



An
Bord
Pleanála

Inspector's Report ABP-316086-23

Question

Whether the works of partial repair, renewal, restructuring and replacement of the vandalised burnt-out timber dwelling known as "The Puffin" is or is not development or is or is not exempted development.

Location

"The Puffin", North Beach, Rush, Co. Dublin.

Declaration

Planning Authority

Fingal County Council

Planning Authority Reg. Ref.

FS5/004/23

Applicant for Declaration

Colin Brady.

Planning Authority Decision

Is not exempted development

Referral

Referred by

Colin Brady.

Owner/ Occupier

Colin Brady.

Observer(s)

None.

Date of Site Inspection

23rd May 2024.

Inspector

Enda Duignan

Contents

1.0 Site Location and Description	4
2.0 The Question	4
3.0 Planning Authority Declaration.....	4
4.0 Relevant Planning History	6
5.0 Policy Context.....	7
6.0 The Referral.....	7
7.0 Statutory Provisions.....	11
8.0 Assessment.....	13
9.0 Recommendation.....	17
10.0	18

1.0 Site Location and Description

- 1.1.** The site in question has an address at North Beach, Rush, Co. Dublin and is located to the north of a local road known as Six Cross Lane and is accessed from a sand/gravel track. This track then extends northwards beyond the site and connects again to Six Cross Lane. The property on the site is known as 'The Puffin' and is a single storey, timber clad, bungalow type structure. The existing structure has a floor area of c. 21sq.m. and is positioned at a lower level than the adjacent track serving the site due the variation in levels. The structure has a mono-pitched roof with a height of c. 3m. The submitted plans identify that the site is served by an existing septic tank with its indicative location identified to the east.
- 1.2.** In terms of the site surrounds, the area is characterised by a mixture of structures which are typically single storey in nature and include a number of structures that are akin to mobile homes. The buildings are generally located on compact sites and I note that there is no consistency in terms of design, building lines etc. and are likely to have evolved in an ad hoc nature over time.

2.0 The Question

- 2.1.** Whether the works of partial repair, renewal, restructuring and replacement of the vandalised burnt-out timber dwelling known as "The Puffin" is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1.** The Declaration issued by the Planning Authority concluded that:
- The repair, renewal of the chalet known as 'The Puffin' at North Beach Rush, is development and is NOT exempt development, and would not come within the scope of Section 4 (1)(h) of the Planning and Development Act, 2000, as amended, not being works for the maintenance, improvement or other alteration of the original structure, but rather works for the provision of a new structure that has replaced that original structure.

3.2. Planning Authority Reports

3.2.1. Planning Report

3.2.1.1. The Fingal County Council Planning Reports form the basis for the decision. The Planning Authority refer to the commentary of the Applicant, where they state that the previous documentation submitted with the previous planning applications proves the existence of a bungalow dwelling on the site since 1958 and was renewed and replaced from time to time. The Applicant contends the works entailed the repair, renewal, restructure and replacement of the vandalised structure on site, and it is not in any material way different from that which was on site since 1958 and the new timber cladding is located on the existing floor slab and foundations and is identical in its dimensions with that which immediately pre-existed it.

3.2.1.2. The Planning Authority go on to note that the works for the refurbishment of the original chalet on the site, in so far as can be ascertained from the documentation submitted on the file by the Applicant involved the substantial removal of the original chalet and its replacement by the structure now existing on the site. Therefore, notwithstanding that the structure now existing on the site may have had the same floor area and be on the same footprint as the original chalet, would not come within the scope of section 4 (1)(h) of the Planning and Development Act, 2000, as amended, not being works for the maintenance, improvement or other alteration of the original structure, but rather works for the provision of a new structure that has replaced that original structure.

3.2.2. Other Technical Reports

Transportation: Report on file which notes that both the surfaced access routes to the lane are substandard in width, alignment and surface condition with no footpaths. Sightlines exiting from the track onto the road from both exit points are also substandard but merging onto the road from the track is possible due to the low speeds. A considerable length of Six Cross Lane and the sandy track itself is not wide enough to allow two cars to pass. In the absence of a specific scheme to upgrade this laneway, it is stated that any further development would be premature. A strategic approach would be required for further development on this road and any increase of traffic on this road would not be advised.

4.0 Relevant Planning History

4.1. The Subject Site.

F21A/0076: Retention permission refused by the Planning Authority to rebuild a single storey detached timber bungalow with a pitched roof and comprising a kitchen, living area bedroom and toilet with a total floor area of 21.3sq.m. Planning permission was also refused for waste water treatment system, sand polishing filter bed per EPA COP. 2009 soakway system per BRE 365. The application was refused for the following 2 no. reasons:

1. Objective RF42 of the Fingal Development Plan 2017-2023 relates to the replacement or conversion of chalets in exceptional circumstances subject to a number of different criteria being met. The applicant has not submitted evidence to demonstrate compliance with this objective. In the absence of such information the proposal would therefore materially contravene Objective RF42 of the Fingal Development Plan 2017-2023 and as such, would be contrary to the proper planning and sustainable development of the area.
2. Part of the proposal relates to the provision of a replacement on-site wastewater treatment system to serve the development to be retained. The application site is significantly below the minimum area required to accommodate an on-site treatment plant and the proposal fails to achieve required minimum separation distances. The proposal therefore materially contravenes Objective DMS54 of the Fingal Development Plan 2017-2023 and conflicts with the Code of Practice: Wastewater Treatment and Disposal Systems serving Single Houses published by the EPA in 2009. As such the proposal would be prejudicial to public health and contrary to the proper planning and sustainable development of the area.

F20A/0382: Retention permission refused by the Planning Authority to rebuild a single storey detached summer bungalow house, all at Puffin, Six Cross Lane, Rush, Co. Dublin. The house has a pitched roof and comprised a kitchen, living area, bedroom and toilet with a total floor area for planning of 21.3 sq.m. The application was refused for the following 2 no. reasons:

1. Objective RF42 of the Fingal Development Plan 2017-2023 relates to the replacement or conversion of chalets in exceptional circumstances subject to a

number of different criteria being met. The applicant has not submitted evidence to demonstrate compliance with this objective. In the absence of such information the development to be retained would therefore materially contravene Objective RF42 of the Fingal Development Plan 2017-2023 and as such, would be contrary to the proper planning and sustainable development of the area.

2. Having regard to the information submitted with the planning application, specifically the inadequacy of information in respect of foul drainage, the lack of the information in respect of surface water drainage and in the absence of an Appropriate Assessment Screening, it has not been demonstrated to the satisfaction of the Planning Authority that the development to be retained would not have a significant effect on Rogerstown SAC and SPA and the Rockabill to Dalkey Island SAC, either alone or in combination with other plans or projects. The proposal would, therefore, be contrary to the proper planning and sustainable development of the area.

5.0 Policy Context

5.1. Development Plan

- 5.1.1. The Fingal County Development Plan, 2023-2029 (CDP) is the operative plan and the subject site is zoned 'HA' (High Amenity) with the objective to 'Protect and enhance high amenity areas'. The vision for HA zoned land is to 'Protect these highly sensitive and scenic locations from inappropriate development and reinforce their character, distinctiveness and sense of place. In recognition of the amenity potential of these areas opportunities to increase public access will be explored. The subject site is also located within an area which has a 'Highly Sensitive Landscape' designation.

5.2. Natural Heritage Designations

- 5.2.1. The nearest designated site is the North-West Irish Sea Special Protection Area (Site Code: 004236), located c. 80m to the east of the appeal site.

6.0 The Referral

6.1. Referrer's Case

- 6.1.1. It is stated that this Section 5 referral appeal does not include any other alterations to

ground levels, foul sewer systems, water supply or access and these works do not form part of this appeal. Any such changes will be the subject of separate future applications to the Planning Authority. The Planning Authority effectively determined that given the extent of demolition and replacement of the original house, that the new build created a new dwelling which is not authorised. The Applicant strongly contests the Planning Authority's view that given the extent of demolition and replacement of the original house, that the new build created a new dwelling which is not authorised. Reference is made within their submission to a case of the Supreme Court and High Court and previous decisions of the Board.

The Supreme Court - 084/03

- 6.1.2. The Applicant contends that Judge in this case noted that – Section 4(1)(g), now 4(1)(h), by referring to 'other alterations', implies that there can be alterations which do not materially affect the external appearance of the structure or render such appearance inconsistent with the character of the structure or of neighbouring structures. In that context, 'alteration' cannot be confined to something which materially affects the appearance of the structure. The alteration which is contended for in the case referenced is the replacement on the gable wall of a new hoarding in place of the then existing hoarding. The Applicant notes that one of the essential findings from the judgement was what he called "the planning unit" which the Judge notes consisted of the gable wall with the hoarding attached and it follows from this that there has been an alteration to the planning unit by the substitution of one hoarding by another. In addition, the judgement states that it is not appropriate to look at a hoarding of this nature as a structure in isolation from the rest of the building.
- 6.1.3. It is contended that the Planning Authority were incorrect in considering 'The Puffin' in isolation from the rest of the structures and services located within the curtilage of the site which should be classified as 'the planning unit'. The Applicant notes that in this case, 'the planning unit' would include the original foundations, concrete floor slab of the original house, concrete toilet block, ESB pole and electrical connection on site, piped water supply and septic tank on site. The repair/renewal of the dwelling are substantially the same size and appearance to that which has been in place since 1958.

6.1.4. In the case of *Cardiff v O Connell*(1986) IR73, a balcony and staircase were erected at the rear of a building on which there had, some years previously, been a balcony and staircase, although of different dimensions. The Applicant refers to page 77, where Justice Finlay CJ said:

- It is clear that if a structure had a particular adjunct such as a balcony and staircase, and if for a relatively short period of time that had been removed or had become demolished, its replacement with one of substantially the same size and appearance would not materially affect the external appearance of the structure on the basis that immediately when work commenced no balcony or staircase existed."

The Applicant requests that consideration be also given to the fact that the works were renewal works carried out to comply with health and safety and that this Section 5 referral appeal would never have to be made, if the house on site was not vandalised and fire damaged by an unknown occupant.

High Court

6.1.5. The Applicant refers to the judgement of the High Court Mr. Justice Keane No. 41 MCA of Fingal County Council V David Byrne. It is stated that the character of the structure in that case consisted of a dwelling house by the sea, in an area of high amenity. The Judgement found and was satisfied that the replacement of the timber cladding to the exterior of the dwelling with external brickwork cladding was exempted development within the meaning of Section 4(1)(g) now 4(1)(h) of the Local Government (Planning & Development) Act 1963.

An Bord Pleanála

6.1.6. The Applicant refers to the decision of Bord Pleanála with particular reference to Ref. 27.RL2572. (Rose cottage, Brockagh, Glendalough, Co. Wicklow). It is stated that this Section 5 referral appeal referred to a domestic extension and the repair and renewal to a cottage. It is stated that the Board in this case concluded that:

- The works of repair renewal to Rose Cottage are of a nature and scale consistent with the purposes of maintenance, improvement, or other alterations to a structure and do not materially affect the external appearance of the

structure so as to render the appearance inconsistent with the character of the structure.

- The works come within the exempted development provisions of Section 4(1)(h) of the Planning & Development Act 2000-20023; and are exempted development.

6.1.7. In conclusion, the Applicant respectfully suggests that the Planning Authority, due to lack of history documentation or personal knowledge of the site have erred in their decision which diminishes natural justice and denies the Applicant their civil right to make good of their property, notwithstanding the volume of supporting documentation, legal and otherwise submitted that the works in this case were of repair and renewal. The Board is therefore requested to reverse the decision of the Planning Authority and make a declaration to the effect that the works of repair and renewal to The Puffin are of a nature and scale consistent with the purposes of maintenance, improvement or other alteration to a structure so as to render the appearance inconsistent the character of the structure.

6.1.8. Documentation enclosed with the appeal included:

- Site location map with site outlined in red.
- Site/ block plan/ layout plan drawing.
- Drawing of constructed development.
- Photos of vandalised dwelling.
- Previous documentation submitted to Fingal County Council, which included:
 - o Statutory Declaration dated 10th February 2021.
 - o Correspondence from family and extended family.
 - o Certified Indenture dated December 1958.
 - o Legal documentation dated October 1973 regarding same.
 - o Legal Agreement made 1971.
 - o 2 no. Indentures dated 1984.
 - o Deed of Assignment dated February 2018.
 - o Energy bills in respect of The Puffin, North Beach, Rush, Co. Dublin.
 - o Photographs of vandalised dwelling.
 - o Copy of Fingal County Council decision to Refuse Section 5.

Declaration considered to be not exempted development.

- Requisite appeal fee of €220
- Extracts from precedent court decisions.
- Extract from Bord Pleanála decision on Rose Cottage
- Previous planning statements to Planning Authority.
- Declaration submission to FCC and receipt.

6.2. Planning Authority Response

- 6.2.1. Correspondence on the file confirming that the Planning Authority have no further comment to make.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 (as amended)

- 7.1.1. Section 2 (1) of the Act provides the following definitions of relevance:

- “habitable house” means a house which –
 - a. is used as a dwelling,
 - b. is not in use but when last used was used, disregarded any unauthorised use, as a dwelling and is not derelict, or
 - c. was provided for use as a dwelling but has not been occupied;
- “house” means - a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building;
- “works” - “...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.....”

- 7.1.2. Section 3(1) of the Act states the following in respect of ‘development’:

- “In this Act, ‘development’ means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.”

- 7.1.3. Section 4 (1)(a)- (i) set out what is exempted development for the purpose 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.
- 7.1.4. Section 4 (2) provides for the making of the Regulations, Planning and Development Regulations, 2001.
- 7.1.5. Section 4(4) states - Notwithstanding paragraphs (a) , (i) , (ia) and (l) of subsection (1) and any regulations under subsection (2) , development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.
- 7.1.6. Section 5 (3) (A) states the following: '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 a fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of issuing the declaration.'
- 7.1.7. Section 193 (Special provision for structures substantially replacing structures demolished or destroyed by fire.)
1. Nothing in section 191 shall prevent compensation being paid—
 - a. in a case in which there has been a refusal of permission for the erection of a new structure substantially replacing a structure (other than an unauthorised structure) which has been demolished or destroyed by fire or otherwise than by an unlawful act of the owner or of the occupier with the agreement of the owner within the 2 years preceding the date of application for permission, or there has been imposed a condition in consequence of which the new structure may not be used for the purpose for which the demolished or destroyed structure was last used, or

- b. in a case in which there has been imposed a condition in consequence of which the new structure referred to in *paragraph (a)* or the front thereof, or the front of an existing structure (other than an unauthorised structure) which has been taken down in order to be re-erected or altered, is set back or forward.
2. Every dispute and question as to whether a new structure would or does replace substantially within the meaning of *subsection (1)* a demolished or destroyed structure shall be referred to the Board for determination.

7.2. Planning and Development Regulations, 2001 (as amended)

- 7.2.1. Article 6(1), 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 certain conditions and limitations.
- 7.2.2. Article 9 (1) of the Regulations sets out various restrictions on works that would otherwise be exempted development under Article 6.

8.0 Assessment

It should be noted that the purpose of this referral is not to determine the acceptability or otherwise of the chalet and associated works but whether the matter in question constitutes development, and if so whether it falls within the scope of exempted development.

8.1. Is or is not development

- 8.1.1. The works in this instance are described as comprising the partial repair, renewal, restructuring and replacement of the vandalised burnt-out timber dwelling on the subject site. Section 2(1) of the Planning and Development Act 2000, (as amended) includes the definition of works as "...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal....."
- 8.1.2. Section 3(1) of the Act states the following in respect of 'development', "in this Act, 'development' means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the

use of any structures or other land.”

- 8.1.3. The works carried out on the dwelling therefore constitute development within the meaning of the Act. The question that is relevant in this instance is whether the works carried out are or are not exempted development.

8.2. Is or is not exempted development

- 8.2.1. The sole question being asked in this instance is whether the partial repair, renewal, restructuring and replacement of the vandalised burnt-out timber dwelling exempted development. In Section 2 of the 2000 Act, a “house” is defined as

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

A “habitable house” is then defined as a house which:

- (a) is used as a dwelling,
- (b) is not in use but when last used was used, disregarding any unauthorised use, as a dwelling and is not derelict, or
- (c) was provided for use as a dwelling but has not been occupied.

- 8.2.2. It is evident from the documentary evidence on the file, including the commentary of the Planning Authority, the site photographs (1984, 2018, 2022), the Statutory Declaration etc., that a dwelling existed at this location which dated back to c. 1958. The appellant in their submission notes that the original house had a floor area of c. 21.6sq.m. and the original concrete slab had not been extended. The works comprised the partial renewal and restructuring work carried out to the vandalised burnt-out dwelling. The appellant is contesting the Planning Authority’s view that the new build created a new dwelling given the extent of demolition and replacement of the original house. Within their appeal submission, the appellant has referred to cases in the Supreme Court and High Court which they deem of relevance to the current appeal as I have outlined in Section 6.1 of this report. The appellant has also referred to a case dealt with by An Bord Pleanála.

8.2.3. In summary, it is argued by the appellant that the works carried out could be categorised as alterations, as the repair/renewal of the dwelling is substantially the same size and appearance to that which has been in place since 1958 and the building should not be considered in isolation to the rest of the site. It is contended that the works would therefore fall within the range of operations specified in Section 4(1)(h) of the Act, which is expressed as follows:

- '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.'

8.2.4. Having regard to the information submitted, I consider that the extent of the works carried out on site were significant. It appears from the documentation on file and having inspected the site that the entire structure (i.e. all walls and the roof) have been replaced. The relevant terms to be applied to the works carried out are improvement and alteration. Having regard to the description of works submitted by the appellant and the photographs of the pre-existing structure, it is doubtful that any of the original structure remains, it is clear from the information supplied by the appellant that the works carried out resulted in the complete replacement of the structure in question. I therefore consider, that based on the extent of works carried out, the development would be more properly described as the demolition of a previously existing dwelling and the construction of a new dwelling within the same footprint.

8.2.5. Thus, whilst I acknowledge that the appearance of the works may not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure, I consider the extent of works carried out cannot be described as improvement and alteration and are more appropriately described as demolition and replacement. There are no provisions within either the Planning and Development Act 2000 (as amended) or the Planning and Development Regulations 2001 (as amended) which refer to exemptions for this type of development. I therefore conclude that the works is development and is not exempted development.

8.3. Appropriate Assessment

8.3.1. The site is not located within a designated Natura 2000 site. However, the North-West Irish Sea Special Protection (Site Code: 004236) is located c. 80m to the east of the site. The qualifying interests and conservation objectives of the relevant site is included as follows:

Table 8.1

European Site	Qualifying Interest/ Conservation Objectives	Distance to Development
North-west Irish Sea SPA (004236)	<p>To maintain the favourable conservation condition of the qualifying interests.</p> <p>Qualifying Interests</p> <p>Red-throated Diver (<i>Gavia stellata</i>) [A001] Great Northern Diver (<i>Gavia immer</i>) [A003] Fulmar (<i>Fulmarus glacialis</i>) [A009] Manx Shearwater (<i>Puffinus puffinus</i>) [A013] Cormorant (<i>Phalacrocorax carbo</i>) [A017] Shag (<i>Phalacrocorax aristotelis</i>) [A018] Common Scoter (<i>Melanitta nigra</i>) [A065] Little Gull (<i>Larus minutus</i>) [A177] Black-headed Gull (<i>Chroicocephalus ridibundus</i>) [A179] Common Gull (<i>Larus canus</i>) [A182] Lesser Black-backed Gull (<i>Larus fuscus</i>) [A183] Herring Gull (<i>Larus argentatus</i>) [A184] Great Black-backed Gull (<i>Larus marinus</i>) [A187] Kittiwake (<i>Rissa tridactyla</i>) [A188] Roseate Tern (<i>Sterna dougallii</i>) [A192] Common Tern (<i>Sterna hirundo</i>) [A193] Arctic Tern (<i>Sterna paradisaea</i>) [A194] Little Tern (<i>Sterna albifrons</i>) [A195] Guillemot (<i>Uria aalge</i>) [A199] Razorbill (<i>Alca torda</i>) [A200] Puffin (<i>Fratercula arctica</i>) [A204]</p>	80m

8.3.2. The Applicant has not submitted an Appropriate Assessment Screening Report for the

development. In the absence of such an assessment and having regard to the coastal location of the site and the lack of information submitted by the appellant in respect of surface & foul water drainage associated with the dwelling, it is not possible to determine whether the development to be retained would result in disturbance to key species or that there will not be any significant adverse direct, indirect or secondary impacts on the integrity of the adjacent Natura 2000 site. Accordingly in the absence of this information, the Board is precluded from determining exemption in this regard by reference to Section 4(4) of the Act.

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 works of partial repair, renewal, restructuring and replacement of the vandalised burnt-out timber dwelling known as "The Puffin" is or is not development or is or is not exempted development:

AND WHEREAS Colin Brady requested a declaration on this question from Fingal County Council and the Fingal County Council issued a declaration on the 24th day of February, 2023 stating that the matter was development and was not exempted development:

AND WHEREAS Colin Brady referred this declaration for review to An Bord Pleanála on the 20th day of March, 2023:

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

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) Article 6(1) and Article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Parts 1 and 3 of Schedule 2 to the Planning and Development

Regulations, 2001, as amended,

- (d) The appeal submissions, including photographs submitted by the referrer,
- (e) The planning history of the site,
- (f) The reports of the Planning Authority and the Inspector.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The works initiated for partial repair, renewal, restructuring and replacement of the vandalised burnt-out timber dwelling known as "The Puffin" is for all practical purposes a new house replacing the original house and therefore, the works carried out on the house do not fall within the range of works set out in 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 partial repair, renewal, restructuring and replacement of the vandalised burnt-out timber dwelling known as "The Puffin" is development and is 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.

Enda Duignan
Planning Inspector

30th May 2024