



An
Bord
Pleanála

Inspector's Report ABP-318746-23

Question

Whether (1) the intensified change of use from residential to commercial short-term let, construction of wooden, roofed, (2) construction of wooden jetty to facilitate kayaking on lake for use of commercial guests is or is not development or is or is not exempted development.

Location

Teach Joe, 2 Knockastoller, Bunbeg, Co. Donegal, F93 P3X4.

Declaration

Planning Authority

Donegal County Council

Planning Authority Reg. Ref.

2357

Applicant for Declaration

Máire Nic Niallais and Niall Hackett.

Planning Authority Decision

(1) Is not development
(2) Is development and is exempted development

Referral

Referred by

Máire Nic Niallais and Niall Hackett.

Owner/ Occupier	Paul Corcoran and Eibhlinn Johnston.
Observer(s)	N/A.
Date of Site Inspection	23 rd of October 2024.
Inspector	Stephanie Farrington

1.0 Site Location and Description

- 1.1. The referral site is located in the townland of Knockastoller, Bunbeg. The site is currently occupied by a dwelling Teach Joe, 2 Knockastoller, Bunbeg. Access to the property is provided via a local road from the R257 to the east. The site is adjoined by an exist lake to the north and west (Loch Chnoc an Stollaire).

2.0 The Question

- 2.1. The questions before the Board relate to the following:
- (1) Whether the intensified change of use from residential to commercial short term let is or is not development, or, is or is not exempted development.
 - (2) Whether the construction of a wooden jetty to facilitate kayaking on lake for use of commercial guests is or is not development, or, is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

Donegal County Council issued a Declaration dated the 29th of November 2023 outlining the following:

- (1) The intensified change of use from residential to commercial short-term let is not development.
- (2) Construction of wooden, roofed, open-ended entertainment bar and hot tub area with associated drainage is development and is not exempted development.
- (3) Putting in foundation and gravel cover on an old unused road on commonage in order to create new private entrance road to commercial Airbnb is development and is not exempted development.
- (4) Construction of wooden jetty to facilitate kayaking on lake for use of commercial guests is development and is exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

Planner's Report (24/11/2023)

The planner's report reflects the decision of the planning authority. The following provides a summary of the key points raised:

- The report refers to the planning history pertaining to the house. The house was built prior to 1995 and there was no condition attached to the original consent restricting the occupancy of the dwelling. The use of the house as a short-term holiday let does not constitute a material change of use.
- There are no designated rent pressure zones within the County, therefore the restrictions on short-term let as set out within Section 6 of the Planning and Development Regulations as amended do not apply.
- The wooden roofed entertainment bar and hot tub area constitutes development and exceeds the limitations set out in Class 3 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended).
- The report cites the provision of Class 6 Part 1 of the Planning and Development Regulations which details exemption for the provision of hard surface within the curtilage of the house. The wooden jetty is located forward of the front building line of the house and is less than the 25 sq.m. floor area limitation and can be regarded as exempted development under Class 6 Part 1 of Schedule 2.
- The report cites the provisions of Class 13 Part 1 of Schedule 2 General Exempted Development set out in the Regulations. A hard surface has been laid to form a new access road into the appeal site and it cannot be considered as repair or improvement under Class 13.
- The report cross refers to the Planning Authority's Appropriate Assessment Screening Report and outlines that the Planning Authority has determined that full Appropriate Assessment of the proposed development is not required in this instance.

3.2.2. Other Technical Reports

Appropriate Assessment Screening ((27/11/2023))

The PA's Appropriate Assessment Screening outlines that the referral site is located 270m north of the Gweedore Bay and Islands SAC (Site Code 001141).

Section 3 of the report outlines that the proposed development will not have a significant effect on nearby Natura 2000 sites having regard to the following considerations:

- The distance of the proposed development from the SAC.
- The minor nature of the proposed development
- The fact that the proposed development will not impact on any habitats/species for which the Natura site has been designated.

An Appropriate Assessment of the development is not required as it can be excluded on the basis of objective scientific information that the proposed development will have a significant effect on nearby Natura 2000 Sites i.e. Gweedore Bay and Islands SAC Special Area of Conservation (Site Code 001141).

4.0 Planning History

PA Ref: 1168/82

- Permission granted in August 1982 for the erection of a dwelling with septic tank at Knockastoller, Bunbeg.

Enforcement

- The planner's report refers to a live enforcement case in respect of the property (Ref UD2379).

5.0 Policy Context

5.1. Development Plan

County Donegal Development Plan 2024-2030

- 5.1.1. The County Donegal Development Plan 2024-2030 was adopted on the 16th of May 2024 and came into effect on the 26th of June 2024.
- 5.1.2. Map 6.3.1 of the County Donegal Development Plan identifies Rural Area Types within Co. Donegal. The referral site is located within an “Areas Under Holiday Home Pressure”. Policy RH-P-2 of the Plan relates to Areas Under Strong Holiday Home Influence and outlines the following:

“To consider proposals for new one-off rural housing within ‘Areas Under Strong Holiday Home Influence’ from prospective applicants that can provide evidence of a demonstrable economic or social need (see ‘Definitions’) to live in these areas including, for example, the provision of evidence that they, or their parents or grandparents, have resided at some time within the area under strong holiday home influence in the vicinity of the application site for a period of at least 7 years. The foregoing is subject to compliance with other relevant policies of this plan, including Policies RH-P-9.

This policy shall not apply where an individual has already had the benefit of a permission for a dwelling on another site, unless exceptional circumstances can be demonstrated.

An exceptional circumstance would include, but would not be limited to, situations where the applicant has sold a previously permitted, constructed and occupied dwelling, to an individual who fulfils the bonafides requirements of that permission.

New holiday homes will not be permitted in these areas”.

- 5.1.3. Map 11.1 relates identifies Scenic Amenity Areas within the County. 3 Separate Landscape Classifications are identified for the County namely: Areas of Especially High Scenic Amenity (EHSA), Areas of High Scenic Amenity (HSA) and Areas of Moderate Scenic Amenity (MSA). The referral site is located within an “Area of High Scenic Amenity”. Section 11.2.2 of the Plan provides the following description of these areas:

“Areas of High Scenic Amenity (HSA): These are landscapes of significant aesthetic, cultural, heritage and environmental quality that are unique to their locality and form a fundamental element of the landscape and identity of County Donegal. These areas have the capacity to absorb sensitively located development of scale, design and use that will enable assimilation into the receiving landscape and which does not detract from the quality of the landscape, subject to compliance with all other objectives and policies of the plan”.

5.1.4. Policy L-P-2 seeks: To protect areas identified as ‘High Scenic Amenity’ and ‘Moderate Scenic Amenity’ on Map 11.1 ‘Scenic Amenity’. Within these areas, only development of a nature, location and scale that integrates with, and reflects the character and amenity of the landscape may be considered, subject to compliance with other relevant policies of the Plan.

5.1.5. There are no Scenic Views/ Prospects designated within the vicinity of the site.

5.2. Natural Heritage Designations

5.2.1. The nearest designated sites to the referral site is the Gweedore Bay and Islands SAC (Site Code 001141), which is located approximately c.300m to the south of the development site. Gweedore Bay and Islands (Site Code 001141) is also designated as a Proposed Natural Heritage Area (pNHA).

6.0 The Referral

6.1. Referrer’s Case

6.1.1. The referral is made by Máire Nic Niallais and Niall Hackett, Conc an Stollaire, An Bun Beag. The following provides a summary of the key points raised.

- The referral refers to the Section 5 Declaration made by Donegal County Council under PA Ref: 23/57. The referrer seeks to appeal the findings of the Planning Authority in respect of the following elements of DCC’s decision:

(1) The intensified change of use from residential to commercial short-term let is not development.

(2) Construction of wooden jetty to facilitate kayaking on lake for use of commercial guests: Is Development and is Exempted Development

(1) The intensified change of use from residential to commercial short-term let

- The referrer raises concern in relation to the impact of the use of the property for short term let on the residential amenity of existing dwellings in the area. The referral raises concerns in relation to noise associated with the use of the outdoor facilities, increased traffic on the road and increased pressure on the septic tank beside a lake and adjacent to a SAC.
- The referral outlines that the house is being used as a commercial party venue rather than residential purposes.
- The referral outlines that this is one of two properties run by the same owner with the same facilities (hot tub, deck, bar and entertainment area). The second address is Charley Neddy's, Derryreel, Dunfanaghy.

(2) Construction of wooden jetty to facilitate kayaking on lake for use of commercial guests

- The referral questions whether the construction of the wooden jetty for commercial use can be built without the requirement of planning permission.
- The referral outlines that the wooden walkway was built to facilitate Airbnb guests with direct access to the lake in kayaks.
- The referrer outlines that their property backs onto the lake and raises privacy concerns associated with guest's use of the lake. The referral outlines that the development interferes with their peaceful enjoyment of their home.

6.2. Planning Authority Response

6.2.1. Donegal County Council provided a response to the referral. The following provides a summary of the key points raised.

- The majority of the matters raised by the appellant have either previously been addressed in the planning report or relate to civil matters concerning rights of way.

- The PA's response refers to clarification from An Bord Pleanála in relation to the use of a dwelling house for short-term letting purposes. The Planning Authority acknowledge this clarification and further acknowledge that the change of use of an existing residential dwelling to a holiday home in use as short-term letting constitutes development and is not exempted development.

6.3. Owner/ occupier's response

- 6.3.1. A response to the Referral was submitted on behalf of the property owner. The following provides a summary of the key points raised:

Intensified Change of Use from Residential to Commercial Short-Term let

- The property is not use on a large-scale commercial basis. It is predominantly used by the applicant and their family (c. 10 times per annum).
- The property was erected in 1970's or early 1980's. There is no condition attached to the permission restricting its use.
- The house is not located within a Rent Pressure Zone and permission is not required to change the use of the property to short term let on this basis.
- In 2023 the property was let out 18 times and is used primarily by families (13 times). The response refutes the claim by the appellant that the house is used by youths playing loud music etc.
- The use of the property for lease is exempted development.

Construction of wooden Jetty to facilitate kayaking on the lake for use of commercial guests

- The adjoining lake is used for recreational purposes by the local community.
- The property owner and their family use the lake for kayaking and have installed a wooden walkway from where the kayaks can be launched.
- The kayaks are stored in the garage beside the house and are available for use by guests to the property.
- The putting in place of a wooded walkway to the river and small jetty type structure at the end is exempted development and as set out in Class 6, Part

1, Schedule 2 which relates to development within the curtilage of a house. The structure is stated as being less than 25 sq.m.

Other matters

- The existing roadway is and was the roadway to the house, was not disused and maintenance was carried out for ease of access.
- The response refers to the proximity of the dwelling to the appellants and outlines that noise from both properties will be heard in a rural area.
- The owner seeks to regularise existing development on site and outlines that this may require submission of a planning application for retention. The points that have been appealed by the appellants should not require planning permission.

Attachments

- The response includes a copy of email correspondence from the owner's agent and DCC's enforcement section (dated 26th of October 2023).

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. Section 2(1) of the Act states the following:

- "habitable house" means a house which— (a) is used as a dwelling, (b) is not in use but when last used was used, disregarding any unauthorised use, as a dwelling and is not derelict, or (c) was provided for use as a dwelling but has not been occupied.
- "house" means a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building;
- 'development' has the meaning assigned to it by Section 3;

- “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.
- “use”, in relation to land, does not include the use of the land by the carrying out of any works thereon.
- “structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and - (a) where the context so admits, includes the land on, in or under which the structure is situate

7.1.2. Section 3(1) states that:

- ‘*development*’ means, except where the context otherwise requires, the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land, or
- (b) development within the meaning of Part XXI (inserted by section 171 of the Maritime Area Planning Act 2021).

7.1.3. Section 3A of the P&D Act delas with short term lettings and states as follows:

- 3A (1) The use of a house or part of a house situated in a rent pressure zone for short term letting purposes is a material change in use of the house or part thereof, as the case may be.
- Section 3 A (4) outlines that: This section shall not operate to abrogate or amend the law with regard to—(a) lettings (including short term lettings) outside a rent pressure zone, or, (b) lettings (other than short term lettings) in a rent pressure zone.
- Section 3 A (5) In this section—

"rent pressure zone" means—(a) any area standing prescribed for the time being under section 24A of the Residential Tenancies Act 2004, or (b) an administrative area deemed to be a rent pressure zone under section 24B of that Act;

‘short term letting’ means the letting of a house or part of a house for any period not exceeding 14 days, and includes a licence that permits the licensee to enter and reside in the house or part thereof for any such period in consideration of the making by any person (whether or not the licensee) of a payment or payments to the licensor.

- 7.1.4. Section 4(1): sets out developments that shall be exempted development for the purposes of this Act.
- 7.1.5. Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations 2001-2020.
- 7.1.6. Section 5(1): 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.
- 7.1.7. 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. (b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).
- 7.1.8. Section 5(4): Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

7.2. Planning and Development Regulations, 2001

7.2.1. Article 6(1) of the Planning and Development Regulations, 2001 as amended 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.”

Class 6 Part 1 of Schedule 2 (Exempted Development General)

Class 6	Conditions and Limitations
(a) The construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house.	The level of ground shall not be altered by more than 1 metre above or below the level of the adjoining ground.
(b) Any works within the curtilage of a house for— (i) the provision to the rear of the house of a hard surface for use for any purpose incidental to the enjoyment of the house as such, or, (ii) the provision of a hard surface in the area of the garden forward of the front building line of the house, or in the area of the garden to the side of the side building line of the house, for purposes incidental to the enjoyment of the house as such	Provided that the area of the hard surface is less than 25 square metres or less than 50% of the area of the garden forward of the front building line of the house, or 50% of the area of the garden to the side of the side building line of the house, as the case may be, whichever is the smaller, or if the area of the hard surface is 25 square metres or greater or comprises more than 50% of the area of the garden forward of the front building line of the house, or 50% of the area of the garden to the side of the side building line of the house, as the case may be, it shall be constructed using permeable

	materials or otherwise allow for rainwater to soak into the ground.
<i>Class 24</i>	
<p>The carrying out by any harbour authority of development of the following description —</p> <p>(a) works authorised by a harbour works order in pursuance of section 134 of the Harbours Act, 1946 (No. 9 of 1946), which consist of the construction, reconstruction, extension or removal of docks, graving docks, quays, wharves, jetties, piers, embankments, breakwaters, roads, viaducts, tram-ways, railways or aerodromes (but not the construction or erection of sheds, transit sheds, transshipment sheds, silos, stores and other structures or the reconstruction or alteration of such excepted structures so as materially to affect the design or external appearance thereof), or</p> <p>(b) the cleaning, scouring, deepening, improving or dredging of the harbour or the approaches thereto or the removal of any obstruction within the limits of the harbour, and the use of land for the disposal of dredged material in accordance with an objective in a development plan for the area in which the land is situated.</p>	

7.2.2. Article 6(5): (a) Each of the following shall be exempted development:

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

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

And

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

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

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

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

(II) the development –

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

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

(b) Where a person proposes to undertake development to which paragraph (a) applies, he or she shall, not later than 2 weeks before the commencement of the development, notify the planning authority in whose functional area the proposed development will occur of the proposed development, or cause that planning authority to be so notified, in writing.

Article 9

7.2.3. Article 9 sets out various restrictions on exemption under Article 6.

(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act— (a) if the carrying out of such development would—

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act

(viiB) Comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,

Article 10 – Changes of Use

(1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not—

(a) involve the carrying out of any works other than works which are exempted development,

(b) contravene a condition attached to a permission under the Act,

(c) be inconsistent with any use specified or included in such a permission, or

(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

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

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

7.3. Precedent Referral Decisions

- 7.3.1. ABP Ref: 314076-22: The Board determined on the 12th of December 2023 that change of use of a dwelling, as a principal place of residence (outside of a rent

pressure zone) to a dwelling in use for short term letting purposes, is development and is not exempted development at 31 The Rectory, Fahan, Co. Donegal F93TH73

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

(a) The use of a residential apartment for short term holiday lettings, as described at Apartment 1A, 5-5A Crown Alley, Dublin Constitutes a change of use,

(b) The change of use to an apartment for short term holiday lettings, as described above, raises planning considerations that are materially different to the planning considerations relating to the permitted use as a residential apartment. In particular,

(i) the extent and frequency of coming and going to and from the apartment by short term renters and servicing staff,

(ii) associated concerns for other residents in respect of security and general disturbance, and

(iii) the fully commercial nature of the activity.

(c) The change of use constitutes; therefore, a material change of use and is development as defined in section 3 of the Planning and Development Act, 2000, and

(d) Neither the Planning and Development Act 2000, as amended, or the planning and Development Regulations, 2001, as amended, provide any exemption in respect of such a material change of use.

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

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

7.3.5. RL2847: The Board determined on the 15th of June 2011 that the excavation of a channel and harbour and the erection of a floating jetty at Carrigeen Cottage, Kilglass, County Roscommon is development and is not exempted development. The Board determined the following in this case.

(a) the field within which the mooring facility has been constructed including the harbour and the jetty does not form part of the curtilage of the house on the opposite side of the county road,

(c) the floating jetty does not come within the description provided in any of the classes set out in Part 1 of Schedule 2 to the Planning and Development Regulations, 2001.

7.3.6. RL.2531: The Board determined on the 18th of November 2008 that (a) the alteration of the floating walkway (jetty) to the north-west of the approved marina from 3 to 4 Bays and (b) the floating walkway (jetty) to the south-east of the approved marina at Jamestown Townland, Jamestown, County Leitrim is development and is not exempted development. Of relevance to the subject referral the Board direction outlined that floating walkways (jetties) do not come within the description provided in any of the classes set out in Schedule 2 to the Planning and Development Regulations, 2001.

7.4. **Case Law**

7.4.1. The following case law is of relevance:

- PL29/8/279 McMahon v Dublin Corporation 1997 1 ILRM 227, The Board's declaration was upheld. Barron J held that "in the absence of explicit reference in the planning permission to a permitted use, regard must be had to the use for which the structure is designed, i.e, the use which was objectively intended for the structure having regard to the relevant planning documentation. The purpose for which the plaintiff's homes had been designed was private residential, whereas the use to which they were currently being put was commercial."
- The question of whether a change of use is a material one was addressed by Keane J in the case of Monaghan County Council v Brogan [1987] I. R. 333. He stated that the issues of relevant to the question are:

"the matters which the planning authority would take into account in the event of a planning application being made for its use, If these matters are materially different (from the original use), then the nature of the use must equally have been materially different".

8.0 Assessment

8.1. Introduction

8.1.1. The Board will note that under PA Ref: 23/57 Donegal County Council issued a Declaration in respect of 4 separate questions as detailed below:

- (1) The intensified change of use from residential to commercial short-term let.
- (2) Construction of wooden, roofed, open-ended entertainment bar and hot tub area with associated drainage.
- (3) Putting in foundation and gravel cover on an old unused road on commonage in order to create new private entrance road to commercial Airbnb
- (4) Construction of wooden jetty to facilitate kayaking on lake for use of commercial guests.

8.1.2. The subject matter of the referral relates solely to Items (1) and (4) of the Planning Authority's Declaration. In the interest of clarity, I have only considered the specific questions raised within the referral.

8.1.3. The purpose of this referral is not to determine the acceptability or otherwise of the above proposal in terms 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.

8.2. Is or is not development

8.2.1. The Board has been requested to determine the development status of two particulars as detailed below:

1. Whether the intensified change of use from residential to commercial short term let is or is not development, or, is or is not exempted development

2. Whether the construction of a wooden jetty to facilitate kayaking on lake for use of commercial guests is or is not development, or, is or is not exempted development.

8.2.2. The first question to consider is whether or not the proposal constitutes development under the definitions contained in the Planning Act. Section 3(1) of the Act defines 'development' as the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land. In terms of determining whether development has occurred, the relevant tests to apply is to establish whether 'works' were carried out and/or whether there was a material change in the use of the structure or land.

8.2.3. The subject matter of the referral relates to both "works" and "material change of use". I consider the questions raised in turn as follows.

1. *Whether the intensified change of use from residential to commercial short term let is or is not development, or, is or is not exempted development*

8.2.4. The key point arising from the first question is whether a material change of use occurred and if so, is this exempted development.

8.2.5. At the outset, I note Section 2(1) of the Planning and Development Act, 2000 includes the definition of "house" as a building or part of a building which is being used or has been occupied as a dwelling or was provided for use as a dwelling but not occupied and where appropriate includes building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building.

8.2.6. The applicant's response to the referral outlines that the house is not a permanent place of residence. The dwelling is used for by the owner as a holiday home and for short term commercial let. I refer to the planning history of site wherein permission was granted in 1982 for the erection of a dwelling and septic tank on site under PA Ref: 1168/82. In the absence of occupation by a permanent resident there is no residential use and therefore, a change of use has occurred.

8.2.7. In accordance with Section 3(1) of the Act, for a change of use to result in 'development', the change of use must be 'material'. Use for short-term lettings amends the duration of stay and materially changes the tenure profile of occupants, to visitors who stay at the property for as short as one night. Such use involves

associated activities and issues such as traffic, maintenance, noise and disturbance which contribute to an intensification of activity on the referral site. I note the concerns raised by the referrer in this regard. The Board has determined in a number of cases, including those referenced at Section 7.3 of my report, that a change of use from residential to short-term letting is a material change of use and I would concur with this determination.

8.2.8. In view of the foregoing, I consider the test for material change of use is met and the short-term lettings use constitutes development.

2. *Whether the construction of a wooden jetty to facilitate kayaking on lake for use of commercial guests is or is not development, or, is or is not exempted development.*

8.2.9. Within Section 2, (1) of the Planning Act, 'works' are defined as 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'.

8.2.10. In respect of Item 2, the construction of the wooden jetty involved the carrying out of works as defined in the Act and would therefore constitute development. I am satisfied that the construction of the wooden jetty constitutes development as per Section 3 of the Planning and Development Act, as amended.

8.3. **Is or is not exempted development**

8.3.1. The second question to be addressed is whether those development works constitute exempted development under any of the provisions set out in either the Planning and Development Act 2000 as amended or the Planning and Development Regulations. I consider the questions raised in turn as follows:

1. *Whether the intensified change of use from residential to commercial short term let is or is not development, or, is or is not exempted development*

8.3.2. I have had regard to the Planning and Development Act 2000 (Exempted development) No 2 Regulations 2019 amend Article 6 (Exempted Development) by providing an exemption for short-term letting in a rent pressure zone. I am satisfied that this provision does not apply in this instance as the subject site is not located within a rent pressure zone.

- 8.3.3. I have already outlined a number of instances whereby the Board determined that a change of use from permanent residential to short-term letting is a material change of use.
- 8.3.4. Regarding exemptions for this change of use, Article 10(1) of the Regulations provides an exemption for a change of use within a class specified in Part 4 of Schedule 2. Short-term lettings use is not an identified use type under Part 4 so the potential for a change of use under this exempted development right does not arise. I am not aware of any other exempted development provision under which the use of the subject house as short-term letting accommodation could be argued to constitute exempted development.
- 8.3.5. Having regard to the above reasons and considerations I consider that the material change of use of the subject house from residential use to short-term holiday lettings use is not exempted development.

2. The construction of a wooden jetty to facilitate kayaking on lake for use of commercial guests is or is not development, or, is or is not exempted development.

- 8.3.6. The applicant's response to the referral outlines that the jetty provides access to the lake for kayaking. Donegal County Council's declaration outlines that the jetty would be classified as exempted development having regard to the provisions of Class 6 (b)(ii) of the Planning and Development Regulations as cited below:

(b) Any works within the curtilage of a house for— (i) the provision to the rear of the house of a hard surface for use for any purpose incidental to the enjoyment of the house as such, or, (ii) the provision of a hard surface in the area of the garden forward of the front building line of the house, or in the area of the garden to the side of the side building line of the house, for purposes incidental to the enjoyment of the house as such

- 8.3.7. I have also given consideration to the provisions of Class 6 (a) which relates to *"the construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house"*.
- 8.3.8. At the outset, I consider the reference to works within the curtilage of a house. The Planning and Development Act 2000 as amended does not provide a definition for

the term curtilage. The Oxford Dictionary definition of curtilage relates to *‘an area of land attached to a dwelling-house and forming one enclosure with it’*. I also refer to The Guidelines on Architectural Heritage Protection (in the context of Protected Structures – Section 13.1.1) which state *‘By definition, a protected structure includes the land lying within the curtilage of the protected structure and other structures within that curtilage and their interiors. The notion of curtilage is not defined in law, but for the purposes of these Guidelines Curtilage is taken as meaning the parcel of land immediately associated with that structure and which is (or was) in use for the purpose of the structure’*.

- 8.3.9. On site inspection I note that the wooden jetty is located forward of the front building line of the house. The structure extends from the front garden of the property to the lake adjoining the house. It is my view that the structure is located primarily within the lake and surrounding wetland area which adjoins the house and falls outside of the curtilage of the house. Having carried out a site inspection I do not consider that the structure falls solely within the area of the garden forward of the front building line of the house as provided for under Class 6 (b) (ii) or within the curtilage of the house as provided for under Class 6 (a) and (b).
- 8.3.10. I am furthermore not satisfied that the wooden jetty falls within the definition of a hard surface as provided for under Class 6(b) (ii). Hard surface is defined within the Collins English Dictionary as *“to make the surface of (something) hard or firm, as by compacting or paving it”*. I do not consider that the jetty falls within this definition.
- 8.3.11. I refer to the referral cases under ABP Ref: RL2847 and RL2531 which outline that floating walkways (jetties) do not come within the description provided in any of the classes set out in Schedule 2 to the Planning and Development Regulations, 2001. In the interim period since the determination of these referrals I note that jetties are specifically referred to under Class 24 of the regulations (which relates to the carrying out of development by harbour authorities). There are no exemptions for such structures within or adjoining private residences by private individuals.
- 8.3.12. Having regard to the above reasons and considerations I do not consider that the development falls within the definition of Class 6 (a) or (b) or any other class specified in column 1 of Part 1 of Schedule 2 of the Planning and Development

Regulations. I consider that the construction of a wooden jetty to facilitate kayaking on the lake is not exempted development.

8.4. Restrictions on exempted development

- 8.4.1. As I have concluded that the works carried out constitute development that is not exempted development, the question of any possible restriction on exempted development does not arise.

9.0 Appropriate Assessment

The subject matter of this referral relates to the change of use of a dwelling to a dwelling in use for short-term letting purposes and construction of a wooden jetty. The site is not located within or adjacent to any designated European site, the closest such sites being the Gweedore Bay and Islands SAC located c.300m to the south of the site. Having regard to the nature and small scale of the development, I do not consider that any Appropriate Assessment issues arise.

10.0 Recommendation

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

WHEREAS a question has arisen as to whether (1) the intensified change of use from residential to commercial short term let, (2) The construction of a wooden jetty at Teach Joes, 2 Knockastoller, Bunbeg, Co. Donegal is or is not development or is or is not exempted development:

AND WHEREAS Máire Nic Niallais and Niall Hackett requested a declaration on this question from Donegal County Council and the Council issued a declaration on the 29th day of November 2023 stating that:

(1) the intensified change of use from residential to commercial short term let is not development,

(2) The construction of a wooden jetty is development and is exempted development.

AND WHEREAS Máire Nic Niallais and Niall Hackett referred this declaration for review to An Bord Pleanála on the 18th day of December 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) and Section 3 (A) of the Planning and Development Act, 2000,
- (c) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1), article 9(1) and article 10 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) The use of the subject house for short-term holiday lettings use is a change of use from the permitted use as a permanent residential unit, which in the light of the different matters that it raises for assessment compared to those which would have arisen for the original use as permanent residential accommodation, constitutes a material change of use and thus development, and neither the

Planning and Development Act, 2000, as amended, nor the Planning and Development Regulations, 2001-2022 recognise the said material change of use to be exempted development.

- (b) The jetty extends to an area of the adjoining lake which does not fall within the curtilage of the house
- (c) The jetty does not come within the description provided for in Class 6 of the Planning and Development Regulations 2001, 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

- (1) the change of use of a dwelling, as a principal place of residence to a dwelling in use for short-term letting purposes is development and is not exempted development.
- (2) The construction of a wooden jetty 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.

Stephanie Farrington
Senior Planning Inspector

26th of November 2024