



An  
Bord  
Pleanála

## Inspector's Report RL29S.RL3511

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<b>Details of Reference:</b>	Whether works to rear of retail showroom at ground floor level of Victorian semi-detached residence is or is not development or is or is not exempt development.
<b>Location:</b>	98A Rathgar Road, Rathgar, Dublin 6
<b>Planning Authority</b>	Dublin City Council
<b>Planning Authority Reg. Ref.</b>	0337/16
<b>Referrer</b>	Brian Fallon and Tara Kelly
<b>Owner/Occupier</b>	Paddy McQuaid
<b>Planning Authority Decision</b>	Is exempted development
<b>Date of Site inspection</b>	7 <sup>th</sup> of February 2017
<b>Inspector</b>	Angela Brereton

## **1.0 Background to the Reference**

- 1.1.1. A referral case has been received by An Bord Pleanála pursuant to Section 5(3)(a) of the Planning and Development Act 2000 (as amended) whereby the referrer has sought a determination as to (in summary) whether or not works to the rear of a retail showroom at ground floor level of Victorian semi-detached residence is or is not development and 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**

- 2.1.1. The site is located on the western side of Rathgar Road towards the junction with Highfield Road, close to Rathgar Village to the south. The subject property is a two storey commercial building which comprises a use that provides space for the new Stone Gallery. It adjoins the common private garden of residential period properties nos. 98,99,100 and 101 Rathgar Road. These properties are set back fronting the garden area with common access from Rathgar Road. Along the public road are a pair of two storey buildings comprising 97A,98A and 99A Rathgar Road. No.97A is an apartment over 98A, the retail unit to which the declaration applies. This ground floor area of the property including the single storey rear extension is now in use as retail floorspace and there is signage for 'Antica'.

## **3.0 Planning History**

- 3.1.1. The Referrer's submission provides a detailed account of the history including planning history of the subject premises and of the surrounding area. A Historic Context and Timeline is provided relative to the development of the area, and the subject properties dating from 1816 to 2016. They also note that there have been a number of recent applications refused by the Council relative to alterations and extensions at nos. 97A, 98A and 99A Rathgar Road, and provide details of these. This includes relevant to the subject site:
- WEB1015/13 – Permission refused for Bedroom extension to existing first floor apartment/residence (over ground floor shop - 98A) with attic conversion

to mansard style adjoining semi-detached property at 99A Rathgar Road. It is noted that the rear elevations show a door rather than a window in the rear elevation of no.98A.

- 3.1.2. They note tenancy at no.98A has changed from a photography studio (Stephanie Parisot) to stone and ceramics showroom (2015), and that the current tenant has affected the changes that are the subject of this declaration.

## **4.0 Referral to the Council**

### **4.1. Referrer's Submission to the Council**

- 4.1.1. George Boyle Designs submitted a letter to the Council in support of and accompanying the Section 5 Declaration of Exemption application, representing Brian Fallon and family residing at no.98 Rathgar Rad, Dublin 6, and their directly contiguous neighbours at no.99 (the O'Donnell family) and 100/101 Rathgar Road (Mrs. Brennan). They describe the circumstances of development at this property, no.98A Rathgar Road.
- 4.1.2. They believe works carried out at no.98A, a mixed use two-storey semi-detached 19<sup>th</sup> century residence with ground floor retail unit are unauthorised, contravening provisions of the Planning and Development Acts and Regulations and of the Dublin City Development Plan. They believe the works carried out are invasive of their private amenity and are not exempted development. They consider that the structure is currently unauthorised and that there are multiple materials impacts on the character of the structure and of neighbouring structures.
- 4.1.3. They provide a description of the premises and notes that no 98A is part of a conjoined pair with 99A. Also that no.97A incorporates residential address 97A. Both buildings are two storey with retail at ground floor, residence above 98A and office/showroom above 99A Rathgar Road. Conditions regarding split use on premises 99A requested that office uses at first floor be connected to the ground floor commercial use. Numerous planning application to intensify capacity of both buildings were refused by either the Council or the Board.
- 4.1.4. They provide that no.98A belongs to Gareth Miller; the first floor apartment is known as 97A and the ground floor as 98A (they attach Fig.1 showing aerial photograph).

They refer to the ground floor no.98A. The current tenant is stone and ceramics company ANTICA CERAMICA owned by Mr. P. McQuaid, who is the developer in the context of this issue.

- 4.1.5. They provide a Description of the Works which include the transformation of the retail unit from photography studios into a stone and ceramics showroom and do not object this as no change of use has occurred. They note that most of the works carried out to the retail unit are internal alterations which have no external impact. However, the rear extension of 98A shares a party wall with their client's private garden.
- 4.1.6. The main concern is that the tenant placed a storey height shopfront window and door – basically in their client's boundary wall (they include photographs). Visitors to the shop can now look directly into their garden, and this impacts on the privacy of their front garden. They provide that the tenants defended their action by demonstrating that an industrial sliding already existed at this garden wall and that while this is true it is defunct for many decades. Also, that this has impacted significantly on third parties and detail a history of the lack of use of this sliding, including relevant to sworn affidavits from previous owners and neighbours. They consider that this cannot be considered as exempted development and provide details of this.
- 4.1.7. They provide a list of reasons as to why they consider the works to be development and not exempted development. These include that it renders the appearance inconsistent with the character of the structure and of neighbouring properties. Also that it is an infringement of the zoning bringing retail use into and causing overlooking to a residential garden area. They consider that it constitutes trespass and are concerned about issues of light pollution and a significant alteration to the character of the wall.
- 4.1.8. They note that the developer noted that the new window is required to provide daylight to the rear of this showroom. They provide that the shopfront door and window has already been installed. Previously there was no visibility of what lay behind the siding as it was always closed up. Originally the area was an open yard when the siding was first installed. Now it is seen as part of a wall enclosing a shared garden for 4 distinctive properties.

- 4.1.9. They provide details of Planning Enforcement and note that they were advised to make an application to the Council to seek a Declaration. They requested that the works constituting the opening and glazing of a section of party wall in shared ownership, making a difference to the character of their client's private realm be acknowledged as development and not as exempted development. They believe that the character of the area has been damaged by this insertion, when the original sliding was old and engrained, and unusual part of the boundary fabric.
- 4.1.10. They also have a query regarding the commercial signage installed recently for the premises and include a photograph. They consider that it should require permission especially in a residential conservation area.
- 4.1.11. They enclose a Context Report dated September 2016 with their submission to the Council. A similar such Report dated November 2016 is included with their Referral to the Board and regard is had to both in this context.

#### 4.2. **The Respondent's Response to the Council**

- 4.2.1. Máirtín D'Alton response on behalf of the occupier of no.98A Rathgar Road, Paddy McQuaid, Creative Director of 'ANTICA' includes the following:
- Whereas 'opening a doorway' in a wall would be a material alteration that would require planning permission, this is a case of 'opening the door' in an existing doorway.
  - It is inaccurate to claim that the door has been replaced with a 'window and shopfront'. His client has fitted an additional set of doors in an existing doorway. They provide photographs to show that two glazed doors have been installed behind the timber sliding door.
  - This is for environmental reasons; this permits light to the rear storage area and thermal insulation from outside, and security reasons, presenting an additional barrier to entrance to the shop.
  - There is frosted glazing, so as to be translucent, but not transparent on these doors. The issue of privacy and overlooking to the open area at the rear is therefore no longer relevant. They do not agree with the loss of amenity through light pollution.

- They note the concerns regarding trespass and provide that it is not intended to refer to claims of ownership or rights of way in this submission as this is a legal matter pertaining to the owner of the property and not planning issues relevant to this application.
- They conclude that the doorway to the rear of no.98A is long in existence. As has already been established by the Council, the opening of this doorway to the rear of no.98A Rathgar Road is not a planning issue.
- As the property is not a protected structure, the installation of an additional door set in this door is not a matter for Planning. This easement existed when the client took possession of no.98A Rathgar Road and his client considers he is entitled to the enjoyment of it.
- Their photographs and mapping have regard to boundary treatment and planting between the laneway to the rear of 98A and 99A Rathgar Road and the gardens to nos.98, 99,100 and 101 Rathgar Road.

## 5.0 THE POSITION OF THE PLANNING AUTHORITY

5.1.1. The planning report prior to the declaration by the planning authority included the following in their Appraisal:

- They note that proposal which is the subject of the Section 5 Declaration comprises two elements: the change of an existing door located behind a sliding door and the provision of two glazed doors that in the first instance were of clear glazing and now appear to be permanently glazed.
- The nature of providing the glazed doors is to provide additional light to the commercial property.
- They note that the key issues relate to the reduction of overlooking and invasion of privacy.
- They provide that it is clear from the information submitted that the principle of the door and the timber panel in front has been in place for many decades.
- They provide that the works carried out to the rear of the timber panel would be considered to be exempt as they are considered to be works *Which affect*

*only the interior of the structure when the timber panelling is closed and at times when the panel remains open it is considered to be exempt as they are works which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure of neighbouring structures.*

- They consider that the works i.e. *Installation of a new glazed shopfront window and door into a garden party wall behind the timber panel* the subject of the Section 5 Declaration would be considered exempted development under the definition applied in Part 1, Section 4(1)(h) of the Planning and Development Act 2000 (as amended).

## **6.0 Planning Authority Declaration**

6.1.1. On the 7<sup>th</sup> of October 2016 the P.A in Dublin City Council declared:

*The provision of a new glazed door which is opaque is exempt development under Part 1, 4(1)(h) of the Planning and Development Act 2000 (as amended).*

## **7.0 Referral to the Board**

### **7.1. Referrer's Description of Development**

7.1.1. They provide a description of the development, which is of note, in the box to the fore of their Referral and this is as follows:

*The relevant works are to the rear of a retail showroom at ground floor level of a 1980's extension to a two-storey 19<sup>th</sup> century Victorian semi-detached residence on Rathgar Road. For many decades the party wall between the former photography studio and their client's garden presented a timber industrial sheeted sliding panel. This was disused as an access for decades. The garden is private to residents of 98,99,100 and 101 Rathgar Road who share it, it is a Victorian walled garden in character. The new tenants installed a glazed shop front window and door into this garden party wall, behind the timber panel. They now draw back the panel daily as if it were a roller shutter: meaning the shop looks into and opens into this private garden. Their clients and their children and families cannot enjoy their own bespoke*

*private amenity space without direct overlooking from random visitors to this showroom.*

## **7.2. The Question**

7.2.1. The Question arising for review is: *Whether it is considered development or exempted development to replace an opaque, fixed, inaccessible party wall between separate, private properties with a fully glazed, openable and accessible window and door set.* The Referrer includes with the Question: *To consider this action as exempted development sets an alarming precedent for boundary, garden and party structures across the nation.*

7.2.2. They wish to establish the following:

- a) Is the installation of a glazed door and window in a party wall to a private garden development?
- b) Is the installation of a glazed door and window in a party wall to a private garden exempted development?

## **7.3. Referrer's Case**

7.3.1. Subsequent to the Council's Declaration, George Boyle Designs has submitted a Referral to the Board on behalf of Brian Fallon and Tara Kelly of no.98 Rathgar Road. This notes that the terrace where his clients reside has a shared external garden which is privately owned and shared by the occupants of 98, 99, 100 and 101 Rathgar Road. These buildings are not protected structures but are located in a residential conservation area. They provide a history of the development and note the description as above.

7.3.2. The case submitted by the Referrer can be summarised as follows:

They refute the decision of Dublin County Council i.e:

- a) On the grounds that there should be no precedent allowing a glazed door, or any other door, to be installed in a party wall between private properties without both parties consent and
- b) On the grounds that the new glazed door is not opaque.



- They consider that the works are not exempt under Section 4(1)(h) of the Planning and Development Act 2000(as amended) and provide reasons for this, including that the works materially alter the appearance of the structure.
- They consider that the works are not exempt under Article 9 of the Planning and Development Regulations 2001 (as amended) and provide reasons for this, including that the extension to the rear of the premises is post 1963.
- They provide that the works subject of this review are works that consist of the alterations to an unauthorised structure.
- They consider that the works do not constitute exempted development taking into account the adverse impact on neighbouring properties, and that it would not be in accordance with planning policy and guidelines relative to the residential conservation area.
- The common garden area is the most valuable asset these properties have and a fundamental feature of their residential amenity, and this intervention violates invasively.
- Placing an active shopfront window onto a private space is deeply invasive.

#### **7.4. Regard to the Context Report**

7.4.1. They submit a Context Report outlining the extent of the impact of the intervention dated November 2016 is attached. This includes the following:

- They note that no.98 is one of a terrace of four built in the early 1800s, that predate much of the village of Rathgar.
- These properties share a common integrated Victorian walled garden and they provide details of the historic setting and context.
- The alleged unauthorised activity has occurred at the rear wall of no.98A, a mixed use unit in a residentially zoned premises. They enclose photographs and mapping including aerial photographs.
- At no point was there any formal rights to use this into the garden area for access way for 98A.

- They note that there have been a number of planning applications, that were resisted by local residents and refused by the planning authority including relative to access by the occupants of nos.98A and 99A. Open space, private space, unacceptable impacts on neighbouring properties and unlawful access were contributing factors in the grounds for refusal.
- Several observations and affidavits, prepared for this matter and for former applications by the residents of nos.98,99,100 and 101 Rathgar Road separately and jointly confirm that the timber wall sliding has been unused for decades.
- They include photographs of the timber panel and provide that until recently it has not been used for the last 30 years.
- After 1980 rear yards to both premises were completely under roofs by single storey extensions. Permission was granted for office use at first floor and retail at ground floor for no.98A. No attempt to regularise the development at no.98A appears on record. There is no record of permission or when the rear extension was built. While Statute of limitations has passed it remains an unauthorised structure. This furthers their case that the works are development and not exempt.
- They provide details of the Historic Evolution of the subject properties. This includes regard to Historic Mapping and notes that the private grounds and associated terraced houses were constructed as a suite in 1838. Details are also given of the historic development of Rathgar Road.
- Nos.97A/98A and its conjoined neighbour were developed in the early 1900's. They are indicative of this era of suburban housing and represent an early delineation of the now reinforced village building line along Rathgar Road.
- These properties are clearly not designed to make use of or engage with the private gardens of nos.98 to 101 Rathgar Road.
- They are fine buildings in their own right with their own unique conservation/heritage contribution to the evolutionary storey of Rathgar.

- They have regard to the DCDP objectives for residential conservation areas and consider that these works are an intervention that would materially affect the character of the properties in the Z2 area.
- Over 30 years ago the green timber siding was fixed in situ to blend into the garden setting.
- These include photographs showing a view of this development when the shopfront is open.
- They provide a Historic Context as Timeline from 1816 to 2016 relative to the local and planning history of the area, including the subject site. This includes that in 2015 there was a tenancy change at no. 98A and the premises was changed from photography studio to stone ceramics showroom.
- They have regard to and note meetings with the Council's Planning Enforcement and provide details of this. They consider the bar has been set too low.
- They are concerned about repeated, unverified claims regarding Access Rights. They provide there is no established public or private right of way to access to the rear of the property.
- They believe that the development fails to be exempted under consideration of the provisions of the DCDP 2016-2022 with regard to residential conservation zoning, privacy, security, overlooking, safety for families and children, sustainability, appropriate designation of public uses, communal space and light pollution in a highly sensitive setting.
- Section 13 of their Submission provides that there are significant reasons under planning law that show that the works described are development, are not exempted development, and should be the subject of a planning application. These include relative to impact on heritage, conservation and urban design.
- They note that the subject properties are now all within the Z2 residential conservation area zoning in the current Plan while prior to that nos.98A and 99A were in the Z1 residential zoning in the previous 2011-2016 DCDP.

- Allowing the intrusion of a brightly lit shopfront into this private open space as exempted development is an invasive violation of privacy and leads to light pollution. More light in the premises could easily be achieved by the inclusion of rooflights.
- They are concerned about implications relative to Backland Development, Safety and Security, Acoustic Privacy and Sustainable Neighbourhoods.
- They also note that the DCDP provides that: *The total removal of historic boundary features or subdivision of rear gardens or original communal front gardens will generally not be permitted.*
- They believe that the facts of this case and the extensive planning history set out are highly relevant to this declaration of exemption application.
- They seek a Declaration declaring that the Works described are Development and are not Exempted Development, and should be the subject of a planning application according to the appropriate procedure.

## 8.0 Responses to the Referral

### 8.1. Planning Authority's Response

- 8.1.1. They provide that the appeal documents have been reviewed and it is considered that the proposed development is exempt development. They request the Board to uphold their decision.

### 8.2. Respondent's Response

- 8.2.1. Máirtín D'Alton response on behalf of the occupier of no.98A Rathgar Road, Paddy McQuaid, Creative Director of 'ANTICA -The Stone Gallery', who is the occupant of the ground floor retail space of no.98A Rathgar Road, includes the following:

- They provide a Background to the premises. This notes that the premises is contained within a two storey semi-detached red brick structures; with retail space on ground floor, and residential accommodation above. The property is not a protected structure. It had been vacant for a brief period of time before Antica took occupancy.

- They note that there is an access to the rear of 98A Rathgar Road and at the side of 99A and that this is shared with residents in nos. 98, 99, 100, 101 Rathgar Road.
- They note enforcement proceedings that were instigated.
- They have regard to the Council's Part 5 Declaration and provide a response to the issues raised by the Referrer and to the relevant planning legislation.
- An additional door-set was installed in the existing doorway behind the existing door and was made non transparent to aid privacy.
- They have regard to Section 4(1)(h) and provide that the rear elevation is completely unaffected as the existing door has not been altered in any way.
- There has been no attempt to undertake any retail activities in the garden area.
- The applicants claim of ownership of the rear access lane is a separate legal issue and not relevant to this referral.
- They do not consider that the works carried out consist of an alteration to a protected structure.
- The Council have already established on two occasions that the provision of a new set of doors in an existing doorway is exempted development.
- They consider that this appeal is vexatious.

### **8.3. Referrer's Response**

8.3.1. George Boyle Design has submitted a response on behalf of Brian Fallon and Tara Kelly of no.98 Rathgar Road. They present a number of grounds for consideration by the Board which include the following:

- They believe that the changes carried out do affect the external appearance of the structure and so would not comply with the exemption in Section 4(1)(h) of the Planning and Development Act 2000 (as amended).
- They consider that these works affect the character and privacy of their private garden area.

- They provide details relative to the history of the extension to the rear of no.98A and consider that it has an unauthorised status.
- The timber siding was in a closed position over 20years, as sworn in affidavits of their client's neighbours. It has existed for many years and as such forms part of the site boundary.
- This is not an invitation to open a shop window into a party wall.
- If the timber siding were to be replaced with a new timber siding this could be seen as exempted development.
- The installation of a glazed window and door behind the timber siding might not be considered so material if it were kept permanently closed.
- They would not object to installing roof lights in the unauthorised extension.
- The replacement of unauthorised doors, or unauthorised anything with replacement doors is not exempted development.
- They again provide details of the Apocryphal House-in-Barn case. In this case the extension was built behind the timber siding, complete with glazed opening to the rear. The current tenant replaced the rear glazed opening with a door and shop window, behind the timber siding, which is now drawn back daily. The location relative to the privacy of the garden area must be taken into account.
- They again refer to the extensive planning history on both premises, where many applications have been made to seek intensification and commercial return on these premises and have been refused.
- They ask the Board to review the case taking account of the points they have raised.

## 9.0 Policy Context

### 9.1. Dublin City Development Plan 2016-2022

This is the pertinent Plan. Land use Zoning Map H refers to the subject site.

Chapter 14 sets out the Land-use Zoning Principles and Objectives. The subject site is located within the Z2 refers to Residential Neighbourhoods (Conservation Areas). Section 14.8.2 sets out the Objective which is: *To protect and/or improve the amenities of residential conservation areas.*

It is provided that the guiding principle is to enhance the architectural quality of the streetscape and the area, and to protect the residential character of the area.

The Z2 zoning objective includes: *Residential conservation areas have extensive groupings of buildings and associated open spaces with an attractive quality of architectural design and scale. The overall quality of the area in design and layout terms is such that it requires special care in dealing with development proposals which affect structures in such areas, both protected and non-protected. The general objective for such areas is to protect them from unsuitable new developments or works that would have a negative impact on the amenity or architectural quality of the area.*

## 10.0 Statutory Provisions

### 10.1. Legislative Context

In order to assess whether or not the activity constitutes development that is exempted development, regard must be had to the following items of legislation:

### 10.2. The Planning and Development Act, 2000 (as amended)

Under Section 2(1), the following is the interpretation of 'works':

"...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..."

'unauthorised development' includes the "carrying out of unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use."

'unauthorised works' means any works on, in over or under land commenced on or after the 1<sup>st</sup> of October 1964, being development other than –

(a) Exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act, or.....

Section 3 (1) states as follows:

“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.”

Section 4(1) of the Act states that the following shall be exempted developments for the purposes of this Act:

“(h) development consisting of the use 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)(a) of the Act enables certain classes of development to be deemed exempted development by way of regulation.

### 10.3. **Planning and Development Regulations 2001, (as amended)**

Article 5. Part 2 refers to Exempted Development and provides an interpretation for this Part. This includes a definition of - ‘shop’ means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public –

(a) for the retail sale of goods....etc.

Article 6 (1) provides: 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) provides: 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.

(viii) 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.

## SCHEDULE 2

Part 1 relates to Exempted Development – General - *Development within the curtilage of a house.*

Part 4 relates to Exempted Development – Classes of Use.

Class 1 – Use as a shop.

## 11.0 Assessment

### 11.1. Is or is not development

11.1.1. The first matter relates to whether or not the works comprises development. Having regard to sections 2 and 3 of the Planning and Development Act 2000, I consider that the installation of a new glazed shopfront window and door, behind the timber panel constitutes 'development' within the meaning of the Act, being the carrying on of an act of construction (i.e. 'works') on land. I note that this is not disputed by the parties.

### 11.2. Is or is not exempted development

11.2.1. Development can be exempted from the requirement for planning permission by either section 4 of the Planning and Development Act, 2000 (the Act), or article 6 of the Planning and Development Regulations 2001 (the Regulations).

11.2.2. Firstly, with regard to section 4(1)(h) of the Act, which I consider to be the only subsection of section 4 with any potential relevance to this referral, I note that the provision relates to works for the maintenance, improvement or other alteration of a structure 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 neighbouring structures.

- 11.2.3. The Referrer contends that the works materially affect the appearance of the structure and so would not comply with Article 4(1)(h) of the Planning and Development Act 2000 (as amended). They believe that the expressive change from solid, opaque, fixed, weathered industrial, historic siding, which formerly opened up to a rear yard area and has been seldom opened in the last 30 years to a glazed aluminium brightly lit shop window including door and full height glazing is a significant departure in terms of consistency of character, impact including on the residential amenity and privacy of neighbouring properties nos. 98,99, 100 and 101 Rathgar Road. They note that the former siding is now treated like a roller shutter, rolled back when the shop is open. They are concerned that it is in seriously compromised condition and is unlikely with such use to survive another winter.
- 11.2.4. The Occupier contends that installing additional doors behind an existing timber panel sliding door in a property which is not a protected structure does not require planning permission and that opening an existing door is not development. They provide that following taking occupancy of 98A Rathgar Road, the current occupier of the premises Mr Paddy McQuaid, installed two glazed doors behind the timber sliding door. This was for environmental reasons: permitting light to the rear storage area, for reasons of thermal insulation from the outside, and for security reasons, presenting an additional barrier to the shop. This work was carried out in October 2015. They note that to aid privacy the occupier made the glazing frosted, so as to be translucent, not transparent i.e allowing the passage of light in both directions.
- 11.2.5. The Referrer provides that the property does not need to be a protected structure to avail of the provision of Section 4(1)(h) that precludes actions that change the character of a structure or neighbouring structures, including gardens and private spaces. They believe that the development amounts to significant material impact on the character of the area, contrary to the Z2 residential/conservation zoning and is, therefore development and not exempted development.
- 11.2.6. I noted on my site visit, that the glazed doors are installed to the rear of the old timber panel sliding door. These appear similar to patio doors and are clear glazed but have translucent tape on them which serves to let light through to the rear of the extension. This tape has been installed to aid privacy and to prevent overlooking. However as this is a commercial premises, I would consider that the installation of these doors which allow for light spillage and could serve as a rear access to the

commercial premises, are materially different from the former use of the timber siding as presented in the documentation submitted. I would therefore consider that this would not comply with Section 4(1)(h) and that the said recently inserted doors *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.*

### 11.3. Issue of unauthorised development

- 11.3.1. The issue of unauthorised development has been raised by the Referrer. They provide that the old timber siding which long predates the unauthorised extension, was originally a disused access gate into an open storage yard, and not a doorway into a retail space. It does not appear from the planning records that this extension is authorised, however the details submitted provide that it is in situ since the 1980's, and was used as part of a commercial property at that time. Regard is had to the Historic Context as Timeline provided by the Referrer in this respect. In view of the time period the issue of taking enforcement proceedings has lapsed. However, this extension to a commercial property is not exempted development and appears to be unauthorised. Article 9(1)(a)(viii) of the Planning and Development Regulations 2001(as amended), which provides a restriction on exemption is of note i.e: *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.*
- 11.3.2. In response to the Enforcement issue it is provided on behalf of the Occupier that the original door opening is long in existence and was not opened by their client. Also that as the property is not a protected structure, the installation of an additional door set does not constitute unauthorised development. However, while they provide there is no evidence to support the claim of unauthorised development relative to the extensions they have not addressed this issue, relative to the extension. It is therefore considered that in this context the subject works to a structure which appears to be unauthorised do not constitute exempt development.

#### 11.4. Other issues

- 11.4.1. The issue of right of way for usage by the commercial property to the rear of the premises has been raised. The Referrer provides there is no agreed right of way either public or private in existence. They note sworn affidavits relative to this issue and provide copies and maps. There is no established use relative to right of way for these properties. Without right of access they provide there would be no reason to turn the garden into ostensibly a rear yard for a retail premises.
- 11.4.2. It is provided on behalf of the Occupier that there is an access to the rear of 98A Rathgar Road at the side of 99A. This access is shared with the residents of nos. 98, 99,100 and 101 Rathgar Road. This access leads to a timber sliding door to the rear of no.98A Rathgar Road that is long in existence. This door is marked with a sign stating 'Fire Escape -Keep Clear'. They note that there is a car frequently parked in front of this access.
- 11.4.3. On my site visit I noted that the common access to the rear of properties nos.98,99,100 and 101 Rathgar Road also leads to the side of no. 99A and the rear of no.98A Rathgar Road. However, the issue of right of way is a civil matter and it would not be appropriate for the Board to adjudicate on this. In any event it is not the subject of this referral.

#### 11.5. Precedent Cases

- 11.5.1. It would appear that there are no precedent cases of direct relevance to the subject of this Referral. However, the following Board decisions are of note:
- 11.5.2. A Question arose in Ref. 29S. RL.2443 as to whether the provision of a new double entrance onto Gordon Street from 9 Barrow Street, Ringsend Dublin was or was not development or was or was not exempted development. In this case the Board concluded that the provision of a new double entrance onto a street constitutes development, the works materially affect the appearance of the structure so as to render the appearance inconsistent with the character of neighbouring structures and therefore these works did not come within the exempted development provisions of section 4(1)(h) of the Planning and Development Act 2000.

- 11.5.3. A Question arose in Ref. 86. RL.2439 as to whether works carried out to a shopfront and associated works at J.P. Hopkins and Sons Limited, Main Street, Wicklow was or was not development or was or was not exempted development. The Board concluded that the installation of a new shopfront and other alterations to the front and side external elevations of the building constitutes development within the meaning of section 3(1) of the Planning and Development Act, 2000. This included that the installation of a set back curved glazed entrance and sliding doors do not come within the scope of section 4(1)(h) of the said Act.
- 11.5.4. A Question arose in Ref. 06F. RL2559 as to, Whether the alterations to the building at 'Tigin', Thormanby Road, Howth, Dublin was or was not development or was or was not exempted development. The Board concluded that the extension was to a structure which was previously determined by An Bord Pleanala, under 06F.RF.0732, to be unauthorised and that the restrictions imposed by Article 9(1)(viii) of the 2001 PDR, which state that development which consists of or comprises the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use, the Board concluded that the alterations to the building constituted development and did not constitute exempted development.
- 11.5.5. Copies of these decisions are included in the Appendix to this Report.

## 11.6. **Appropriate Assessment**

- 11.6.1. 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.

## 12.0 **Recommendation**

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

**WHEREAS** a question has arisen as to whether the replacement of an opaque, fixed, inaccessible party wall between separate, private properties with a fully glazed, openable and accessible window and door set is or is not development or is or is not exempted development:

**AND WHEREAS** Brian Fallon and Tara Kelly requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 7th day of October, 2016 stating that the matter was development and was exempted development:

**AND WHEREAS** Brian Fallon and Tara Kelly referred this declaration for review to An Bord Pleanála on the 3rd day of November, 2016:

**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) of the Planning and Development Act, 2000,
- (c) Section 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1)(viii) of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 1 and 4 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,
- (h) the report of the planning inspector:

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

- (a) The installation of a glazed door and window in a party wall of a commercial premises facing a private communal residential garden area is development under section 3(1) of the Planning and Development Act 2000, as amended.
- (b) The installation of a glazed door and window in a party wall at the rear of a commercial premises facing a private communal residential garden area is not exempted development, in that the works materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of neighbouring structures.
- (c) Therefore, the works do not come within the exempted development provisions of section 4(1)(h) of the Planning and Development Act 2000, as amended.
- (d) There are no exemptions provided for in the said Planning and Development Act, 2000, as amended, and the Planning and Development Regulations 2001, as amended, by which such works to an unauthorised extension to a commercial property would be exempted development.

- (e) Therefore, the alterations to the building in question constitute development by virtue of Article 9 (1)(a)(viii) of the Planning and Development Regulations, 2001, as amended and are not exempted development.

**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 alterations to the building is development and is not exempted development.

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Angela Brereton

Planning Inspector

14<sup>th</sup> of February 2017