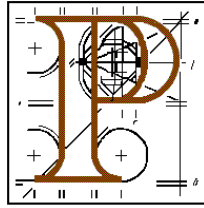


# An Bord Pleanála



## Inspector's Report

<b>Board Reference:</b>	<b>RL3439</b>
<b>Question:</b>	Whether a proposal to construct a ground floor extension to the rear of a house is or is not development or is or is not exempted development.
<b>Location:</b>	3 Rinawade Avenue, Leixlip, Co. Kildare
<b>Referrer:</b>	Angela Carpenter
<b>Observer:</b>	Tim & Ivy Buckley
<b>Planning Authority:</b>	Kildare County Council
<b>Planning Authority Reference:</b>	ED/00569
<b>Date of Site Inspection:</b>	9 <sup>th</sup> March 2016
<b>Inspector:</b>	Sarah Moran

## **1.0 INTRODUCTION**

1.1 A referral case has been received by An Bord Pleanála pursuant to Section 5 of the Planning and Development Act, 2000. The Planning Authority has issued a declaration to the effect that the development is development and is not exempted development. The planning authority stated the following reasons for refusing to issue a section 5 declaration:

- a) *The ground floor extension has been constructed on a party boundary shared with no. 1 Rinawade Avenue, and is therefore not built within the curtilage of no. 3.*
- b) *There is a window above ground level that is less than 11m from the boundary it faces.*

The primary concern relates to whether the extension to the rear of the property is exempted development.

## **2.0 SITE LOCATION AND DESCRIPTION**

2.1 The site is a 2 storey semi-detached house dating to the late 1990s, located in a modern housing estate in Lexlip, Co. Kildare. There is an existing gable fronted single storey extension to the rear of the house, which has a pitched roof. This extension is occupied as part of the original house. The house apparently has not been extended previously. The side wall of the extension appears to have been constructed along the boundary shared with the adjoining house to the south. It appears that the original shared boundary wall has been removed and replaced with the extension. There is an existing timber fence along the remainder of the shared boundary.

2.2 Note:

I visited the site on 9<sup>th</sup> March 2016. I viewed the existing extension from the surrounding area but was unable to gain access to the rear of no. 3 Rinawade Avenue. However, I am satisfied that my view of the structure and the photographs provided on file by both the applicant and the adjoining landowner provide enough information for a full analysis of the relevant issues in this case.

## **3.0 DEVELOPMENT PLAN**

3.1 The site is located in an area zoned as 'Existing Residential' under the Leixlip Local Area Plan 2010.

## **4.0 PLANNING / ENFORCEMENT HISTORY**

### **4.1 UD 6582**

4.1.1 The planning authority carried out enforcement action in relation to the construction of the existing extension to the rear of the house.

## **5.0 GROUNDS OF REFERRAL**

5.1 The referral has been made by the owner of no. 3 Rinawade Avenue. The submission makes the following main points:

- The development as constructed varies from the drawings submitted with the application for a section 5 declaration. The drawings submitted indicate the extension entirely within the curtilage of no. 3 Rinawade Avenue. However, the extension as built on site may appear to be construction on the boundary wall shared with no. 1 Rinawade Avenue, this has yet to be determined and agreed.
- The applicant lodged drawings for the section 5 application to show proposed works to the as built extension, comprising moving the side wall such that it is clearly within the curtilage of no. 3 Rinawade Avenue.
- The planning authority has based its decision on the section 5 application on the development as built rather than the revised proposal as indicated in the drawings submitted.
- Upon receipt of a Section 5 declaration, the applicant intends to modify the as built extension to comply with the drawings submitted with the section 5 declaration.
- It is submitted that the planning authority would have granted an exemption certificate if it had based its decision on the drawings submitted with the section 5 application and not on the structure as built on site at present.
- The applicant submits that the window in the rear elevation above ground level that is less than 11m from the rear boundary is clearly a feature window and not above ground floor level. The structure in question is a single storey extension.

## **6.0 RESPONSE OF PLANNING AUTHORITY**

6.1 The planning authority has not responded to the referral.

## **7.0 OBSERVER SUBMISSION**

7.1 The observers are owners of no. 1 Rinawade Avenue, the adjoining semi-detached house to the south. They make the following main points:

- The observers have lived in the adjoining property since it was constructed in 1999. The shared boundary between no. 1 Rinawade Avenue and no. 3 Rinawade Avenue was never moved or adjusted in any way and is therefore a well-established boundary.
- They object to the development on the grounds that it has been constructed on the shared boundary wall and that its foundations extend into their property. The applicant has admitted that the boundary has been breached, correspondence stating same is submitted.
- Concerns about legal implications of development on the shared boundary if the observers wish to extend or sell their property.
- Photographs of the existing structure are submitted.
- Concerns about overlooking from velux roof windows within the subject extension.
- A report by Val O'Brien & Associates Chartered Building Surveyors, dated 8<sup>th</sup> December 2014, is submitted with the observation. This report is based in an inspection of the site and concludes as follows:
  - The concrete foundation under the side wall facing the observers' property appears to extend into their property and could be interpreted as a boundary incursion.
  - The new wall occupies the space of the previous shared party wall and has extended slightly beyond it towards the rear boundary.
- A copy of correspondence issued by Rory O'Connor C/Eng Dip Law to the owners of 1 Rinawade park, dated 8<sup>th</sup> December 2012, is also submitted. This states that the foundation of the shared wall has breached the boundary, also that the gable wall face is 'right on the boundary'.
- The submission also includes a copy of the Inspector's report of RL2250. It is submitted that this referral raises points that are relevant to the subject case.

## **8.0 LEGISLATIVE CONTEXT**

### **8.1 Planning and Development Act, 2000 (as amended)**

#### 8.1.1 Section 2(1) of the Act defines "works" as

*"Any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ..."*

Section 3(1) of the Act defines "development" as follows:

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

Section 4(1)(h) provides for exempted development 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”*

Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The principle regulations made under this section are the Planning and Development Regulations, 2001.

## **8.2 Planning and Development Regulations 2001 (as amended)**

8.2.1 Article (6)(1) of the Regulations states that subject to *Article 9* development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 2.

8.2.2 *Article 9* provides restrictions on exemptions. Article (9)(a)(viii) specifies development that would:

*Consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,*

8.2.3 Schedule 2 – *Exempted Development, Part I - Development Within the Curtilage of a House, Class 1* specifies:

*The extension of a house, by the construction or erection of an extension (including a conservatory) to the rear of the house or by the conversion for use as part of the house of any garage, store, shed or other similar structure attached to the rear or to the side of the house.*

This exemption is subject to the following limitations set out in Column 2:

1. (a) *Where the house has not been extended previously, the floor area of any such extension shall not exceed 40 square metres.*

- (b) *Subject to paragraph (a), where the house is terraced or semi-detached, the floor area of any extension above ground level shall not exceed 12 square metres.*
  - (c) *Subject to paragraph (a), where the house is detached, the floor area of any extension above ground level shall not exceed 20 square metres.*
- 2. (a) *Where the house has been extended previously, the floor area of any such extension, taken together with the floor area of any previous extension or extensions constructed or erected after 1 October 1964, including those for which planning permission has been obtained, shall not exceed 40 square metres.*
  - (b) *Subject to paragraph (a), where the house is terraced or semi-detached and has been extended previously, the floor area of any extension above ground level taken together with the floor area of any previous extension or extensions above ground level constructed or erected after 1 October 1964, including those for which planning permission has been obtained, shall not exceed 12 square metres.*
  - (c) *Subject to paragraph (a), where the house is detached and has been extended previously, the floor area of any extension above ground level, taken together with the floor area of any previous extension or extensions above ground level constructed or erected after 1 October 1964, including those for which planning permission has been obtained, shall not exceed 20 square metres.*
- 3. *Any above ground floor extension shall be a distance of not less than 2 metres from any party boundary.*
- 4. (a) *Where the rear wall of the house does not include a gable, the height of the walls of any such extension shall not exceed the height of the rear wall of the house.*
  - (b) *Where the rear wall of the house includes a gable, the height of the walls of any such extension shall not exceed the height of the side walls of the house.*
  - (c) *The height of the highest part of the roof of any such extension shall not exceed, in the case of a flat roofed extension, the height of the eaves or parapet, as may be appropriate, or, in any other case, shall not exceed the height of the highest part of the roof of the dwelling.*
- 5. *The construction or erection of any such extension to the rear of the house shall not reduce the area of private open space, reserved exclusively for the use of the occupants of the house, to the rear of the house to less than 25 square metres.*

6. (a) Any window proposed at ground level in any such extension shall not be less than 1 metre from the boundary it faces.
  - (b) Any window proposed above ground level in any such extension shall not be less than 11 metres from the boundary it faces.
  - (c) Where the house is detached and the floor area of the extension above ground level exceeds 12 square metres, any window proposed at above ground level shall not be less than 11 metres from the boundary it faces.
7. The roof of any extension shall not be used as a balcony or roof garden.

## 9.0 RELEVANT REFERRALS

### 9.1 RL2250

9.1.1 Both the planning report on file and the observers' submission refer to RL2250, in which the Board decided that structures built on a party wall cannot be considered to be 'within the curtilage' of a house.

9.1.2 The referral related to the issue of whether the replacement of an existing flat roof with a tiled and pitched roof is or is not development or is or is not exempted development. The roof in question covered a converted garage to the side of the house and a single storey rear extension. The garage structure had been built on the boundary wall. The concluding section of the Inspector's report states the following in relation to the definition of the term 'curtilage' (note that this statement is referred to by the applicant and the observers):

*"The curtilage of a dwelling is not defined in planning legislation and as such is a matter for interpretation on a case-by-case basis. The Collins English Dictionary defines 'curtilage' as 'the enclosed area of land adjacent to a dwelling house'. In the circumstances that apply in this case (i.e. a housing estate) I would consider that the curtilage is clearly marked out as the boundary wall or fence. In particular, I would consider that the elements identified as a 'boiler and store' were built **on** the party wall and therefore cannot be considered 'within the curtilage'. I would therefore consider that these elements of the proposal are unauthorised in terms of the relevant legislation."*

9.1.3 The report went on to recommend that the works in question were not exempt on the basis that they did not come within the scope of section 4(1)(h) of the Act, i.e. they would materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and of neighbouring structures.

9.1.4 The Board concluded that (a) section 4(1)(h) did not apply; (b) the structure over which it is proposed to construct the replacement roofing incorporates a store not built within the curtilage of the house and, therefore, this store does not come within Class 3 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, and (c) the overall proposed replacement roofing over a structure part of which is unauthorised development comes within the scope of restriction on exemption set out in article 9 (viii) of the said Regulations. The Board therefore decided that the works in question were not exempted development.

## **10.0 ASSESSMENT**

10.1 This referral generally relates to the question of whether the extension to the rear of the house is or is not development and whether it is or is not exempted development. The relevant matters may be considered as follows:

- Whether the extension is development
- Whether or not it is exempted development

### **10.2 Whether the Extension is Development**

10.2.1 Section 2(1) of the Planning and Development Act 2000 (as amended) defines “works” as:

*“Any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...”*

Section 3(1) defines “development” as:

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

The subject development involves the construction of a single storey extension to the rear of an existing house. It is considered that this comes within the scope of the definition of “works” and “development”, as set out above. I therefore conclude that the extension is “development”

### **10.3 Whether the Extension is Exempted Development**

10.3.1 Both the Act and the Planning and Development Regulations 2001 (as amended) include provisions that allow for certain developments to be exempted from the need to apply for planning permission. The relevant provisions may be considered separately as follows:



- Section 4(1)(h) of the Act
- Part 1 of Schedule 2 of the Regulations
- Article 9 of the Regulations
- Conclusion

### 10.3.2 Section 4(1)(h)

Section 4(1)(h) of the Act provides for exempted development 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.”*

The development in question involves the construction of a substantial single storey extension to the rear of the house, which significantly changes the appearance of the rear of the house. Having inspected the site and with regard to the drawings and photographs on file, I am satisfied that the development does not come within the scope of section 4(1)(h).

### 10.3.3 Part 1 of Schedule 2 of the Regulations

Article (6)(1) of the Regulations states that, subject to Article 9, development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that the development complies with the conditions and limitations specified in column 2. Part 1, ‘*Development Within the Curtilage of a House*’, states that the following shall be exempt within same:

*The extension of a house, by the construction or erection of an extension (including a conservatory) to the rear of the house or by the conversion for use as part of the house of any garage, storey, shed or other similar structure attached to the rear of the house.*

Part (a) of the PA refusal to issue a section 5 declaration states that the extension has been constructed on a party boundary shared with no. 1 Rinawade Avenue and therefore is not within the curtilage of no. 3 Rinawade Avenue. I note the Board’s decision in the referral case RL2250 as outlined above, which concluded that structures built on the party wall cannot be considered to be ‘within the curtilage’ of a house. It is considered that the same applies in this case and that the exemptions set out in Part 1 therefore do not apply.

Notwithstanding that conclusion, I now propose to consider the relevant conditions and limitations set out in Column 2 of Part 1, as set out above, in order to provide as full an assessment as possible. Having inspected the site and considered the drawings and photographs on file, I am satisfied that none of the limitations and exemptions apply in this case. I note in particular the following:

- No. 3 Rinawade Avenue has not been extended previously.
- The development is a single storey extension that is used as additional residential accommodation. Its stated area is 16.5 sq.m.
- The windows to the structure are within the required distances to site boundaries. The windows in the roof of the structure are roof lights only and would not result in overlooking. I accept the point of the applicant that the circular window in the rear elevation is a feature window only.

#### 10.3.4 Article 9 of the Regulations

Article 9 provides restrictions on exemptions, specifying development that would:

*Consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.*

The applicant submits that the section 5 application relates to the development as proposed in the drawings on file rather than that as constructed on site. If granted a section 5 declaration, the applicant would modify the existing extension such that it is within the curtilage of no. 3 Rinawade Avenue. However, the existing structure, as constructed, is not exempted development as discussed above. It does not have the benefit of planning permission. It is therefore unauthorised and any alterations to it would not be exempted development with regard to article 9.

#### 10.3.5 Conclusion

Having regard to the above, I conclude that the subject development is not within the curtilage of no. 3 Rinawade Avenue and it therefore is not exempted development with regard to the restrictions and limitations set out in Schedule 2 Class 1 of the Regulations. The existing structure is therefore unauthorised. In addition, any works to the existing structure are not exempted development with regard to Article 9 of the Regulations.

### **11.0 CONCLUSION AND RECOMMENDATION**

11.1 Having considered the contents of the file, and following inspection of the site and surrounding area, I conclude the works as described constitute

development. Accordingly, I recommend a decision order in the following terms: -

## **SCHEDULE**

**WHEREAS** a question has arisen as to

**WHETHER** a proposal to construct a ground floor extension to the rear of no. 3 Rinawade Avenue, Leixlip, Co. Kildare, is or is not development or is not exempted development.

**AND WHEREAS** Angela Carpenter, 3 Rinawade Avenue, Leixlip, Co. Kildare, requested a Declaration on the said question from Kildare County Council, and the said Council issued a declaration on the 10<sup>th</sup> day of November 2015 stating that the said matter is not exempted development.

**AND WHEREAS** the said Angela Carpenter referred the declaration for review to An Bord Pleanála on the 4<sup>th</sup> December 2015.

**AND WHEREAS** An Bord Pleanála, in considering this reference, had regard particularly to:

- (a) Sections 2, 3 and 4 of the Planning and Development Act 2000 (as amended);
- (b) Articles 6 and 9 and Schedule 2 of the Planning and Development Regulations 2001 (as amended);
- (c) Class 1 of Part 1 of Schedule 2 of the said Regulations;
- (d) The construction of the side wall of the extension in the location of the party wall along the site boundary shared with no. 1 Rinawade Avenue;
- (e) The pattern of development in the area.

**AND WHEREAS** An Bord Pleanála has concluded that -

- (a) The development would constitute works which would come within the scope of Section 3(1) of the Planning and Development Act, 2000, as amended,
- (b) The development does not come within the scope of the exemptions provided in Class 1 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,

(c) The development does come within the scope of the restrictions on exemption provided in Article 9 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 of the Planning and Development Act 2000 (as amended), hereby decides that the construction of a single storey extension to the rear of 3 Rinawade Avenue is development and is not exempted development.

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**Sarah Moran,**  
**Senior Planning Inspector**  
**10<sup>th</sup> March 2016**