



An  
Bord  
Pleanála

## Inspector's Report RL29S 3547

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### Question

Whether the simultaneous erection of an extension to the rear of a house which has not yet been built, but which is to be constructed beside No 46 Beech Hill Drive Donnybrook, Dublin is exempt development.

### Location

46 Beech Hill Drive, Donnybrook, Dublin 4.

### Declaration

Planning Authority

Dublin City Council

P. A. Reg. Ref.

0470/16.

Decision

The development is not exempt development.

Referrer

Margaret Purdy,

Observer

Jonathon O'Connell

Date of Site Inspection

3<sup>rd</sup> May, 2017.

Inspector

Jane Dennehy.

## Contents

|   |    |
|---|----|
| 1.0 Site Location and Description .....                         | 3  |
| 2.0 The Question .....  | 3  |
| 3.0 Decision of the Planning Authority .....                    | 3  |
| 3.2. Planning Authority Reports .....                           | 3  |
| 4.0 Planning History.....                                       | 4  |
| 5.0 The Referral.....   | 4  |
| 5.1. Referrer's Case .....                                      | 4  |
| 5.2. Planning Authority Response .....                          | 5  |
| 5.3. Observer Submission .....                                  | 5  |
| 5.4 Further Submission of the Referrer.....                     | 7  |
| 6.0 Statutory Provisions.....                                   | 7  |
| 6.1. Planning and Development Act, 2000 as amended .....        | 8  |
| 6.2. Planning and Development Regulations, 2001 as amended..... | 8  |
| 7.0 Assessment.....   | 9  |
| 9.0 Recommendation.....   | 11 |

## 1.0 Site Location and Description

- 1.1. No 46 Beech Hill Drive is a semi-detached house with front and rear gardens within a residential estate in Donnybrook, Dublin 4. There is an extant grant of planning permission for development of a dwelling to the side of the existing house, details of which are set out under Planning History below. (Section 4.) It can be confirmed that this grant of permission had not been taken up at the time of inspection.

## 2.0 The Question

The owner occupier of the dwelling, through her agent, Vincent Farry and Co. Ltd., requested a declaration from the planning authority on 14<sup>th</sup> December, 2016 as to:

*Whether the simultaneous erection of an extension to the rear of a house which has not yet been built, but which is to be constructed beside No 46 Beech Hill Drive Donnybrook, Dublin is exempt development.*

## 3.0 Decision of the Planning Authority.

- 3.1. By order dated, 13<sup>th</sup> February, 2017 the planning authority issued a declaration in which it is indicated that the development described in the Question is not exempt development as no dwelling is on the site and no construction has been commenced.

### 3.2. Planning Officer Report.

The planning officer in her report notes the extant grant of permission for development of a house on the site details of which are under Planning History in Section 4 below and the exempt development provisions set out under Class 1, Part 1 Schedule 2, of the Planning and Development Regulations, 2011-2016. She concludes that the Declaration request is premature in that there is no existing dwelling and construction has not commenced.

## 4.0 Planning History

PL 29S 245806/P. A. Reg. Ref 2511/16: The planning authority decision to grant permission for a house to the side of the existing dwelling, extensions and alterations to the existing dwelling and a new vehicular entrance was upheld following third party appeal. Condition No 2 is reproduced below:

*“The proposed development shall be amended as follows:*

- a. The first floor rear bedroom and the associated structure to the proposed new dwelling shall be omitted;*
- b. The first floor rear wall to the proposed new dwelling shall align with the original rear boundary wall of the attached two storey dwelling on site; and*
- c. Any fenestration to the first floor bathroom in the rear wall of the new dwelling shall be in frosted glass.*

*Prior the commencement of development revised drawings showing the above modification shall be submitted to and agreed in writing with the Planning Authority.*

*Reason: In the interests of protecting the amenities of No 44 Beech Hill Drive.”*

PL 29S 246978/P. A. Reg. Ref: 3586/15: The planning authority decision to grant permission for a house to the side and for extensions to the existing dwelling was overturned and permission was refused following third party appeal for reason relating to over-development and impact on residential amenities.

## 5.0 The Referral

### 5.1. Referrer’s Case.

- 5.1.1. The Declaration issued by the planning authority was referred to the Board by Vincent Farry and Associates on 7<sup>th</sup> February, 2017 and it includes an outline of the planning history and a copy of the declaration request to the planning authority. The

case made in the Referral is that it is explicitly confirmed in *Smyth v Colgan* that a landowner does not need to await actual provision of a house to avail of exempt development provisions and therefore a residential extension could be built at the same time as the house. A brief outline of *Patricia Smyth and Thomas Smyth, Plaintiffs v John Colgan, Defendant* [S.C. No 250 of 1997] and a copy is included in the submission.

- Construction of a house had commenced which was unauthorised development and an interim injunction was issued by the High Court to the Plaintiff.
- The status of a house before it has been lived in is that of a habitable house and not a dwelling house. There is no planning definition of a dwelling house but there is for a habitable house in Article 8 of the Local Government (Planning and Development Regulations, 1994. A dwelling house will always be a habitable house.
- It is affirmed in the Supreme Court Judgement that the Defendant's development was not a 'dwelling house' within the meaning of exempted development regulations having regard to *The Queen v Allison* (1843) 2 L.T.O.S 24.
- It is also affirmed in the Supreme Court Judgement, that a house purchased but not yet lived in is a 'habitable house' not a 'dwelling house' which is the term used in Class 1 of the Regulations as amended in the Local Government (Planning and Development) Regulations, 1995.

5.1.2. The Regulations do not say who can carry out exempt development therefore it is possible for a developer (who will sell a property on) to carry it out. The fact that the house has not been inhabited should not result in breach of the planning code.

## 5.2. **Observer Submission.**

An observation was received from Mr. Jonathon O'Connell of No 44 Beech Hill Drive, the property to the north west side of Ms Purdy's property.

Mr. O'Connell outlines the planning history including objections he submitted in relation to the two applications both of which were subject to appeal and, in particular, Condition No 2 of the Decision to grant permission under PL 29S 245806/P. A. Reg. Ref 2511/16. (Details in Section 3 refer.) He also states that he has been unable to inspect the drawings provided with the Referral submission which were not available at the time of a visit to the public office at Dublin City Council.

It is requested that the planning authority decision be upheld because:

Building an extension at the same time as building the house should be regarded and considered as 'the same build'

The extension would eliminate development (a three metre length) in a development for which permission was previously refused and will eliminate the condition attached to the permission to grant permission. (Details in section 3 refer)

The Case Law referred to by Ms Purdy's agent, can easily be contradicted. Every case is different and Mr. O'Connell's circumstances are different to those of the Case law referred to by Mr. Farry. The references to Case law should be disregarded.

If a plan to build the extension was in a planning application proposal, permission would have been refused in line with the inspector's recommendation. (PL 29S 245806/P. A. Reg. Ref 2511/16 refers.)

Mr O'Connell also raises a number of issues of concern with regard to impact on the residential amenities of his property.

### **5.3. Planning Authority Response**

- 5.3.1. In a letter received from the planning authority it is confirmed that there are no additional observations to those set out in the planning officer's report.

#### 5.4. Further Submission of the Referrer.

A further submission was received from the Referrer's agent on 21<sup>st</sup> March, 2017 according to which:

- It is difficult to place weight on the observer's submission in that he has not had sight of the drawings.
- A legal analysis to determine whether planning permission is required rather than considerations of effects on amenity.
- There are three questions:
  - (a) Whether the proposed extension complies with the distance and dimensional requirements for exempted development status
  - (b) Whether exempt development rights are withdrawn by any provision within Article 9 of the Planning and Development Regulations and,
  - (c) Whether the works can be undertaken simultaneously with the construction of the permitted house.
- The subject extension would not normally require planning consent and there is no reference in the planning officer report as to breach of provisions of Article 9 of the Regulations. <sup>1</sup>
- With regard to the timing of the works relative to the construction of the 'host' house, the Referrer simply wishes to simultaneously increase the floor space. The ruling in *Smyth v Colgan* indicates that this would be legally permissible and therefore the development would not come within the ambit of planning control.

## 6.0 Statutory Provisions

- 6.1. The following provisions of the *Planning and Development Acts, 2000 as amended* are relevant to consideration of the Question referred to the Board.

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<sup>1</sup> Such a breach would de-exempt an otherwise exempt development

Section 2(1)

*In this Act, except where the context otherwise requires –*

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

*"structure" as 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 situate*

*"use", in relation to land, does not include the use of the land by the carrying out of any works thereon*

Section 3(1)

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

6.2. The following provisions of the Planning and Development Regulations, 2000 as amended apply if exempt development provisions are relevant:

6.2.1. Article 6 provides for exempt development which is subject to Article 9 thereof. According 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."*

Article 9 (1) (a). de-exempts development in certain circumstances which material contravention of a condition attached to a prior grant of permission.

6.2.2. According to Class 1 Schedule 2, Part 1 of the Planning and Development Regulations:



*“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.”*

Class 1, Condition and Limitation 1 (a) where the house has not been extended previously, the floor area of such extension shall not exceed 40 square metres.

Condition and Limitation 5. An extension to the rear 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.

## 7.0 **Assessment**

- 7.1. There is no dispute that the erection of an extension to an existing house comes within the meaning of “works” and “development” provided for in sections 2 and 3 of the Planning and Development Act, 2000 as amended. (The Act) <sup>2</sup>
- 7.2. There is no definition for “extension” within the Act and Planning and Development Regulations 2001 as amended. (The Regulations.) However, it is reasonable to assume that is little doubt that the intention in the legislation is to provide for exemption, under Class 1 of Schedule 2, Part 1 of the Regulations for extensions to existing houses subject to conditions and limitations and to the restrictions provided for through Articles 6 and 9 of the Regulations. In this instance, the Question is as to whether the “simultaneous” erection of an extension to the rear of the “house which has not yet been built” comes within the meaning of exempt development as provided for in the Act and the Regulations. It can be confirmed that the legislation is silent with regard to exempt development entitlements for extensions and additions to permitted development that has not been commenced, to which the extension would be connected.

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<sup>2</sup> The relevant extracts are outlined or reproduced in section 6.1 above.

- 7.3. While there is an extant grant of permission for a house on the site there is no evidence of works or development, (within the meaning of Sections 2 and 3 the Act) on the site at present on foot of the grant of permission. (PL 29S 245806/P. A. Reg. Ref 2511/16 refers.) As a result, the extension subject of the Question does not constitute an extension to a house because there is no existing “works” or “development” (within the meaning of sections 2 and 3 of the Act) to which the extension is to be connected so the “extension is not development”. An extension is an addition to an existing house providing for enlarged or additional accommodation that is to be connected to an existing structure which is in this instance is a house.
- 7.4. If there is no existing development, an extension cannot be erected as an extension is not a structure that is independent of a ‘parent’ structure. The extension must be connected to an existing structure. The ‘extension’ referred to in the Referrer’s Question in effect constitute material changes to an extant grant of permission for a house the construction of which has not been commenced. These material changes would require a further grant of permission comprising proposals for changes to the permitted proposal subject of the prior grant of permission. which the Referrer wishes to modify. (PL 29S 245806/P. A. Reg. Ref. 2511/16 refers.)
- 7.5. On the assumption that an extension to a non-existent permitted dwelling is not ‘development’ within the meaning of Sections 2 and 3 of the Planning and Development Acts., 2000-2016 the Question as to whether the *simultaneous erection of an extension to the rear of a house which has not yet been built, but which is to be constructed beside No 46 Beech Hill Drive Donnybrook, Dublin is exempt development* is irrelevant in that it cannot be therefore be decided that the extension so described is exempt development.
- 7.6. As a result, it can be concluded that that the extension subject of the Question is not exempt development because it is not development. An extension to a non-existent permitted dwelling is not ‘development’ because the non-existent permitted dwelling to which it is to be connected itself is not ‘development’ within the meaning of Sections 2 and 3 of the Act. To this end, the conclusion reached by the planning officer that the Question requested from the planning authority is premature is reasonable.

- 7.7. In the event that it is to be decided that the extension constitutes “development” and that the lack of an existing house on the site is irrelevant, it would be necessary to determine whether the extension would be exempt development. It then could be concluded that the extension would constitute exempt development having regard to Articles 6 and 9 of the Planning and Development Regulations, 2001-2016 and to Class 1, Schedule 2 Part 1 thereof.<sup>3</sup>
- 7.8. The Observer party refers to a number of issues that relate to planning matters which would be subject to consideration in planning review further to an application for planning permission. It is also noted that the Observer party did not have the benefit of sight of the plans and would have been unaware that an upper floor was not included in the drawings submitted with the request for the Declaration and the subsequent Referral to the Board. The required modifications for the permitted dwelling under Condition No 2 of the prior grant of permission under PL 29S 245806/P. A. Reg. Ref 2511/16 to which the Observer Party refers apply to the first floor only. The provisions of Article 9 (1) (a) are therefore irrelevant to the Question.
- 7.9. The extension shown on the lodged plans would come within the description for Class 1, Schedule 2, Part 1 of the Regulations and would not exceed the restrictions in the relevant Condition and Limitation Nos 1 and 5 of Class 1 in that the extension would have a floor area of 33.5 square metres and the remaining private open space to the rear would be approximately forty-six square metres in area.
- 7.10. Finally, the references to case law by the Referrer’s agent have been reviewed and it has been concluded that there is no relevant precedent within the Judgements that would guide the determination of a decision on the Question.

## 8.0 Recommendation

- 8.1. It is recommended that it be determined that the simultaneous erection of an extension to the rear of a house which has not yet been built, but which is to be constructed beside No 46 Beech Hill Drive Donnybrook, Dublin is not development as there is no existing development on the site to which the extension could be

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<sup>3</sup> The relevant extracts are reproduced or outlined in section 6.2 above.

connected. The simultaneous erection of an extension to the rear of a house which has not yet been built is therefore not exempt development. A draft Decision follows.

**WHEREAS** a Question has arisen as to whether the simultaneous erection of an extension to the rear of a house which has not yet been built, but which is to be constructed beside No 46 Beech Hill Drive Donnybrook is or is not development or is or is not exempted development:

**AND WHEREAS** Margaret Purdy requested a declaration from Dublin City Council and the said Council issued a Declaration 27<sup>th</sup> January, 2017, stating that the said simultaneous erection of an extension to the rear of a house which has not yet been built is not exempt development;

**AND WHEREAS** Margaret Purdy referred this declaration for review to An Bord Pleanála on 7<sup>th</sup> February, 2017;

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

- (a) An extension is structure that is connected to another structure and is not an extension if the structure is independent of a parent structure;
- (b) there is no existing development on the site and no works have been commenced on the site subject of the Question on foot of the extant grant of planning permission under PL 29S 245806/P. A. Reg. Ref 2511/16 and,
- (c) there is no existing structure to which the extension is to be connected,

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) of the Planning and Development Act, 2000 Act, hereby decides that the said simultaneous erection of an extension to the rear of a house which has not yet been built is not development and is not exempt development.

**Jane Dennehy**  
Senior Planning Inspector,  
9<sup>th</sup> May, 2017