



An
Bord
Pleanála

Inspector's Report ABP-318275-23

Question

Question 1: Whether the partial/incidental use of a room within dwelling house on the part ground floor for part-time art school is incidental to the enjoyment of the dwelling house and as such, does not come within the scope of Section 4 (1) (j) of the Planning and Development Act, 2000 (as amended) and the character of the residence has not altered from the intensification of the use is or is not development or is or is not exempted development.

Question 2: Whether the current warning letter dated 24th February 2023 is a completely new issue that should not be linked to file UD17-056?

Location

4 Woodhaven Drive, Woodhaven,
Kilrush Road, Ennis, Co. Clare.

Declaration

Planning Authority

Clare County Council

Planning Authority Reg. Ref.

R23-76

Applicant for Declaration Carmel Doherty

Planning Authority Decision No Declaration

Referral

Referred by Clare County Council

Owner/ Occupier Carmel Doherty

Observer(s) Lorraine Haugh

Date of Site Inspection 9th October 2024

Inspector Ciara McGuinness

1.0 Site Location and Description

- 1.1. The subject referral relates to a residential dwelling located in the Woodhaven Drive estate to the southwest of Ennis Town. Woodhaven Drive is a mature residential suburb with low density, two-storey detached houses on large plots. The wider area is predominantly residential in nature with the Westgate Business Park located to the south of the estate. A large area of open space serving the estate is located to the south of the site and is zoned as open space. The site is accessed along a cul de sac road. The referral relates to the use of a ground floor room within the dwelling house as a part-time art school.

2.0 The Question

- 2.1. The referrer has sought a determination as to 'Whether the partial/incidental use of a room within dwelling house on the part ground floor for part-time art school is incidental to the enjoyment of the dwelling house and as such, does not come within the scope of Section 4 (1) (j) of the Planning and Development Act, 2000 (as amended) and the character of the residence has not altered from the intensification of the use is or is not development or is or is not exempted development.'
- 2.2. I note that the referrer considers elsewhere in their documentation that the use does come within the scope of Section 4 (1) (j) of the Planning and Development Act, 2000. Therefore, I have rephrased the question to simply read as follows;
- "Whether the use of a room within a dwelling as a part-time art school is or is not development or is or is not exempted development"
- 2.3. I note the referrer sought a determination on a second question. This question relates to an enforcement matter, is not a valid question under the Section 5 process and is not a matter for the board to determine.
- 2.4. The purpose of this referral is not to determine the acceptability or otherwise of the part-time art school in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. The Planning Authority has not made a declaration and has referred the case to An Bord Pleanála.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Planner's Report (dated 17/10/23) notes that there is an open and active unauthorised development file in relation to the property and activity in which the applicant is seeking a Section 5 referral. It is considered appropriate that this Section 5 Referral be referred to An Bord Pleanála for determination.

3.2.2. Other Technical Reports

None

4.0 Planning History

Site History

PA Reg Ref 04/107 – Permission granted in September 2004 for the construction of 5 no. detached dormer type dwelling at Woodhaven, Cahercalla, Ennis.

Enforcement History

UD17-56 – authorised art school within dwelling house

Relevant Precedents

ABP-311946-21 – The Board decided that the use of part of the house for limited and appointment based beauty treatment is incidental to the use of the property as a house as defined at Section 2(1) of the Planning and Development Act, 2000, as amended, and therefore does not constitute a material change of use. The Board concluded that the change of use of part of a house for intermittent and limited beauty treatment, does not raise issues which are material in relation to the proper planning and sustainable development of the area and this change of use does not

constitute a material change of use having regard to the considerations outlined above and is therefore not development.

ABP-302542-18 - The Board decided that the use of part of a dwelling house (58.5sq.m. of 207 sqm ground floor) as a solicitors' office at Beachside, Kincasslagh, County Donegal is development and is not exempted development. The Board had regard to inter alia the scale, nature and layout of the solicitors' office use, the description of the use carried on therein, including receptionist function (10am-1pm Monday to Friday), the availability of access to the premises by visiting members of the public, and the presence of free-standing signage at the property advertising a solicitors' practice, as observed by the Inspector during his site visit and concluded that the change of use raises issues which are material in relation to the proper planning and sustainable development of the area. The Board concluded that a material change of use had occurred that was not covered by the exempted development provisions of Section 4 of the Act and the regulations made thereunder.

RL2220 - The referral related to a two-storey semi-detached dwelling located in a residential area. Part of the ground floor (c. 25%) of the dwelling was used as an office for a self-employed architect, with desk space for four persons. There was a separate doorbell and signage for the office. A key issue was whether there would be new planning consequences, particularly in terms of parking demand in a residential area. The referral was made by the owner / occupier. The Board decided that the use was development and not exempted development concluding that a material change of use had occurred that was not covered by the exempted development provisions of Section 4 of the Act and the regulations made thereunder.

5.0 Policy Context

5.1. Clare County Development Plan 2023-2029

The site is located within the settlement boundary of Ennis. The site is zoned 'Existing Residential'. The objective for land zoned 'existing residential' is to conserve and enhance the quality and character of the areas, to protect residential amenities and to allow for small scale infill development which is appropriate to the character and pattern of development in the immediate area and for uses that

enhance existing residential communities. Existing residential zoned land may also provide for small-scale home-based employment uses where the primary residential use will be maintained.

5.2. Natural Heritage Designations

Lower River Shannon Sac (Site Code: 002165) – c.1.5km to the east/north of the site

6.0 The Referral

6.1. Referrer's Case

6.1.1. The referrer/owner of the property, Carmel Doherty, made the following points as part of the Section 5 application to Clare County Council;

- The referrer quotes sections of the Inspectors Report in relation to ABP-311946-21. The following sections are noted;
 - Reference is made to Article 5 and Article 10 of the Planning and Development Regulations (outlined below in full in Section 7.2 of this report). The test as to whether a material change of use of the land and if so, is such use incidental to the enjoyment of the dwelling house if by reference to the nature, scale and degree of the home business and to the extent that the character of the residential area is altered.
 - Reference is made to "Irish Planning Law and Practice" in ABP-302542-18 which states that "if an architect used one room of his dwelling as a studio, did not invite clients there, employ staff or have a plate outside the door, this would not constitute a material change of use".
 - The extent and nature in the Sage case (a 6 day a week operation with 30 sessions) is also referenced whereby the court clarified that that the phrase "incidental to", is not simply a question of whether the use is not dominant, but whether at all times the house remains used as a residence, not as anything else.

[Note; the case details are outlined in Section 7.3 below]

- The business operates from a room accessed from the front door and side entrance. It has no independent access or external manifestation of a business. The dwelling house thereby retains its residential character in the streetscape setting. Additional requirements of home insurance require patrons to use the side entrance to the dwelling house.
- The room in which the business operates has no structural alterations, machinery or elaborate /intensive water or electrical based equipment and relies on limited portable furniture that could be used as part of residential occupancy.
- The business relates to a small area of the detached dormer dwelling, is restricted to 6 days of the week on a part-time basis. Classes are held Monday to Friday 4:00pm to 6:00pm and Saturday 9:00am to 6:00pm for children. An additional class for adults is held on Wednesdays 10:00am to 1:00pm. The school is operated by a single occupant of the dwelling and involves no external staff.
- The dwelling house has off-street parking and controlled on-street parking in addition to the nearby Woodhaven Business Park car parking. Visiting students are unlikely to have any discernible impact on traffic or parking to the extent that it would alter the residential character of the area.
- The business is described as intermittent and part-time use over a limited time frame.
- Notwithstanding the business use, the space is also used for personal use for art works and sculpture activities.
- While the business element constitutes a change of use of the dwelling house, it is not considered to be material having regard to the nature, scale and degree of the home and the overall character of the house remains as residential.
- It can reasonably be concluded that the business use in its ancillary purpose, nature, and degree and is not 'development' as defined in section 2 of the Act. As it is not 'development' the provisions for exempt development do not therefore apply.

6.2. Planning Authority Response

None

6.3. Further Responses

6.3.1. I note that a further submission was made to the Board by Carmel Doherty generally reiterating the issues raised in the initial Section 5 application to the Local Authority. Further additional points are summarised below;

- Reference is made to Board decisions ABP-302542-18 and ABP-311946-21.
- The student attendance is managed and staggered.
- While the business use constitutes a change of use within the dwelling house, it is not considered to be material.
- Appropriate Assessment issues are not considered to arise.
- Use of part of the house for limited and appointment-based art classes is incidental to the use of the property as a house, as defined at Section 2(1) of the Planning and Development Act 2000, as amended, and, therefore, does not constitute a material change of use.
- The use of the room does not raise issues which are material to the proper planning and sustainable development of the area.
- The development comes within the scope of Section 4(1)(j) of the Planning and development Act, 2000, as amended, as the use is incidental to the enjoyment of the house.

6.4. Observations

6.4.1. An observation has been received from Lorraine Haugh, of the adjoining property. The observation is summarised as follows;

- The matter of commercial use of the residential dwelling has been ongoing since February 2017 when an unauthorised development complaint was made.

- The PA has already decided that an unauthorised development in the form of an intensification of use has occurred and it therefore has a statutory duty to issue an Enforcement Notice or to initiate S160 proceedings or both.
- The Board needs to consider its jurisdiction to consider this referral in circumstances where the PA has already made a S154 decision following its investigation.
- The Planning Authority have made a decision that the development is an unauthorised intensification of use since 2018 and requires regularisation. Therefore, there is nothing for the Board to declare.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

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

“development” has the meaning assigned to it by Section 3,

“habitable house” means a house which—

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

"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)** of the Act states -

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

- 7.1.3. **Section 4 (1) (a) – (l)** sets out what is exempted development for the purposes of this Act. **Section 4 (2)** provides for the making of the Regulations.
- 7.1.4. **Section 4 (1) (h)** states - 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.
- 7.1.5. **Section 4 (1) (j)** states - 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;
- 7.1.6. **Section (4)(4)** of the Act 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.

7.2. Planning and Development Regulations, 2001

- 7.2.1. Article 5 of Part 2, Exempted Development sets out interpretations for this part and includes “business premises” which inter alia means “any structure or other land (not being an excluded premises) which is normally used for carrying on any professional, commercial or industrial undertaking or any structure which is normally used for the provision therein of services to persons...”.
- 7.2.2. Under Article 10, 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.

7.3. Relevant Case Law

- The question as to whether a change of use is a material one was addressed by Justice Keane in the case of *Monaghan County Council -v- Brogan*. He stated that the issues of relevance to this question are:
“...the matters which the planning authority would take into account in the event of a planning application being made for the use. If these matters are materially different (from the original use), then the nature of the use must equally be materially different.”
- In *Galway County Council v Lackagh Rock*, Justice Barron suggested that the Courts would look to matters which affect the proper planning and sustainable development of the area and whether a further burden was imposed by the present use.
- In *Carrickhall Holdings Ltd. v Dublin Corporation*, the Supreme Court held that the change of use from a hotel bar to a public bar was development which was not exempted development on the basis that the change of use resulted in a change in the whole character of the business and resulted in increased traffic, parking and other changes in the amenities for local residents.
- In *Westport UDC v Golden*, the implications in terms of traffic, noise and litter were appropriate considerations in deciding that a change of use from a sit-in restaurant to a fast food outlet was material.
- In *Cork Corporation v Connell*, the court had regard to fact that large crowds, particularly young people, would be attracted to an area in the case of a change of use from a hardware store to an amusement arcade.
- In *Sage v Secretary of State for Housing, Local Government and Communities* [2021] EWHC 2885 (Admin), the case relates to a home-based personal training business in part of an outbuilding in the garden. The court commented that an inspector properly directed by lawful guidance could not

rationality have concluded, as a matter of fact and degree, that the six day a week use, with 30 or so sessions, with the hours envisaged on this property in a tight knit residential area, was incidental or ancillary to the use of a dwelling house as a dwelling house. The main consideration was if the use of the outbuilding is incidental or ancillary, it is in law part of the single main use, and not a separate use at all. The “single main use” in reality, incorporates the incidental or ancillary use. The incidental nature was in effect rejected having regard to the scale and degree of the home business. The court made it clear that a material change of use can be made without any adverse environmental impact at all. The crucial test is whether there has been change in the character of the use having regard to a range of factors.

[Note: the definition of development in the Town and Country Planning Act 1990 similarly includes material change of use in the definition of development.]

8.0 Assessment

8.1. Is or is not development

- 8.1.1. The first issue to be decided is whether or not a change of use has occurred and if any change of use is material and therefore development. The change of use in this case relates to the use of a ground floor room within a dwelling as a part-time art school. I would note that the use of internal rooms within a dwelling for personal business use could be considered exempted development under Section 4(1)(j) of the Act as “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.” Furthermore, any alteration of a structure that affect only its interior, 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, is exempted under Section 4(1)(h) of the Act”.
- 8.1.2. Notwithstanding, I would be of the opinion that the materiality of the change of use in this case should be considered with regards to the extent to which the use of the house is being used as a business premises. In this regard, a house is defined within the Planning and Development Act, 2000 (as amended) as ‘a building or part of a

building which is being or has been occupied as a dwelling...'. Article 5 of Part 2 of the Planning and Development Regulations, 2001 (as amended) sets out an interpretation of a "business premises" as inter alia "any structure or other land (not being an excluded premises) which is normally used for carrying on any professional, commercial or industrial undertaking or any structure which is normally used for the provision therein of services to persons...".

- 8.1.3. Typically matters to be considered in deciding whether or not the change of use is material may include the area of the dwelling devoted to the use, employment of staff, clients/patrons visiting the premises, car parking and traffic impact, and other external physical changes such as the presence of signage or name plates. I note cases ABP-311946-21 and ABP-302542-18 specifically cite "Irish Planning Law and Practice" in relation to this matter, where it is stated that "if an architect used one room of his dwelling as a studio, did not invite clients there, employ staff or have a plate outside the door, this would not constitute a material change of use".
- 8.1.4. I note from the documentation submitted by the referrer that the art school operates Monday to Friday from 4.00pm to 6:00pm and Saturdays from 9:00am to 6:00pm for children. Adult classes are held on Wednesdays from 10:00am to 1pm. I also note from the documentation on file that additional out-of-term camps are also advertised by the school. The referrer is the sole operator of the art school. There were no external physical changes which would indicate the presence of the art school, however art works/displays were visible in the windows. Internal Access to the property was not facilitated on the day of my site visit. On the day of my site inspection, I was present at the site shortly before the evening class was due to start. I noted a significant increase in activity in the area with 15 cars entering the cul-de-sac road to drop off students and a total of 20 students entering the premises. It is not unreasonable to assume that this would translate to a significant need for on-street parking for adult classes where patrons would drive themselves.
- 8.1.5. In relation to whether or not the change of use is material, case law refers to the need to consider the planning implications of the use. The matter of parking and traffic resulting from visits to this house by persons for commercial reasons is of critical importance in this case. Having regard to the above factors, I would consider that the professional nature and scale of the activity makes this use materially different to the normal domestic use. The scale and frequency of visiting members of

the public would undoubtedly lead to the intensification of use on the site, resultant traffic and disturbance and impact on residential amenity. Having regard to the foregoing I conclude that a material change of use has taken place.

8.2. Is or is not exempted development

- 8.2.1. The property is normally being used for carrying out a professional/commercial undertaking to persons and this use is materially different and goes beyond the use of the house or land within its curtilage for a purpose incidental to the enjoyment the house. The development does not come within the scope of Section 4(1)(j) of the Planning and Development Act, 2000, as amended, as the use as an art school in this instance is not considered incidental to the enjoyment of the house. There is no other class of use under Part 4 of Schedule 2 that allows for a change of use from residential to art school use, or similar, as exempted development.

8.3. Other restrictions on exempted development

Appropriate Assessment

- 8.3.1. I have considered the proposed development in light of the requirements of S177U the Planning and Development Act 2000 as amended.
- 8.3.2. The subject site is not located within or adjacent to any European Site. The closest European Site, part of the Natura 2000 Network, is the Lower River Shannon SAC c.1.5 kms from the proposed development.
- 8.3.3. The development the subject of this referral is located within a residential area and comprises the use of a dwelling as a part-time art school. There are no works relating to the change of use.
- 8.3.4. Having considered the nature, scale and location of the proposed development I am satisfied that it can be eliminated from further assessment because it could not have any appreciable effect on a European Site.

The reason for this conclusion is as follows:

- Small scale and domestic nature of the development

- The location of the development in a serviced urban area, distance from European Sites and urban nature of intervening habitats, absence of ecological pathways to any European Site.

8.3.5. I consider that the proposed development would not be likely to have a significant effect individually, or in-combination with other plans and projects, on a European Site and appropriate assessment is therefore not required

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 use of a room within a dwelling as a part-time art school is or is not development or is or is not exempted development:

AND WHEREAS Carmel Doherty requested a declaration on this question from Clare County Council and the Council has not made a declaration;

AND WHEREAS Clare County Council referred this declaration for determination by An Bord Pleanála on the 19th day of October, 2023:

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

- (a) Sections 2(1), 3(1) and 4(1)(j) of the Planning and Development Act, 2000, as amended,
- (b) Part 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (c) the planning history of the site,

- (d) the scale and nature of the art school use, and the availability of access to the premises by visiting members of the public, and
- (e) the impact on the character of the residential area resulting from general activity associated with the art school use, and including parking and traffic generation, as observed by the Inspector during her site visit.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the use of a room within a dwelling as a part-time art school does not constitute use as a house as defined at Section 2(1) of the Planning and Development Act, 2000, as amended, and therefore such use is a change of use;
- (b) the change of use from use as part of a house to use as a part-time art school, raises issues which are material in relation to the proper planning and sustainable development of the area and this change of use constitutes a material change of use having regard to the considerations outlined above and is therefore development;
- (c) the development does not come within the scope of Section 4(1)(j) of the Planning and Development Act, 2000, as amended, as the use as an art school in this instance is not considered incidental to the enjoyment of the house;
- (d) there are no other provisions in the Act or Regulations whereby such development would be exempted in this instance;

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 use of a room within a dwelling as a part-time art school 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.

Ciara McGuinness
Planning Inspector

18th October 2024

Appendix 1 - Form 1

EIA Pre-Screening

[EIAR not submitted]

An Bord Pleanála Case Reference			
Proposed Development Summary	Use of a part a dwelling as a part-time art school		
Development Address	4 Woodhaven Drive, Woodhaven, Kilrush Road, Ennis, Co. Clare.		
1. Does the proposed development come within the definition of a 'project' for the purposes of EIA? (that is involving construction works, demolition, or interventions in the natural surroundings)		Yes	
		No ✓	No further action required
2. Is the proposed development of a class specified in Part 1 or Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) and does it equal or exceed any relevant quantity, area or limit where specified for that class?			
Yes		Class.....	EIA Mandatory EIAR required
No			Proceed to Q.3
3. Is the proposed development of a class specified in Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) but does not equal or exceed a relevant quantity, area or other limit specified [sub-threshold development]?			
		Threshold	Comment (if relevant)
			Conclusion
No		N/A	No EIAR or Preliminary Examination required
Yes			Proceed to Q.4

4. Has Schedule 7A information been submitted?

No		Preliminary Examination required
Yes		Screening Determination required

Inspector: _____ **Date:** _____