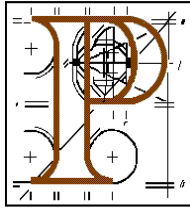


An Bord Pleanála



Inspector's Report

Referral Reference No: RL29S.RL3455

Referral under Section 5 of the 2000 Act (as amended)

Question: Whether the erection, of a structure providing 12no. nest boxes for swifts and sound speakers emitting bird call is or is not development or is or is not exempted development.

Referrer: Mr Ray McGovern

Location: 199A Strand Road, Sandymount, Dublin 4

Planning Authority: Dublin City Council

Planning Authority Ref.: 0401/15

Date of Site Inspection: 21st of April 2016

Inspector: Angela Brereton

Appendices: Photographs, maps, etc.

1.0 INTRODUCTION

A referral case has been received by An Bord Pleanála pursuant to Section 5 of the Planning and Development Act 2000 (as amended) whereby the referrer has sought a determination as to whether or not the erection, of a structure providing 12 no. nest boxes for swifts and sound speakers emitting swift bird call at no.199A Strand Road, Sandymount, Dublin 4 is or is not development or is or is not exempted development within the meaning of the Planning and Development Acts, 2000 (as amended) and Planning and Development Regulations, 2001 (as amended).

2.0 SITE LOCATION AND DESCRIPTION

The site of the proposed development is located on the west side of Strand Road, Sandymount, Dublin 4, opposite the houses facing Merrion Strand, north of Merrion Gates. No. 199A is a two-storey flat roof detached dwelling set back some 25 metres from the public road and has a deep back garden that runs to a boundary with the DART line. The rear garden area is well landscaped with mature trees and hedgerows along the site boundaries.

The general area at this location and on this side of Strand Road is characterised by a variety of detached and semi-detached houses on large sites. Nos. 197 and 199B flanking the appeal site comprise two-storey houses adjoining the site.

3.0 PLANNING HISTORY AND BACKGROUND

The following planning history relates to the site:

PL 29S.124738 (P.A. Ref. 0403/01)

Permission was granted subject to conditions by the Board for the demolition of an existing single storey house and the erection of a two-storey house with associated ancillary works in 2001.

PL 29S.126020 (P.A. Ref. 1574/01)

Permission was granted subject to conditions by the Board for the demolition of an existing single storey house and the erection of a two-storey house with associated ancillary works in 2002.

PL29S.243273 (P.A.Ref. WEB1270/13)

Permission was refused to Ray McGovern by the Board on the 13th day of August 2014, for the erection of a hardwood post, 5.7metres tall, with 20 number x nest boxes attached to it for Swifts, on to the roof of the existing house. The post was to be hinged and in the vertical position of four months of each year, from the first of May to the end of August at 199A Strand Road, Sandymount, Dublin 4.

The Board's reason for refusal was as follows:

“Having regard to its location within an area zoned ‘Z2’ in the Dublin City Development Plan 2011-2017, with the objective *to protect and/or improve the amenities of residential conservation areas*, and in close proximity to existing residential properties, it is considered that the proposed development, due to its scale, nature and purpose, would seriously injure the residential amenities of neighbouring properties, by reason of noise, general nuisance and

disturbance. The proposed development would, therefore, be contrary to the proper planning and development of the area.”

0246/15

Whether the erection, annually from May to August (inclusive) of: - Structure providing 4 no. nest boxes for swifts - Structure providing 12 no. nest boxes for swifts - Sound speakers emitting swift bird calls on rear elevation are or are not development or exempt development under the Planning and Development Act 2000 (as modified) and the Regulations made thereunder.

In this case the Council issued a split decision i.e they *refused* the exemption for the structure providing 12no. nest boxes for swifts and the sound speakers emitting bird call and they *granted* an exemption for the structure of c. 1.25m wide x 0.25m high providing 4 no. nest boxes for swifts, and suspended on the rear elevation of the residential dwelling at 199A Strand Road.

Enforcement History

On the 8th of May 2015, Mr McGovern received a Warning Letter from Dublin City Council, advising him that it was alleged that:

- Swift nesting box structures has been installed to the rear of 199A Strand Road, Sandymount, without the benefit of planning permission.
- Sound speakers had been attached to the nesting box structures without planning permission.

4.0 DECLARATION BY THE PLANNING AUTHORITY

The planning authority decided on the 18th of December 2015 on foot of a request by Auveen Byrne Associates on behalf of Ray McGovern for a declaration under Section 5 that the erection of a structure (annually from May to August inclusive only), of 1m wide x 1m wide providing 12 no. nest boxes for swifts and fixed to the roof above the eaves level and sound speakers emitting swift bird call is development and is not exempted development by virtue of the provisions contained in Schedule 2, Part 1, Class 1 of the Planning and Development Regulations, 2001 and Section 4 (1)(h) of the Planning and Development Act 2000.

5.0 THE QUESTION

Auveen Byrne Associates, on behalf of Ray McGovern seeks the Board’s determination as to whether;

- The erection, annually from May to August (inclusive) only of a structure providing 12 no. nest boxes for swifts;
- Sound speakers emitting swift bird call;

on the rear elevation at no.199A Strand Road, Sandymount, Dublin 4, is or is not development or exempt development under the Planning and Development Act 2000 (as modified) and the Regulations made thereunder.

6.0 REFERRER'S CASE

In response to the Council's Declaration Auveen Byrne Associates, Consultant Town Planners submitted a Referral to ABP on behalf of Ray McGovern owner and occupier of 199A Strand Road. The purpose of this request is for a declaration to confirm whether or not planning permission is required to carry out the proposed works as given in the Question above. They refer to the planning history of the site as noted above and provide a background history of the swifts and nest boxes and their submission includes the following:

- The nest boxes on the side elevation of the dwelling were not at issue in the Council's Warning Letter and therefore they are not at issue in the reference.
- The decision of the Council issued on the 26.08.2015 was that the 4 nest box structure was considered to be exempt development under S.4(1)(h) of the Planning and Development Act 2000 (as amended). The 12 nest box structure was considered not to constitute exempt development under S.4(1)(h).
- As there are 7no. nest box structures in place at no.199A Strand Road, which are deemed to be exempt development, the principle of attraction of swifts to the garden is not at issue.
- The reference to the Council sought to re-examine their contention that the 12 nest box structure is not development and falls within the scope of S.4(1)(h).
- Subsequent to the Council's decision that this did not constitute exempted development they now refer this declaration to the Board.
- The 12 nest box structure will be in place from May to August (inclusive) only, the period that the birds spend in this country after migration mainly from The Democratic Republic of the Congo in Africa.
- They include photographs showing the demountable structure in situ.

Section 1.0 of their submission provides information of the swift and its roosting, calling and nesting activities, by way of background to understanding the function and positioning of the 12 nest box structure.

- This includes that swifts are faithful to their nesting place, returning to the same site once established. The nearest nesting swift colony to no.199A Strand Road is at St. Alban's Sanymount. Visiting birds are common in the skies adjacent to his residence.
- They refer to an article from a recent article in the Birdwatch Ireland Magazine 'Wings' Spring 2014 regarding the decline in the swift population and loss of breeding sites due to better repair of buildings.

Section 2.0 refers to the site and swifts at 199A Strand Road. It is noted that this is a modern architecturally designed house and is finished and landscaped to a high standard.

- On completion of his dwelling the Referrer set about attempting to attract the birds from the Sandymount area to his particular site.
- The purpose of this activity is to attract birds to his garden, for his enjoyment, for the convenience of the birds and to contribute to the preservation of this endangered species. This is a hobby and is not a business.

- Details are provided of the nesting boxes on site. In addition to other boxes erected on the building in 2015 a c.1m x 1m, 12 box structure is placed on the rear elevation above eaves level. The high locations are chosen to maximise safety and appropriate access for the birds.
- Details are provided as to why no.199A Strand Road has its drawbacks as a swift nest site.
- In summary, 3 swift box structures have been erected at no.199A, only one is now of concern to the Council, that on the rear elevation above eaves level. The total component of nests only in place for 4 months of the year and could theoretically accommodate 32 birds (2 per box) in practice very significantly lower numbers of birds use these boxes. In practice it is noted that only 2 to 3 swifts have used these boxes.
- The swift call is infrequent and within the bounds of normal, summer birdsong.
- Mr McGovern's activity is little different from those who erect bird baths, bird houses feeding structures to attract common garden birds to their property for their enjoyment.

Section 3.0 is concerned with the Planning Status of the nest box structures and sound speakers

- It is contended that the structure is of the nature of a bird house, bird table, dog kennel or aviary that can be erected or placed in a dwelling house without reference to the planning system. It is of a temporary nature erected for 4 months not development for the purpose of the Planning Acts.
- People are entitled to attract wild life to and keep pets on their property without reference to the planning system.
- If it is considered to be development for the purposes of S.3 of the Act, it is *de minimis* viz. minor scale and impact and so ancillary to domestic use that the planning system does not and should not concern itself with it.
- Alternatively the nest boxes could be viewed as exempt development by reference to S.4(1)(h) of the Planning and Development Act 2000 (as modified).
- They provide a description relative to adjacent properties, no.197 is to the north, and no. 199B to the south and note dense tree screening between the properties. They consider that it does not impact adversely on these properties.
- They provide a description including the de-mountable 12 box structure and provide that it is not inconsistent with the character of the house.
- They provide details of the sound speakers which they consider are not of consequence and consider any noise issues are a civil matter.
- They provide a comparison with the erection of a satellite dish and refer to Class 4(b) of Schedule 2, Part 1 of the Planning and Development Regulations 2001 as amended.
- They contend that no unauthorised development takes place with the erection of these nest boxes and sound speakers for a temporary period.

Section 4.0 provides their comments on the Council's Declaration which includes the following:

- They consider that the Council's Declaration is lacking and is more of a recommendation than the basis for a Declaration. It should have included reasons and the basis for their conclusions.
- They consider that the site was not adequately inspected.
- The demountable and temporary nature of the works needs to be taken into account and they contend that they are not out of character with the existing house.
- They consider that the works including the speakers should not require planning permission.

Section 5.0 provides their Conclusion and includes further details of the structure relative to its location at the rear of the house. They refer further to the Planning and Development Regulations 2001 relative to exemptions in Class 3 of Part 1 of Schedule 2. They note bird tables and feeders are exempt. The speakers are not development and any dis-amenity they may cause is a matter for neighbour's negotiation. They consider that this proposal is either not development for the purposes of the Planning and Development Acts 2000 (as amended) and the Regulations made hereunder, is *de minimis*, or is exempt development by reference to S.4(1)(h) of the Planning Act 2000.

7.0 POLICY

Dublin City Development Plan 2011-2017

Zoning

The site is zoned Z2 with the objective "To protect and/or improve the amenities of residential conservation areas".

Biodiversity

It is a policy of the Plan (GC25): "To protect and enhance bio-diversity in the city through the protection of nature conservation sites, maintenance of valuable mitigation habitats, the creation of a cohesive network of green corridors, green infrastructure design and also through the identification of opportunities for new habitats, buffer zones and wildlife corridors.

8.0 RELEVANT LEGISLATION

8.1 Planning and Development Act 2000 (as amended)

In order to assess whether or not the proposal is or is not development or is or is not exempted development, regard must be had to the following legislation:

Planning and Development Act, 2000 (as amended):

Part 1, Section 2 (1) Defines, among other things:

"alteration' includes

- (a) plastering or painting or the removal of plaster or stucco
- (b) the replacement of a door, window or roof,

that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures”.

“structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or part of a structure so defined, and – (a) where the context so admits, includes the land on, in or under which the structure is situated..

“works” – as including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

S.3.(1) 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.

S.4(1)(h) Provides for 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.

S.4(1)(j) Provides for 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.

8.2 Planning and Development Regulations 2001 (as amended)

Article 6 refers to Exempted Development i.e. (1) Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Article 9(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.

Part 1, Schedule 2 refers to *Exempted Development – General*. Class 1 refers to *Development within the curtilage of a house*. This includes the erection of an extension, shed or similar structure attached to the rear or to the side of a house.

Class 3 of Part 1 of this Schedule refers to works within the curtilage of a house including shed, greenhouse, garage etc. Sub-section (6) provides limitations on type of fauna which can be kept within the structure.

Class 4(b) of Part 1 of this Schedule provides limitations on the exemptions for the erection of a satellite dish within the curtilage of a dwelling.

Table 1 Relevant Extracts:

Column 1 Description of Development	Column 2 Conditions and Limitations
<p>Class 1 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.</p> <p>CLASS 3 The construction, erection or placing within the curtilage of a house of any tent, awning, shade or other object, greenhouse, garage, store, shed or other similar structure</p> <p>CLASS 4 (b) The erection on or within the curtilage of a house, of a dish type antenna used for the receiving and transmitting of signals from satellites.</p>	<p>4(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.</p> <p>(6) The structure shall not be used for human habitation or for the keeping of pigs, poultry, pigeons, ponies or horses, or for any other purpose other than a purpose incidental to the enjoyment of the house as such.</p> <p>1. Not more than one such antenna shall be erected on, or within the curtilage of a house.</p> <p>2. The diameter of any such antenna shall not exceed 1 metre.</p> <p>3. No such antenna shall be erected on, or forward of, the front wall of the house.</p> <p>4. No such antenna shall be erected on the front roof slope of the house or higher than the highest part of the roof of the house.</p>

9.0 ASSESSMENT

9.1 Is it or is it not development

Having Regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended) it is considered that the erection of this nesting box at the rear of no.199A Strand Road, constitutes development i.e the erection of a structure on the roof of and the carrying out of works to the rear of the dwelling house.

9.2 Is the Development Exempted Development

The Referrer has asked the Board to have regard to Section 4(1)(h) of the Planning and Development Act 2000 (as amended). This Section refers to 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.*

In Sections 1.0 to 3.0 of their Referral they set out in detail the background of this report (reproduced from the submission to Dublin City Council) and to the provision of nest boxes and speakers which in their opinion are not development and are *de minimis*, such that they should not be relevant to the planning system, or are exempt development by reference to S.4 (1)(h) of the Planning and Development Act 2000 as modified.

A description of the structure has been provided by the Referrer. This notes that the 12 box structure is approx. 1m square, it is entirely above eaves level. It projects a little forward of the eaves at the rear, for the added protection of the swifts (safe from climbing predators or birds/animals on the roof). It is supported by two struts which are anchored to the roof by girders. The arrangement is easily and deliberately demountable. It is intended that the small size of the structure, and its white painted appearance, with its 12 tiny openings, is not at all inconsistent with the character of the house.

For the past 5 years swift call has been emitted from the sound speakers from May to July. Emissions run approximately 4 times per day, for periods of c.one hour each. The objective of erecting the speakers with swift sound is to attract airborne swifts to his nest boxes and 2 speakers were moved to the 12 nesting box structure in 2015. The sound speakers are tiny additions one on either of the 12 nest box structure and are not of consequence as structures per se and will not impact on neighbours. They note that complaints have not been received and consider that such noise emissions are a civil rather than a planning matter.

The swift boxes were not erected and were still in storage at the time of my site visit in mid-April, however I was able to view the context of the rear of the house and garden area. The Referrer advised that they are only erected for a temporary period between May and August which is the time of the year the swifts visit Ireland and details of the swift has been given in the Referral. It notes that this proposal is to support the swift as a wildlife species and is not for any economic or sporting gain.

It is emphasised that the nest boxes are to the rear of the house which is visually less sensitive than the public road. The roof of no. 199A has a roof light structure and a chimney, so that the nest boxes which are on the rear elevation do not materially exceed the highest point of the roof. They consider that this nesting box is *de minimis* and therefore not of concern to the planning system, or exempt development by reference to S.4(1)(h) of the Planning and Development Act 2000 (as modified).

9.3 RELEVANT PRECEDENT CASES

It would appear that there are no precedent cases of direct relevance to the subject of this Referral. However there are some cases that are of interest having regard to the concept of *de minimis*.

These include Ref. PL06D.RL2671 which refers to a number of alterations and renovations to a house at Mount Alverno, Nerano Road and Sorrento Road, Dalkey. The Board decision concluded that the raising of the Parapet Height of the main houses structure as built by 500mm *is development and is considered exempted development, having regard to the limited increase in height of the development as constructed, which is considered de minimis*. This decision also included that in this case the alteration of the siting of the footprint of the replacement dwelling *is considered development, and is considered exempted development, due to the limited change in position, which is considered de minimis*.

In the case of PL09.RL2885 the Board decided that a shed located in the rear garden in use as a hobby room for a purpose incidental to the enjoyment of the dwellinghouse at no.16 Rail Park, Maynooth is exempted development. This included that *the inclusion of a rooflight to the shed is considered to be de minimis*.

9.4 Planning and Development Regulations – Exempted Development

The relevance of these has been raised by the Referrer. Regard is had to Class 1 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 relative to *Development within the curtilage of a dwelling*. Class 1 refers to exemptions relative to extensions to the rear of a dwelling house and is quoted having regard to sub-section 4(c) in the relevant section above. In this case it is noted that the nest box would exceed the height of the eaves or parapet of the flat roofed dwelling at the rear.

They refer to Class 3, Schedule 2, Part 1 of the Planning and Development Regulations 2001 relative to exemptions for the construction of garden sheds which can be filled with birds as long as they are not pigeons or poultry – Class 3(6) relates. They note bird tables and feeders are exempt.

They note that a satellite dish of max. 1m diameter can be erected on a house as exempt development and refer to Class 4(b) of Schedule 2, Part 1 of the Planning and Development Regulations 2001 as amended. While this is not a satellite dish they consider that there are similarities. As noted above the structure is erected

above the flat roof of the house which if it were a satellite dish would be contrary to Class 4 (4).

However it is not considered that any of these is particularly relevant to the present case, which refers to the erection of a nest box structure and sound speakers emitting swift bird call on the roof of the dwelling. Rather it is considered that Section 4(h) of the Planning and Development Act 2000 (as amended) is the relevant consideration.

9.5 Appropriate Assessment

Having regard to the nature and scale of the development proposed and to the nature of the receiving environment, namely a suburban and fully serviced location, no appropriate assessment issues arise.

10.0 CONCLUSION AND RECOMMENDATION

An abbreviated form of the Latin Maxim *de minimis non curat lex*, "*the law cares not for small things.*" A legal doctrine by which a court refuses to consider trifling matters.

The *de minimis* doctrine is used in law to avoid the resolution of trivial matters that are not worthy of judicial scrutiny. Appellate courts also use the *de minimis* doctrine when appropriate. (Legal Directory).

However it is noted that there is no specific definition of what constitutes *de minimis* stated in the Planning Acts or Regulations. However S.4(1)(h) of the Act allows for *works which do not affect the external appearance of the structure so as to render the appearance inconsistent with the character of neighbouring structures.*

In this case the subject nesting box is to the rear of the property it is not visible from the streetscape. As shown on the photographs submitted with the Referral, the demountable temporary structure is erected on top of and above the flat roof of the property, so it is visible from the rear garden area. However it is considered that in view of its small size i.e 1m x 1m and the location shown on the photographs submitted that it will not appear inconsistent with the character of surrounding dwellings.

I would therefore conclude that the structure is considered development, and is considered exempted development as due to the limited size and context, it is considered *de minimis*. It is considered that in view of the description given of the limited scale and usage of the associated speakers emitting bird call that they can also be considered *de minimis*.

Accordingly I recommend the Order in the following terms:

11.0 DRAFT ORDER

WHEREAS a question has arisen as to whether:

- The erection, annually from May to August (inclusive) only of a structure providing 12 no. nest boxes for swifts and
- Sound speakers emitting swift bird call;

on the rear elevation at no.199A Strand Road, Sandymount, Dublin 4, is or is not development or constitutes exempt development.

AND WHEREAS the said question was referred to An Bord Pleanála by Auveen Byrne Associates on behalf Ray McGovern of 199A Strand Road, Sandymount, Dublin 4 under the provisions of Section 5(3)(a) of the Planning and Development Act, 2000 on the 22nd of January 2016.

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

- (a) Sections 2(1), 3(1) and 4(1)(h) and 4(1)(j) of the Planning and Development Act, 2000 (as amended),
- (b) Articles 6(1) and 9(1) of the Planning and Development Regulations, 2001,
- (c) Classes 1, 3 and 4 of Part 1, Schedule 2 to the Planning and Development Regulations 2001 (as amended),
- (d) The planning history of the site,
- (e) The location of the nest boxes to the rear of the property,
- (f) The de-mountable and temporary nature and small scale of the structure.

AND WHEREAS An Bord Pleanála concluded that –

- (a) The works constitute development, being works which come within the scope of section 3(1) of the Planning and Development Act 2000 (as amended).
- (b) The works come within the scope of section 4(1)(h) and 4(1)(j) of the Planning and Development Act 2000 (as amended).
- (c) The works are small scale and to the rear of the property.
- (d) The works do not come within the scope of the restrictions on exempted development contained at Article 9(1) of the Planning and Development Regulations 2001(as amended).
- (e) The works do not fall within the description of exempted development set out in Class 1, 3 and 4 Column 1 of Schedule 2, Part 1 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 said works are development and constitute exempted development, by virtue of the location to the rear of the property and to the limited scale and temporary nature of the nest box structure. Therefore it is considered that this nest box structure and speakers emitting bird call are de minimis.

Angela Brereton,
Inspector,
28th of April 2016