that:

- ABP 310287-21 'having regard to the information provided by the referrer to the planning authority and to the board, and to the inspectors reports, ...the

extent and purpose of the case in question has not been adequately described by the referrer and therefore the board has not been able to adequately evaluate the question'

- 310086 In regard to the question referred to the Board by the planning authority which included information provided by the person who made the request for a declaration to the planning authority, to the submission received on the inspectors reports... the extent and purpose of the case in question has not been adequately described by the person who made the request for the declaration to the planning authority which formed part of the submission forwarded by the planning authority to the Board. The Board therefore has not been able to adequately evaluate the question.

Both referrals concluded with the following text:

- In light of such circumstances and having regard to the nature of the referral, the board is satisfied that the question should not be further considered by it and decided to dismiss this referral under section 138(1)(b) of the Planning and Development Act 2000, as amended.

6.6. **ABP-309231-21**

- 6.6.1. On the 5th of October 2022, the board dismissed a referral that asked 'Whether the underground electricity grid connections and associated works from the Ballynahulla 220kV substation to the Gneevs 38kV substation is or is not development or is or is not exempted development' for a reason which included:

- Having regard to the nature of the question raised in the referral,...and noting that the questions raised in the referral are lacking relevant detail on the context and purpose, the Board concluded that the questions cannot be properly addressed or decided in isolation within the meaning of Section 5 of the Planning and Development Act 2000, as amended. Accordingly, the Board decided to exercise its absolute discretion to dismiss this referral under Section 138(1)(b)(1) (nature of the question raised) of the Planning and Development Act 2000, as amended.

6.7. Friends of the Irish Environment -v- An Bord Pleanála & Ors. (2013 No 486 J.R.)

6.7.1. I consider that this precedent is relevant as Mr. Cosgrave was not provided with an opportunity to make a submission in referral Ref3522 and was not provided with a copy of the declaration, which meant he could not refer the declaration to the board and ultimately resulted in the current referral. These matters are raised by the referrer in their response to the board regarding the third party observation.

6.7.2. The High Court judgement dated the 9th of March 2018 stated, at paragraph 7, that:

‘it is clear that the owners and/ or occupiers of land the subject matter of a referral under s.5 of the Act of 2000 have a clear interest in the determination of the respondent. A determination by the respondent to the effect that what was once an exempted development is no longer exempt can have a serious consequence for the owners and/or occupiers involved. Therefore, as one would expect, the statutory provisions set out above give legislative effect to basic fair procedures. That is, that those affected by determination of the respondent have an opportunity to make observations or submissions as they may wish.

7.0 Policy Context

7.1. Dun Laoghaire Rathdown Development Plan 2022-2028

7.1.1. The relevant Development Plan is the Dun Laoghaire Rathdown Development Plan 2022-2028, which came into effect on 21st April 2022. The site is zoned ‘Objective A’ with a stated objective ‘to provide residential development and improve residential amenity while protecting the existing residential amenities.’

7.1.2. The site is also located within the boundary of the Killiney Architectural Conservation Area (ACA) and Chapter 11.4.2.1 sets out Policy Objective HER13: Architectural Conservation Areas, where it is a Policy Objective, among other things to protect the character and special interest of an area designated as an ACA, ensure that all development proposals be appropriate to the character of the area having regard to the Character Appraisals for each area and to ensure street furniture is kept to a minimum, is of good design and any redundant street furniture is removed.

- 7.1.3. Appendix 4 to the Development Plan, referring to ‘External Seating and Screening’, states that ‘external seating should be of wood, painted metal or other material which enhances the visual appearance of the ACA. Plastic is not an acceptable material for seating’.

Killiney ACA Character Appraisal

- 7.1.4. The Killiney Proposed ACA Character Appraisal and Recommendations, states that:

The village though unique and distinctive is modest with one shop and one pub. The latter The Druids Chair, formerly The Victoria Hotel, while being a well known landmark is a rather modest two storey edifice that has lost most of its 18th century past through suffering piecemeal modifications to its architectural features.

The dominance of traffic and parking submerge any potential of the village to be a most attractive place. Policies have been recommended in order to safeguard the historic and aesthetic value of the Village core and the sympathetic replacement of insensitive additions will be a core policy objective. This area has been recommended for inclusion within the ACA.

7.2. Natural Heritage Designations

- 7.2.1. The nearest European site is the Rockabill to Dalkey Island SAC, that is located offshore, c1.6km to the east. No Appropriate Assessment issues arise.

7.3. EIA Screening

- 7.3.1. The referral question does not refer to a type of development or proposed development specified in Part 2 of Schedule 5 to the Planning and Development Regulations 2001 (as amended), so, the question as to whether or not it might be sub-threshold does not arise.

8.0 The Referral

8.1. Referrer's Case

- 8.1.1. The declaration of Dun Laoghaire Rathdown County Council was referred to the Board on the 13th of July 2022, by a Planning Consultant on behalf the referrer, Mr

Paul Cosgrave, who is a director of Cosgrave Mount Merrion Limited, the owner/operator of The Druids Chair, Killiney Village, Killiney Hill Road, Co Dublin.

8.1.2. The referral made the following points, by way of background:

- The open area in front of the building has in the past been used for car parking and since the smoking ban in 2004 has functioned as an informal outdoor smoking and drinking area. With the onset of COVID in 2020, the owners decided to formalise the area as an outdoor hospitality area to make it an attractive outdoor alternative to drinking and socialising indoors.
- The area in front of the premises was upgraded by the installation of outdoor tables and seating with all-weather synthetic grass carpeting installed over the entire area with a low timber white painted picket fence delineating the boundary and the adjoining road.
- Despite the relaxation of COVID restrictions many customers prefer to use outdoor facilities as is evidenced from a letter of support from the Killiney Village Residents Association.
- In July 2021, a Warning letter (Ref. Enf. 14221) was issued in respect of alleged unauthorised development consisting of ‘the creation of an outdoor dining area within the curtilage of the premises materially changing the use of the car park’. Following a site inspection and an investigation of the matter, the planning authority issued a letter dated the 1st of October 2021, which stated the ‘planning authority does not consider that the use of the external open space to the public house for outdoor drinking/ dining in itself constitutes a material change of use of the land’. The enforcement file was closed.
- Notwithstanding the decision in Ref. Enf. 14221, a third party made an application for a Section 5 declaration (Ref3522) in relation to the alleged change of use of the subject area and the planning authority declared that:

“the indicated change of use and works, of ‘change of use of C75m2 of the car park to a beer/ outdoor drinking area at the front of the Druids Chair Pub’, under the (PDA), constitutes development, and specifically under Section 82 (1) of the Planning and Development Act, 2000 (as amended), does not constitute exempted development”.

- The volte-face by the planning authority came as a shock, particularly in light of the authoritative opinion to the contrary issued only seven months previously and learning that they were excluded from the decision making process, including being precluded from appealing the decision on Ref3522, and having been advised by the planning authority that the only way to bring the matter to the attention of the Board would be to seek a further Section 5 declaration, Mr. Cosgrove as director of the company made an application to the planning authority for a Section 5 Declaration (the current referral) in which he detailed the advantages to the business and its clientele. On 17th of July 2022, the planning authority issued a declaration indicating that indicated the change of use and works “constitutes development that does not constitute exempted development”.

8.1.3. The referrer’s case for exempted development status is set out under three headings being Use, Appearance and Works, and the key points are summarised below:

Use

- It refers to the definition of ‘works’ in the Planning and Development Act 2000 (as amended) (PDA), states that the subject area is an integral part of the licenced premises and activities associated with the primary use cannot and should not be questioned. The referral area has been an informal smoking/drinking area since at least 2004.
- The use of the area for car parking has never been questioned.

Appearance

- Referring to Section 4(1)(h) of the PDA, the use of the subject area is an outdoor element of the primary function and is a visual improvement over its use as a car park.
- As the contested development affects only use of the space, the area is not a structure and moveable elements (cars) have been replaced by other moveable elements (tables and chairs), the development does not materially affect the external appearance of the premises so as to render it inconsistent with its character or with the character of the area.

- It is debatable as to whether the rearrangement of moveable elements within a defined area within an established use can be described as development, but even if so described, it must be regarded as exempted development in this particular context.

Works

- The only element that constitutes works is the picket fence and this is less than 1.2m high and exempted as Class 11 of Part 1 to the second schedule to the Planning and Development Regulations 2001 (as amended).
- The conservation officers report stated by virtue of Section 82(1) of the Act, that notwithstanding Section 4(1)(h), works to the exterior of a structure located in an ACA shall be exempted development only if those works would not materially affect the character of the area. The referrer does not consider that the works materially affect the character of the area and considers that the removal of car parking has led to the visual improvement of the subject space and the picket fence has improved the safety of pub customers and their children and members of the public using the defined pedestrian walkway.

Conclusion

- The Planning Authorities Section 5 referral decisions in Ref. 55/22 and 76/22 fly in the face of the previous decision in Enf.14421, wherein the planning authority categorically stated that it did not consider the use of the external open space for outdoor dining/drinking in itself did not constitute a material change of use.
- Given the diametrically opposing views in the enforcement and section 5 referrals, the referrer has no other recourse other than to place the matter in the hands of the board and it is respectfully request that their view, that use of the subject area within the curtilage of the licensed premises, for activities directly connected with its primary use is exempted development, is endorsed.

8.1.4. A letter of support from the Killiney Village Residents Association, supports the proposal and states that the car park area for customers was modified to facilitate the outdoor hospitality and they wish to support the application to retain it.

8.2. Planning Authority Response

- None

8.3. Observation

8.3.1. A submission was received by the Board on the 8th of August 2022 on behalf of Connolly Real Estate Limited, Eagle House, Killiney Hill Road, Killiney, who had previously made an uninvited submission to the planning authority, which I have briefly addressed in Section 4.0 above. It included the following comments:

- The referral submitted to the planning authority included a site location map, a site layout plan and a photograph of 1st April 2022 that were prepared by Kiaran O'Malley & Company on behalf of Connolly Real Estate Limited (CREL), in respect of the previous referral (Ref.3522) and were used without their consent.
- A new site location map has been added to the referral and confirms the area subject to the referral is the same as that subject to the CREL referral.
- The allegation that the Section 5 by CREL was misrepresented, is not expanded upon, and is inconsistent with the use of the documentation that identifies the same area of land.
- ENF14221 is referenced in question 7 of the Section 5 declaration previously submitted by CREL. The planning authority letter of 1st October 2021 merely refers to an enforcement case and does not amount to a planning decision. Shocked with the contents of that letter, and similar to what the referrer is now doing, CREL choose to submit a formal declaration to the council to obtain a definitive answer. CREL's declaration documents were forwarded to Dr. (sic) Cosgrave, and it was available to the Council to issue him a copy of the declaration, thus affording him the right to refer the decision on Ref3522 to the board.
- CREL welcome the referrers clarification that the unauthorised works and change of use that took place, occurred in 2020.
- Reference is made to precedent referral cases RL2185, RL2188 and ABP-307112-20. (see sections 5.4 and 5.5 above).

- As this declaration is effectively a re-hearing of CREL declaration, the council is reminder of the judgment in the Narconon Trust v An Bord Pleanála which stated that ‘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 authorities determination’.
- The referrer ‘has not presented any new evidence, material or otherwise, in his declaration to the Council or his referral to the Board. There has been no change in the planning facts as they relate to the question now before the Board. On that basis, it should therefore follow that the Council is precluded from determining this Section 5 declaration’.

8.3.2. The judgement in Narconon Trust v An Bord Pleanála and Others is appended.

8.4. Further Responses – Response of Referrer to Observation

8.4.1. The board circulated a copy of the observation to the planning authority and to the referrer on the 25th of August 2022 and a responding submission was received from the referrers planning consultant, Feargall Kenny, on the 29th of August 2023. The subject matter of the cover letter, was:

- **Re:** Whether the change of use of C.75m2 of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub is/or is not development and or is or is not exempted development.

8.4.2. Mr. Cosgrave’s response made the following comments:

- Mr. Cosgrave was guided by the planning authority and was astonished that as the owner of the subject premises he was precluded from referring the original Section 5 referral (Ref3522) lodged by Connolly Real Estate Limited, to the board. He was advised of this by the planning authority in an e-mail on the 21st of April 2022, which stated:

“The application in question ‘REF3522’ ‘The Druids Chair Pub’ is still a live application and a decision is due to be made by Tuesday the 3rd of May.

Unfortunately there is no mechanism to facilitate observations from 3rd parties on Section 5 applications under the Planning & Development Act 2000. Only the applicant can appeal to An Bord Pleanála within four weeks of the decision being made.”

- Contrary to Mr Cosgrave being denied the opportunity to make an observation on the original Section 5, Connolly Real Estate Limited were facilitated by the law to make an observation to the board on the current reference.
- The same maps and plans were used as in the earlier section 5 referral as it “seemed to be the most convenient way to steer the issue through the Section 5 process for the second time, particularly as these documents were already in the public domain”. A more recent photograph of the external seating arrangement at that time is included in the body of the response.
- The referral was made in haste by Mr. Cosgrove who is not familiar with planning legislation and process and seemed the only course open to him in light of the attempts by Connolly Real Estate Ltd. to reopen enforcement case ENF14221. The reference to misrepresentation in the referrers cover letter of the 20th of May 2022 should be ignored.
- This current referral arose because Mr. Cosgrave was informed by the planning authority, the competent body in this matter, that he was precluded from referring the original Section 5 declaration to the board.
- The referrers agents incorrectly suggest that the change of use only took place with the onset of COVID, and the area has been used as an informal smoking and drinking area since at least 2004. It was upgraded and cars excluded with the advent of the pandemic.
- The referrer does not agree with the previous declaration issued by the planning authority and maintain that the use of the space at the front of the premises for activities associated with the primary use of the premises is exempted development.
- The circumstances of the referral cases cited by the observer, being RL2185, RL2188 and ABP-207112-20 are different from this case as they refer to pronounced changes to the rear of premises and not the front, as is the case

in this referral, which relates to the front of the premises facing a busy road and does not involve construction.

- The Narconon Trust case is with due respect to the observer not a like case. The facts in that case were that in 2018 two parties sought to overturn a section 5 referral from 2016 and if it has been overturned it would have represented an injustice to the Narconon Trust. The current case also represents an injustice as the owner of the subject property was precluded by deficiencies and legislation from making a submission to the planning authority in the course of their deliberations and were also precluded from referring the decision in Ref3522 to the board, which the transcript of the appended e-mail No.3 makes quite clear.
- As a result of deficiencies in the legislation, Mr. Cosgrave has been forced to take this section 5 referral himself. The planning authority has naturally made the same decision as previously. He has been able to refer it to the board as is his entitlement, and the board is requested in the interest of natural justice to continue consideration of the case put to them.

9.0 Statutory Provisions

9.1. Planning and Development Act, 2000

9.1.1. **Section 2(1)** states that: In this Act, except where the context otherwise requires-

“**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.

9.1.2. **Section 3(1)** states that - 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.

9.1.3. **Section 4(1)** identifies categories of development which are “exempted developments for the purposes of this Act” including **Section 4(1)(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;

- 9.1.4. **Section 4(2)** empowers the Minister to make Regulations providing for any class of development to be exempted development for the purposes of the Act.
- 9.1.5. **Section 5(1)** provides that: If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.
- 9.1.6. **Section 5(2)(a)** provides that: Subject to paragraphs (b) and (ba), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.
- 9.1.7. **Section 5(2)(b):** provides that: A planning authority may require any person who made a request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question and..
- 9.1.8. **Section 5(2)(c):** provides that: A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question.
- 9.1.9. **Section 5(3)(a)** Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.
- 9.1.10. **Section 50(2)** of the Act provides that no person shall question the validity of any decision made or act done by a planning authority or the Board under the Act

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts. A section 5 declaration is such a decision or act.

9.1.11. **Section 82(1)** of the Act provides: Notwithstanding paragraph (a), (h), (i), (ia), (j), (k) or (l) of section 4(1), or any regulations made under section 4(2), the carrying out of works to the exterior of a structure located in an architectural conservation area shall be exempted development only if those works would not materially affect the character of the area.

9.1.12. **Sections 138(1)(b) & 138(2)** provide:

(1) The Board shall have an absolute discretion to dismiss an appeal or referral—

(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to—

(i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or

(ii) any previous permission which in its opinion is relevant.

(2) A decision made under this section shall state the main reasons and considerations on which the decision is based.

9.1.13. **Section 152** sets out the procedures for the issuing of Warning Letters by a Planning Authority, while **Section 153** addresses the 'Decision on Enforcement'.

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

9.2.1. Article 10 addresses "change of use" in respect of exempted development, and provides that:

(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.

- 9.2.2. Following from Article 10(1), Part 4 to Schedule 2 to the Regulations identifies eleven different classes of use within which a change-of-use is exempt. Class 12 is of relevant to this case:

CLASS 12

Use as a Public House, meaning a premises which has been licensed for the sale and consumption of intoxicating liquor on the premises under the Licensing Acts 1833 to 2018.

10.0 Assessment

10.1. Introduction

- 10.1.1. The purpose of a Section 5 referral is to answer any question that arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of the Planning and Development Act 2000 (as amended) and not to determine the acceptability or otherwise of the question raised in the referral in respect of the proper planning and sustainable development of the area. However, the circumstances of this referral are not as simple as that, because of the nature of the question that the board has been asked to consider. In this assessment it is necessary to address whether or not a valid question has been asked and if the question asked is the same as that previously asked of and answered by the planning authority in an earlier referral (Ref3522) in respect of the same area of land, and I consider that it would be of assistance to the board to set out the background to this referral in chronological order, to facilitates its deliberations in the matter it has been asked to consider in this referral.

10.2. Background Information – Previous question Ref3522 and current referral

- 10.2.1. On the 6th of April 2022 Connolly Real Estate Limited sought a Section 5 declaration (Ref3522) from the planning authority on the following question 'Is the change of use of C.75m2 of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub development, and if so, is it exempt development. The documentation

submitted to the planning authority was cc'd to Mr. Paul Cosgrave who was stated to be the owner/reputed owner of the Druids Chair.

- 10.2.2. On the 20th of April 2022, Mr. Cosgrave, as director of Cosgrave Mount Merrion Limited, the company that owns the Druids Chair, emailed the planning authority, requesting that correspondence he submitted (which the board has not been provided with), be forwarded to the Section 5 Department of DLRCC.
- 10.2.3. Mr. Cosgrave was informed by the planning authority in an email dated the 21st of April 2022, that "The application in question 'REF3522' 'The Druids Chair Pub' Section 5 application and a decision is due to be made on Tuesday the 3rd of May. Unfortunately there is no mechanism to facilitate observations from third parties on Section 5 applications under the Planning & Development Act 2000. Only the applicant can appeal to An Bord Pleanála within four weeks of the decision being made."
- 10.2.4. On the 3rd of May 2022, the planning authority decided to issue a declaration that the change of use of C.75m² of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub constitutes development, and specifically under Section 82(1) of the Planning and Development Act, 2000 (as amended), does not constitute exempted development.
- 10.2.5. On the 18th of May 2023, by email, the planning authority provided Mr. Cosgrave with a Section 5 application form.
- 10.2.6. On the 23rd of May 2023 Mr. Cosgrave, on behalf of Cosgrave Mount Merrion Limited, requested a declaration from the planning authority on the following question, in accordance with Section 5. The question stated, verbatim:

I wish to have a Section 5 assessment in this application for the following reasons:

- 1 The previous Section 5 did not take into account ENF14221 decision.
- 2 This area provides a safe area for customers to dine + drink in fine weather.
- 3 The residents do not have any objection to the outdoor area.
- 4 There is a outdoor defibrillator for this area for community use.
- 5 The area is now safer for customers + children with the picket fence in place.
- 6 There is now a pedestrian walkway demarcated instead of parking access.

10.2.7. On the 17th of June 2022, Dun Laoghaire Rathdown County Council decided to issue a declaration, referring to the question stated above, which stated:

That having regard to:

- The Plans and particulars lodged with this Section 5 referral.
- Section 3(1), Section 4(1)(h) and Section 82(1) of the Planning and Development Act 2000 (as amended).

The planning authority hereby determined that **the indicated change of use and works**, comprising ‘...2. This area provides a safe area for customers to dine + drink in fine weather. 3. ... The outdoor area. 5. The area is now safer for customers + children with the picket fence in place. 6. There is now a pedestrian walkway demarcated instead of parking access’, at the Druid’s Chair, Killiney Village, Killiney Hill Road, Killiney Dublin, under the Planning and Development Act, 2000 (as amended), **constitutes development, and does not constitute exempted development.** (bold emphasis added).

10.3. Matters arising from Ref 3522

10.3.1. I have reviewed the online planning file for referral Ref3522, the hyperlink to which is included in an email sent by the planning authority to Mr, Cosgrave on the 18th of May 2022, and is included in Appendix 1 to Mr. Cosgrave’s responding submission to the board dated the 29th of August 2022. I note that the cover letter submitted to the planning authority with Ref3522 which was cc’d to Paul Cosgrave, c/o The Druid’s Chair Pub, Killiney Hill Road, Killiney, Co Dublin, included a footnote that stated, ‘It is not a requirement to inform the owner/ reputed owner of the premises subject to the Section 5 declaration, but a copy of the Section 5 application has been issued to him by post’. Therefore, the planning authority would have been aware of Mr Cosgrave even before he made contact by email on the 20th of April 2022.

10.3.2. Section 5(2)(c) of the PDA provides that a planning authority may request persons (including the owner of the Druids Chair) to submit information in order to enable the authority to issue the declaration on the question. In addition, Section 5(2)(a) provides that a planning authority shall issue the declaration ...where appropriate, to the owner and occupier of the land in question, ...

- 10.3.3. Having considered the information provided to it by the referrer of Ref3522, and the provisions of Section 5 of the PDA, the planning authority could have requested information from Mr. Cosgrave and/or could have issued him with a copy of the declaration to allow him the opportunity to refer the declaration to the board. The planning authority did neither, but instead informed Mr. Cosgrave that he was not entitled to make a submission on the declaration.
- 10.3.4. I note the email of DLRCC dated the 21st of April 2022, advising Mr. Cosgrave that 'Unfortunately there is no mechanism to facilitate observations from third parties on Section 5 applications under the Planning & Development Act 2000' and that 'Only the applicant can appeal to An Bord Pleanála within four weeks of the decision being made'.
- 10.3.5. I am also satisfied that Mr. Cosgrave (on behalf of CMML) as the landowner, did not have the opportunity to make a submission to the planning authority in respect of referral R3522 and was not issued with a copy of the declaration, decisions that ultimately restricted his/their ability to refer the declaration to the board, which has directly led to the current referral being submitted. However, that decision of the planning authority is not the subject matter of the current referral, and it is not within the scope of the board to reopen that declaration as part of the current referral.

10.4. Has the referrer asked the same question as in Referral Ref3522?

- 10.4.1. Instead of launching judicial review proceedings in respect of referral Ref3522, Mr Cosgrave made submitted a new Section 5 question to the planning authority.
- 10.4.2. In section 6.2 above, I have addressed the key outcomes in the judgement in Narconon Trust v An Bord Pleanála, in the Court of Appeal, whereby Costello J determined that 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 authorities determination and in such circumstances the board ought to have concluded that the referral amounted to an impermissible attack on a previous declaration, which, in substance, amounted to questioning the validity of the Section 5 declaration other than by way of section 50; that's such a challenge is prohibited by Section 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.

10.4.3. I also noted in section 6.4 above, that following from the Narconon Judgement, the board dismissed ABP-310385-21 as it was deemed to amount to an impermissible attack on an earlier Section 5 declaration, on the same or substantially the same question in respect at the same land, that the previous determination had not been challenged by way of section 50 and that there have been no change in planning facts or circumstances.

10.4.4. Although already stated a number of times, the question asked of the planning authority in referral Ref3522 was:

Is the change of use of C.75m² of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub development, and if so, is it exempt development.

10.4.5. In the current referral the question asked was:

I wish to have a Section 5 assessment in this application for the following reasons:

1. The previous Section 5 did not take into account ENF14221 decision.
2. This area provides a safe area for customers to dine + drink in fine weather.
3. The residents do not have any objection to the outdoor area.
4. There is a outdoor defibrillator for this area for community use.
5. The area is now safer for customers + children with the picket fence in place.
6. There is now a pedestrian walkway demarcated instead of parking access.

10.4.6. I am satisfied by reference to the maps submitted, that the two questions relate to the same area of land, which is stated to be a C.75m² area to the east of the Druids Chair Pub.

10.4.7. When the question asked in this application (see section 2.1.2 above) and the determination issued by the planning authority (see section 3.1.1), are compared to the question and declaration asked and answered in Ref3522, I am satisfied that Mr Cosgrave (the referrer) on behalf of CMML, did not ask the planning authority the same question as was asked of the planning authority under Ref 3522, and in that

context the principles of the judgement in Narconon Trust -v- An Bord Pleanála would not apply to the current reference as the planning authority were not and the board has not been asked to determine the same, or substantially the same question. Therefore, I am satisfied that the question asked would not constitute an impermissible collateral challenge to the declaration issued by the planning authority on Ref3522, which is claimed by the observer, in their submission to the board.

10.4.8. I am also satisfied that Mr. Cosgrave on behalf of Cosgrave Mount Merrion Limited did not improperly invoke the provisions of Section 5 of the 2000 Act and points 2 to 4 of the judgement in 'Spectre v An Bord Pleanála' (2021) IEHC 745 are relevant (see section 6.3.6), and in the current case, I consider those principles translate to: The request made by Mr Cosgrave for a declaration pursuant to s. 5(1) of the Act was not an impermissible collateral challenge to the Section 5 Declaration made in Ref3522; The referral to the board by Mr Cosgrave in the current case was a valid exercise of his right to request a review of the Declaration made by DLRCC, which itself had arisen from a valid and permissible original request by Connolly Real Estate Limited; The board is acting within its power and authority in considering and deciding the referral made by Mr Cosgrave.

10.5. What question did the planning authority answer?

10.5.1. Being satisfied that the referrer has not asked the same question as that asked of the planning authority in Ref3522, I will now address the question that the planning authority answered.

10.5.2. I am satisfied that the area subject to this referral relates to the same area as the previous referral Ref3522, by reference to a) the plans submitted by the referrer to the planning authority; b) an additional drawing submitted to the board; and c) the stated area being c75sqm;

10.5.3. The question asked by the referrer to the planning authority, states, verbatim:

I wish to have a Section 5 assessment in this application for the following reasons:

- 1 The previous Section 5 did not take into account ENF14221 decision.
- 2 This area provides a safe area for customers to dine + drink in fine weather.
- 3 The residents do not have any objection to the outdoor area.
- 4 There is a outdoor defibrillator for this area for community use.

5 The area is now safer for customers + children with the picket fence in place.

6 There is now a pedestrian walkway demarcated instead of parking access.

10.5.4. I note that the referrer did not ask the planning authority to determine whether or not items 1-6 above, either individually or collectively, is or is not development, or is or is not exempted development.

10.5.5. I also note by reference to Section 3.2 above (Planning Authority Reports) that both the conservation officer and the planning officer elaborated upon the question asked, and answered a question that in my opinion was not asked of them.

10.5.6. The conservation officer's report referred to a change of use of part of the car park, the laying of a synthetic surface, the placement of wooden picnic type benches and barrels, and a wooden picket fence, while the planning officer's report considered these same elements constituted works and that the change of use materially affected and impacted on the ACA and is considered therefore not to be exempted development, and not in accordance with Section 82(1) of the PDA.

10.5.7. The declaration issued by the planning authority on the 17th of June 2022, directly reflects the question put to the board by the referrer as set out in section 10.5.4 above, but the declaration decision refers to 'the indicated change of use'. I do not consider that the reference in point 1 of the question to 'the previous section 5', the reference in the application form to a copy of 'DLR Letter Ref 352 Re Section 5 Application (with text missing)', or the fact that the area subject to the referral is c75sqm, which is the area that was subject to the referral in Ref 3522, permits the planning authority to answer a different question to that asked and I consider that the declaration issued by the planning authority does not reflect the question asked.

10.5.8. Having reviewed the information on the file, I am satisfied that in making its determination the planning authority answered a question that it was not asked and I also consider that the board is precluded from answer a question that it was not asked regarding 'change of use'.

10.6. **What Question must be answered by the board?**

10.6.1. While Section 5(3) of the Planning and Development Act 2000 (as amended) provides that it is the declaration of the planning authority that is the subject matter of a referral to the board, a declaration cannot stand on its own without reference to the

question that has been asked, and in that respect, I consider in this case that the board is limited to the question asked of the planning authority.

10.6.2. The referral to the board included a cover letter, a copy of the Section 5 declaration, a copy of a previous Section 5 declaration (Ref3522) in respect of the same land, an enforcement letter and a letter of support from local residents.

10.6.3. A letter acknowledging receipt of the referral, dated the 18th of July 2022 was issued by the board to the referrer's agent, while a copy was also provided to the planning authority. In both letters, the subject matter heading was slightly different to the direct question asked, by the addition of the words 'Whether the following' at the start and 'Is or is not development and is or is not exempted development' at the end, as those words did not form part of the question asked of the planning authority. The subject matter stated:

Re: Whether the following:

- a. The previous Section 5 did not take into account ENF14221 decision.
- b. This area provides a safe area for customers to dine + drink in fine weather.
- c. The residents do not have any objection to the outdoor area.
- d. There is an outdoor defibrillator for this area for community use.
- e. The area is now safer for customers + children with the picket fence in place.#
- f. There is now a pedestrian walkway demarcated instead of parking access.

Is or is not development and is or is not exempted development.

The Druids Chair, Killiney Village, Killiney Hill Road, Killiney, Co Dublin.

10.6.4. The question to be determined by the board, was further rephrased in the board's internal Form 6, dated the 27th of July 2022, wherein the question was described as:

- Whether the change of use of C75m2 of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub is or is not development and or is or is not exempted development.

10.6.5. This new wording also appeared in an internal board memorandum dated the 24th of August 2022, which stated:

- A question has arisen on whether the change of use of c75sqm of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub is/or is not development and is or is not exempted development. The referrer wants the following considered also:

Whether the following:

- a. The previous Section 5 did not take into account ENF14221 decision.
- b. This area provides a safe area for customers to dine + drink in fine weather.
- c. The residents do not have any objection to the outdoor area.
- d. There is an outdoor defibrillator for this area for community use.
- e. The area is now safer for customers + children with the picket fence in place.
- f. There is now a pedestrian walkway demarcated instead of parking access.

is or is not development and is or is not exempted development.

10.6.6. In correspondence dated the 25th of August 2022, the board wrote to the planning authority and the referrers agent enclosing the submission it received on behalf of Connolly Real Estate Limited, and the following subject matter heading was used:

Re: Whether the change of use of c75sqm of the car park to a beer/outdoor drinking area at the front of the Druids Chair Pub is/or is not development and is or is not exempted development.

The referrers response to the board dated the 29th of August 2022 used the same heading.

10.6.7. Having reviewed the information on the file, I am satisfied in respect of the current case, neither the planning authority nor the board was asked to answer the same question that was asked in referral Ref3522 and I do not consider that the board can amend the question to the extent that it reads as stated in 10.6.5 or 10.6.6 above.

10.6.8. While it may have been the intention of Mr. Cosgrave to ask the same question as that asked in Ref3522, he did not do so, and while it may be acceptable to rephrase a question to clarify the planning issue raised, neither the planning authority nor the board can go beyond the question asked and seek to answer a different question. I

am satisfied that if the board were to answer the question stated in 10.6.7 above that it would have gone beyond the question asked. However, if the board considers that the question being asked by the referrer can be rephrased to read like it is set out in paragraphs 10.6.5 or 10.6.6 above, it would be answering a question which is effectively the same question or subject matter as that which was previously determined by the planning authority in Ref3522, would represent an impermissible collateral attack on the unchallenged determination of Ref3522, and in those circumstances I am satisfied that the principles and the judgment of *Narconon Trust v An Bord Pleanála* would apply and the board would be required to dismiss the referral in accordance with section 138 of the Planning and Development Act 2000 (as amended).

10.7. The question asked - is it or is it not development or exempted development?

10.7.1. Part 5 of the Section 5 application form required the referrer to provide 'details of works (where applicable) or proposed development' and included a note, which states 'Only works listed and described under this section will be assessed under this Section 5 application. (Use additional sheets if required).' The specific question asked by the referrer stated, verbatim:

I wish to have a Section 5 assessment in this application for the following reasons:

1. The previous Section 5 did not take into account ENF14221 decision.
2. This area provides a safe area for customers to dine + drink in fine weather.
3. The residents do not have any objection to the outdoor area.
4. There is an outdoor defibrillator for this area for community use.
5. The area is now safer for customers + children with the picket fence in place.
6. There is now a pedestrian walkway demarcated instead of parking access.

10.7.2. Notwithstanding my comment in paragraph 10.5.4 above, that the referrer did not ask the planning authority to determine whether or not items 1-6 above, either individually or collectively, is or is not development, or is or is not exempted development, in the interest of completeness, I will address the individual elements

of the referral as they were asked, to determine in each case, 1) if it is development; 2) if development, whether it is exempted development and 3) if exempted development, are there any restrictions to this exemption.

10.7.3. In Section 2 of the Planning and Development Act 2000, “works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. As per Section 3(1) “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.

10.7.4. **Point 1** – ‘The previous Section 5 did not take into account ENF14221 decision’.

- I consider that this is a statement and not a question capable of being answered by the board in its remit under Section 5 of the Planning and Development Act 2000 (as amended), and neither does it constitute works, development, or a material change of use. If the statement was to be interpreted as re-asking the referral question that was previously asked of the planning authority in referral Ref3522, it would not be within the capacity of the board to consider the same question anew, by reference to the Judgement of Narconon Trust v An Bord Pleanála, as it was previously determined in referral Ref3522, and I do not consider that any new planning facts or circumstances have been demonstrated by the referrer.
- I consider that the referrers point here was that in October 2021, the planning authority closed enforcement case ENF14221, and in doing so stated that it does not consider that the use of the external open space to the public house for outdoor dining/drinking in itself constitutes a material change of use of the land. I note that in referral Ref3522, by reference to the observer’s submission and the hyperlink provided by Mr. Cosgrave that the referral application form in Ref3522 did reference ENF14221, so the planning authority would have been aware of it, when making its decision in respect of Referral Ref3522. Therefore, ENF14221 is not a new planning fact or circumstance in the context of this referral.

10.7.5. **Point 2** – ‘This area provides a safe area for customers to dine + drink in fine weather’.

- I am satisfied that this is a statement, does not constitute works, development or a material change of use and is not a question that falls within the scope of Section 5 of the Planning and Development Act 2000 (as amended).

10.7.6. Point 3 – ‘The residents do not have any objection to the outdoor area’.

- I am satisfied that this is a statement, does not constitute works, development or a material change of use and is not a question that falls within the scope of Section 5 of the Planning and Development Act 2000 (as amended).

10.7.7. Point 4 – ‘There is an outdoor defibrillator for this area for community use’.

- The location of the defibrillator has not been identified by the referrer, although I did note on the occasion of the site visit that a defibrillator is located on the eastern external wall of the Druids Chair and it is also evident in the photographs submitted by the referrer. However, the referrer does not ask that a declaration be issued as to whether or not the defibrillator on the Druids Chair pub is or is not development or is or is not exempted development.
- I do consider that the placement of a defibrillator on the external wall of the building would constitute an alteration to the structure and would constitute works and development. However, I also consider that the placement of the defibrillator on the exterior of the Druids Chair pub, that is located in an architectural conservation area would not materially affect the character of the area and would therefore constitute exempted development by reference to Sections 4(1)(h) and 82(1) of the Planning and Development Act 2000 (as amended).
- Notwithstanding the above comments, as in the case of points 1-3 above, I consider that point 4 constitutes a statement, and is not a question that falls within the scope of Section 5 of the Planning and Development Act 2000 (as amended).

10.7.8. Point 5 – ‘The area is now safer for customers + children with the picket fence in place’.

- This element of the question is considered to constitute a moot point as it refers to safety as a result of the picket fence being in place rather than asking whether or not the placement of a fence along and/or close to the

roadside edge is or is not development and is or is not exempted development. On the occasion of the site visit, the fence had been removed and the area was marked out and in use as a car park.

- I am satisfied that this is a statement written at a time when the picket fence was in place, rather than a question that falls within the scope of Section 5 of the Planning and Development Act 2000 (as amended).

10.7.9. Point 6 – ‘There is now a pedestrian walkway demarcated instead of parking access’

- On the occasion of the site visit, the area has been restored to a parking area and no pedestrian walkway was evident.
- I am satisfied that this is a statement, does not contain adequate information to allow the board to consider a question as to whether or not something may or may not constitute development or exempted development and I am also satisfied that the statement is not a question that falls within the scope of Section 5 of the Planning and Development Act 2000 (as amended).

Conclusion to Assessment of Question

10.7.10. Having reviewed points 1-6, I consider that the referrer has failed to ask a valid question, that for the purposes of section 5 is capable of being answered, and I also consider that the principles of the decisions issued by the board in ABP309231-21, ABP-310086-21 and ABP-310287-21 are relevant to the current case as the extent and purpose of the case in question has not been adequately described in the question asked by the referrer and therefore it has not been possible to adequately evaluate the question within the strict confines of Section 5.

10.7.11. I also considered that to rephrase the question to that reflect the question stated by the board in its correspondence with the referrer in August 2022 or to reflect the question previously asked of and answered by the planning in referral Ref3522, goes beyond any scope that the board has and would go beyond the question asked. That said if the same question were to be asked, the board would be restricted from considering it by the judgement of *Narconon Trust V An Bord Pleanála*.

10.8. Power of the Board to Dismiss Referrals

10.8.1. Section 138 (1) of the Planning and Development Act 2000 (as amended) provides that the Board shall have an absolute discretion to dismiss an appeal or referral—

(1) The Board shall have an absolute discretion to dismiss an appeal or referral—

(a) where, having considered the grounds of appeal or referral, or any other matter to which, by virtue of this Act, the Board may have regard in dealing with or determining the appeal or referral, the Board is of the opinion that the appeal or referral —

(i) is vexatious, frivolous or without substance or foundation, or

(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to—

(i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or

10.8.2. Following from the foregoing paragraphs, that collectively make up this report and assessment, I am satisfied that the question that has been asked, does not actually constitute a question that the board is capable of answering in the context of Section 5 of the Planning and Development Act 2000 (as amended).

10.8.3. Accordingly, as per my comments in section 10.7 above, I consider that the six part question asked is in fact a series of statements rather than a question for the purpose of Section 5. Section 138 of the Planning and Development Act 2000 (as amended) states grounds upon which the Board has an absolute discretion to dismiss referrals. Insofar as the referrer has failed to ask a question capable of being answered in accordance with Section 5, I consider that Section 138(1)(b) is of relevance and I conclude that Section 138(1)(b)(i) is applicable and the referral should be dismissed.

11.0 Recommendation

11.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen stating:

I wish to have a Section 5 assessment in this application for the following reasons:

1. The previous Section 5 did not take into account ENF14221 decision.
2. This area provides a safe area for customers to dine + drink in fine weather.
3. The residents do not have any objection to the outdoor area.
4. There is a outdoor defibrillator for this area for community use.
5. The area is now safer for customers + children with the picket fence in place.
- 6 . There is now a pedestrian walkway demarcated instead of parking access.

AND WHEREAS Mr Paul Cosgrave, director of Cosgrave Mount Merrion Limited, owner and operator of the Druids Chair public house requested a declaration on this question from Dun Laoghaire Rathdown County Council and the Council issued a declaration on the 17th day of June 2022 stating that the matter constitutes development and does not constitute exempted development:

AND WHEREAS Mr. Paul Cosgrave referred this declaration for review to An Bord Pleanála on the 13th day of July 2022:

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

- (a) Section 2(1), 3(1), 4(1)(h), 5, 50, 82(1) and 138 of the Planning and Development Act, 2000, as amended,
- (b) Article 10(1) of Part 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,

- (c) The previous Section 5 referral determined by the planning authority in respect of the same land under referral Ref3522,
- (d) The judgement of the Court of Appeal in Narconon Trust v An Bord Pleanála (2021) IECA 307
- (e) Precedent Section 5 referrals ABP-309231-21, ABP-310086-21 and ABP-310237-21

AND WHEREAS An Bord Pleanála has concluded that:

Having regard to the nature of the question raised in the referral, the board is of the opinion that the 'question' consists of a series of statements and that a valid question has or questions have not in fact been raised in the referral, and the board has concluded that the question/s cannot be properly addressed or decided in isolation within the meaning of Section 5 of the Planning and Development Act 2000, as amended. Accordingly, the Board decided to exercise its absolute discretion to dismiss this referral under Section 138(1)(b)(1) (nature of the question raised) of the Planning and Development Act 2000, as amended.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Joe Bonner
Senior Planning Inspector

3rd April 2024