



Question

Whether the alteration to roof finish of new build element of granny flat is or is not development and/or is or is not exempted development.

Location

5 Royal Canal Terrace, Broadstone, Dublin 7, D07 N1K6 (Protected Structure)

Declaration

Planning Authority

Dublin City Council North

Planning Authority Reg. Ref.

0412/22

Applicant for Declaration

Paul Kelly.

Planning Authority Decision

Is not exempted development

Referral

Referred by

Paul Kelly.

Owner/ Occupier

Paul Kelly.

Observer(s)

Treasa and Kenneth Faulkner.

Date of Site Inspection

13th February 2024.

Inspector

Terence McLellan

1.0 Site Location and Description

1.1. The subject site is an end of terrace three bay, two storey house with pitched roof behind parapet wall. The site is located on Royal Canal Terrace, which fronts onto Phibsborough Road (R135) in the Broadstone area to the north of Dublin city centre. To the rear of the house is a 2-storey lean-to extension and a single storey conservatory. A recently constructed “granny flat” is located along the rear boundary of the property. This structure comprises a flat roof element curving around the rear boundary with mono-pitched roof. The floor area of the “granny flat” is approximately 50 sq.m. Royal Canal Terrace comprises 11 two storey over basement houses dating from 1826. Long gardens to the rear of the terrace extend back to Broadstone depot and there is a gated rear service laneway with access between No’s. 4 & 5.

2.0 The Question

2.1. The question has been referred to the Board as to whether the alteration to the roof finish of the new build element of granny flat is or is not development and/or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1. Dublin City Council issued a Notification of Declaration on the 20th January 2023 that the works undertaken constitute development that would not be exempted development.

3.2. Planning Authority Reports

3.2.1. The following points of note are contained within the Planner’s Report:

- The report notes the previous applications and previous refusals to grant Exemption Certificates on the basis that the alterations would contravene a condition on the original consent.

- Decision to grant an Exemption Certificate for alterations to the drainage layout was considered to be acceptable and the report notes that this was considered not to contravene the terms and conditions of the original planning permission as the condition attached by An Bord Pleanála required the development to comply with the drainage requirements of the planning authority and, based on the information submitted, that the revised layout was considered to comply with these requirements as set out in the Code of Practice.
- The alterations to the roof materials are considered to comprise a material alteration to the permitted development, which is considered to comprise works and therefore development.
- The report notes the relatively minor nature of the alterations to be retained and their lack of visibility from the public realm but notes that they were carried out at the time of construction. The cumulative impact of subsequent alterations is also noted.
- The alterations are considered to contravene condition 1 of the parent permission and cannot be considered as exempted development under Section 4(1)(h) of the Planning and Development Acts.

4.0 Planning History

Subject Site

- 4.1.1. **Planning Authority Reference - 0390/22:** An Exemption Certificate was refused by Dublin City Council on 3rd January 2023 for an alteration to mono-pitch roof (PS). The Exemption Certificate was refused on the basis that the alteration contravenes Condition 1 of the permission granted under Reg. Ref. 2026/11 which requires the development to be carried out and completed in accordance with the plans and particulars lodged with the application. It was considered that the works which have been carried out comprise development, which is not exempted development.
- 4.1.2. **Planning Authority Reference - 0332/22:** An Exemption Certificate was issued by Dublin City Council on the 16th December 2022 for alterations to the drainage layout.

- 4.1.3. **Planning Authority Reference - 0292/22:** An Exemption Certificate was issued by Dublin City Council on 28th October 2022 for alterations to the approved design of a granny flat, with alterations to screen/door in rear/laneway elevation.
- 4.1.4. **Planning Authority Reference - 0320/22:** An Exemption Certificate was issued by Dublin City Council on 26th October 2022 for an alteration to a roof light in the extension mono pitch roof and an alteration to the high level window in south elevation.
- 4.1.5. **Planning Authority Reference - 0257/22:** An Exemption Certificate was issued by Dublin City Council on 1st September 2022 for a revised external door to the granny flat.
- 4.1.6. **ABP Reference 302528 / Planning Authority Reference 0280/18:** A question arose as to whether revisions to approved granny flat as detailed:
1. Revised rooflight.
 2. Revision to window in laneway elevation.
 3. Revision to windows in garden elevation.
 4. Revised external cladding to extension.
 5. Revised extent of extension roof overlap and
 6. Revision to drainage layout are or are not development or are or are not exempted development under section 4(1)(h) of the Planning and Development Act, 2000.
- 4.1.7. The Board concluded that the revisions from the previously permitted “granny flat” are works that were carried out during construction and before completion of the permitted development and in contravention of the plans and particulars that were lodged with planning application at that time. The “granny flat” was therefore constructed in contravention of a condition of the parent permission and cannot, therefore, avail of the exempted development provisions of Article 6 of the Planning and Development Regulations, 2001, as amended, or section 4(1)(h) of the Planning and Development Act, 2000, as amended.
- 4.1.8. This case is currently subject to Judicial Review proceedings (reference Kelly v An Bord Pleanala 2019/606). At the time of report writing, no judgement had been made on the case.

4.1.9. **ABP Reference - 238610/Planning Authority Reference - 2026/11:** Permission was granted by the Board in July 2011 for the extension and conversion of the existing garage for use as a detached “granny flat” at the rear.

4.1.10. Condition 1 states as follows:

“The development shall be carried out and completed in accordance with the plans and particulars lodged with the application except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.”

Precedent Cases

4.1.11. **An Bord Pleanála Ref - RL3011:** A question arose as to whether the existing first floor windows to the rear, as modified from those permitted, are or are not development or are or are not exempted development. The Board concluded that the said first floor windows are works that were carried out during the construction of the dwelling houses and are development and, therefore, cannot avail of the exemption under section 4(1)(h) of the Planning and Development Act, 2000.

5.0 Policy Context

5.1. Development Plan

Dublin City Development Plan 2022-2028

5.1.1. The subject site is zoned “Z2” where the objective is “to protect and/ or improve the amenities of residential conservation areas.”

5.1.2. All dwellings along Royal Canal Terrace, including No. 5, are protected structures.

5.2. Natural Heritage Designations

5.2.1. None relevant.

6.0 The Referral

6.1. Referrer's Case

6.1.1. The referrer requests the Board to review the Declaration of the Planning Authority within a submission received by the Board on 16th February 2023. The grounds for review are summarised as follows:

- Compliance is not defined by the Act and in order to establish what is meant by compliance, the purpose of the Act must be the reference point.
- The planning process is intended to address only development which has a material bearing on the proper planning and sustainable development in the area.
- It is not possible to classify the subject alteration as being development without first defining 'compliance'.
- The subject alteration by virtue of context, limited extent, and location would not offend the principles of proper planning and sustainable development and is not an alteration to which the definition of works refers as is would not render the development out of character with the structure or neighbouring properties.
- The alteration is neither an alteration, work nor development as defined in the legislation.
- It is not disputed that the alteration is not specifically included in the schedule of exempted development in the Regulations, but the provisions of the Planning Act address the implicit exemption due to the trivial nature of the works. This is supported by the ruling in *Kenny v Dublin City Council*.
- 'Accordance' is not defined in the Planning Legislation or the planning permission and is taken to have the same meaning as compliance.
- Not disputed that the subject works represent a variation/alteration to the design for which permission was granted and to which Condition 1 refers. The works do not offend against the principles of proper planning and sustainable development and have therefore been carried out in material 'accordance' with the drawings and documents on foot of which permission was granted.

- Regarding Protected Structures, in the case of alterations, the definition is precise in that it must not be of such material significance to render the development out of character with the structure or neighbouring structures.
- The subject works refer to the cladding of the roof and the Planning Authority accept that, by virtue of its scale and location remote from the Protected Structure, it has no effect on the structure or its character.
- No emphasis was placed on external finishes nor was there a condition requiring finish samples for approval.
- Given that the construction of the entire granny flat was determined not to have an impact on the Protected Structure, it is difficult to see how an alteration to part of an element of the construction could be considered to have altered it to the extent it is inconsistent with the permitted or neighbouring structures.
- Subject works are not to a protected structure (Section 57). No original external features associated with the protected structure are extant on the site to the rear and works do not affect the character of the protected structure.
- It is not evident from the Planner's Report that Dublin City Council took account of similar precedent references to the Board.
- Micro and rigid application of planning legislation to works can only serve to encourage frivolous and vexatious use of the planning process and the waste of valuable planning resources.

6.2. Observation

6.2.1. An observation was received by the owners of No. 6 Royal Canal Terrace, which adjoins the subject site to the north. The main points raised in this submission are summarised as follows:

- The original planning permission was for a roof of zinc cladding, the only reference to zinc cladding on the permission related to the mono-pitch roof.
- A previous application for a Section 5 Exemption Certificate for alterations was refused by the Council and upheld by the Board. This is now subject to a judicial

review (Kelly v An Bord Pleanala 2019/606) and the Board should not consider the matter until that process is concluded.

- If the Board decide to consider the appeal, then the Board should note that the applicant has stated that the alteration was carried out during construction. As it was carried out prior to the completion of the development, the applicant cannot avail of exemptions as the works were carried out in contravention of Condition 1 of the permission.
- The Board should consider that this is one of a number of alterations and the cumulative impact of the changes should be considered.

6.3. Planning Authority Response

6.3.1. No response on file.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. In order to assess whether or not the works in question constitute development that is exempted development, regard must be had to the following items of legislation: Section 2 (1) of Part I provides the following interpretations:

“alteration” includes—

(a) plastering or painting or the removal of plaster or stucco, or

(b) the replacement of a door, window or roof, that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures...'

“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) states as follows:

“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.”

7.1.3. Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act and includes the following:

(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.”

(j) “development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such.”

7.1.4. Notwithstanding Section 4(1)(a) – (l) and the regulations made under Section 4(2), “...the carrying out of works to a protected structure, or a proposed protected structure, shall be exempted development only if those works would not materially affect the character of (a) the structure, or (b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.”

7.1.5. Section 4 (2) provides for the making of Regulations. The main Regulations are the Planning and Development Regulations, 2001 (as amended).

7.2. Planning and Development Regulations, 2001

7.2.1. Article 6 (1) of the Planning and Development Regulations states as follows:

“Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.”

7.2.2. Classes 1-8 of Part 1 of Schedule 2 relate to development within the curtilage of a house. Those which may be of relevance to the development in question include the

conversion of a garage; provision of a chimney/ flue for heating system; the construction of a garage, store, shed, etc.; the construction of a block wall or gate; or the provision of a hard surface to the rear of the house.

- 7.2.3. Under Article 9, development to which article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

8.0 Assessment

8.1 Introduction

- 8.1.1. The purpose of the referral is not to assess the acceptability of the alterations, but to determine whether or not the matter in question constitutes development, and if so, whether or not it would constitute exempted development. At the outset I note the grant of several exemption certificates for alterations to the permitted development as set out in section 4.0 above. It is not clear from the Planner's Reports when the subject alterations related to those exemption certificates were completed, whether during construction or post construction. I also note that no reference is made to the Board's previous decision in these reports. Whilst the cumulative modifications are considered, this referral relates to the question referred to the Board only. Namely, whether the alteration to the roof finish of the new build element of the 'granny flat' is or is not development and/or is or is not exempted development.
- 8.1.2. The Planning Authority is of the opinion that the modifications and variations to the design of the "granny flat" are development within the meaning of the Act and are not exempted development, as the "granny flat" has not been constructed in accordance with the plans, particulars and specifications lodged with planning application Ref: 2026/11 (ABP Ref: 238610) and is therefore in contravention of a condition of this permission.
- 8.1.3. The referrer contends that the subject alterations by virtue of context, limited extent, and location, would not offend the principles of proper planning and sustainable development, and would not constitute an alteration to which the definition of works refers on the basis that it would not render the development out of character with the

structure or neighbouring properties. The referrer does not dispute that the subject works represent a variation/ alteration to the design for which permission was granted and to which Condition 1 refers but considers that the development has been carried out in material 'accordance' with the drawings and documents of the original planning permission.

8.2. Is or is not development

- 8.2.1. The alteration in question relates to the materials used on the mono-pitch roof of the 'granny flat' structure. In this case, western red cedar shingle roofing has been installed in lieu of the approved standing seam zinc.
- 8.2.2. Section 2 (1) of the Planning and Development Act, 2000 (as amended) provides an interpretation of 'works' as including 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'. An "alteration" includes '...the replacement of a door, window or roof.... that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures...'.
- 8.2.3. The "alteration" to the roof of the "granny flat" structure may be considered "works" where the appearance of the as-constructed "granny flat" is inconsistent with the permitted structure. The definition of works is broad and covers any act or operation of construction. The alterations to the "granny flat" structure therefore can be described as "works".
- 8.2.4. 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.' I am therefore satisfied that the works undertaken constitute development.

8.3. Is or is not exempted development

- 8.3.1. The applicant refers to Section 4(1)(h) of the Planning and Development Act, 2000 (as amended) whereby the following shall be exempted development for the purposes of the Act:

(h) “development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.” 8.5.2. It may be argued that the sum of the revisions to the structure are such that the external appearance has been materially affected to an extent that it is inconsistent with the appearance of the permitted structure”.

- 8.3.2. The alteration of the roof cladding from standing seam zinc to red cedar shingles does, in my opinion, materially alter the external appearance of the structure to the extent that it is inconsistent with the appearance of that originally granted permission. In this respect, I consider the alteration to be a material change.
- 8.3.3. Reference is also made to Section 4(2) of the Act whereby the Minister may, by regulations, provide for any class of development to be exempted development for the purposes of the Act where he or she is of the opinion that “...by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend the principles of proper planning and sustainable development”. In this regard, I note the fairly concealed nature of the site and the fact that the alterations would not be highly visible from any public areas.
- 8.3.4. However, Article 6 (1) of the Planning and Development Regulations states that, “subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.”
- 8.3.5. It is stated in Article 9 of the Regulations that development to which article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.
- 8.3.6. In accordance with the judgement of *Horne v Freaney*, a development seeking exemption rights under Section 4(1)(h) must first have been completed in full accordance with its permission.

8.3.7. Condition 1 of the Board’s Decision to grant permission for the “granny flat” under ABP Ref: 238610, states that “the development shall be carried out and completed in accordance with the plans and particulars lodged with the application”. The approved plans detail standing seam zinc as the roofing material. The referrer has confirmed that the subject alteration was carried out during the course of construction and as such it is clear that the development was not completed in full accordance with the original planning permission. On that basis, the provisions of Section 4(1)(h) of the Planning and Development Act, 2000 (as amended) and Article 6 of the Planning and Development Regulations, 2001 (as amended) relating to exempted development do not apply.

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 the alteration to roof finish of the new build element of the ‘granny flat’ is or is not development and/or is or is not exempted development:

AND WHEREAS Mr. Paul Kelly requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 20th day of January 2023, stating that the matter was development and was not exempted development:

AND WHEREAS Mr. Paul Kelly referred this declaration for review to An Bord Pleanála on the 16th day of February 2023:

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,
- (c) Section 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) Permission was granted for the “granny flat” under Reg. Ref: 2026/11 (ABP Ref: 238610) and Condition 1 of said permission states that the development shall be carried out and completed in accordance with the plans and particulars lodged with the application.
- (b) Under Article 9 (1)(a)(i) of the Planning and Development Regulations, 2001 (as amended), development to which Article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,
- (c) The alterations to the roof of the permitted “granny flat” are works that were carried out during construction and before completion of the permitted development and in contravention of the plans and particulars lodged with planning application Reg. Ref: 2026/11 (ABP Ref: 238610),
- (d) The “granny flat” has been constructed in contravention of Condition 1 of Reg. Ref: 2026/11 (ABP Ref: 238610) and cannot therefore avail of the exempted development provisions of Article 6 of the Planning

and Development Regulations, 2001 (as amended) and Section 4(1)(h) of the Planning and Development Act, 2000 (as amended):

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the revisions to the permitted “granny flat” roof are development and are not exempted development.

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.

Terence McLellan
Senior Planning Inspector

21st February 2024