



An  
Bord  
Pleanála

## Inspector's Report PL.04.3571

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<b>Question</b>	Whether the works undertaken to change the location of house and garage and associated site works is or is not development and is or is not exempted development.
<b>Location</b>	Site no. 1 Atlantic View, Ballinluska, Myretleville, Co. Cork.
<b>Referrer</b>	Cork County Council
<b>Planning Authority</b>	Cork County Council
<b>Planning Authority Reg. Ref.</b>	None
<b>Owner / Occupier</b>	Donal & Marion Kissane

**Date of Site Inspection** 26<sup>th</sup> September 2017

**Inspector** Kenneth Moloney

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## 1.0 Site Location and Description

- 1.1. The referral site<sup>1</sup> is located within the built up area of Myrtleville, Co. Cork, and the site is situated within close proximity to the atlantic coastline.
- 1.2. The referral site comprises of a fully constructed dormer bungalow including single storey detached domestic garage and landscaped gardens.
- 1.3. The subject house is located within a small housing development of 4 no. houses.
- 1.4. All four houses are located on sites with sizable gardens and all overlook a public open space.
- 1.5. The referral site is elevated above the adjoining public road and the adjacent public green space.
- 1.6. The referral site is accessed by a vehicular entrance which rises from the public road.

## 2.0 The Background

- 2.1. Cork County Council granted planning permission (L.A. Ref. 08/6647) on the 6<sup>th</sup> October 2008 for a dwelling house, detached garage and installation of a bio-cycle treatment unit at site no. 1 Atlantic Views, Ballinluska, Myrtleville, Co. Cork.
- 2.2. Cork County Council issued an Enforcement notification on the 29<sup>th</sup> July 2016 requesting the owner of site (Donal & Marion Kissane) no. 1, Atlantic View, Ballinluska, Myrtleville to regularise unauthorised development on the site. The site owner was instructed to submit a planning application for permission for retention of unauthorised works within 3 months of 29<sup>th</sup> July 2016.
- 2.3. The planning authority decided to refer a question to the Board in accordance with Section 5(4) of the Planning and Development Acts 2000 (as amended) as to whether the subject development is or is not development or is or is not exempted development.

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<sup>1</sup> Site no. 1 Atlantic Views, Ballinluska, Myrtleville, Co. Cork

### 3.0 The Question

*“Whether alterations / modifications to a house which was permitted in accordance with Permission Register Reference no. 08/6647 at site no. 1. Atlantic View, Ballinluska, Myrtleville, Co. Cork is or is not development or is or is not exempted development”.*

### 4.0 Policy Context

#### 4.1. Local Area Plan

The operational Local Area Plan is the Ballincollig Carrigaline Municipal District LAP, 2017.

The referral site is located within the development boundary and the existing build-up area.

### 5.0 The Referral

The referral submission includes 17 questions for the Board's consideration. Questions 1 – 13 relates to questions whether individual works carried out on the referral site compared to permission granted under L.A. Ref. 08/6647 are or are not development and are or are not exempted development. These questions are summarised as follows;

- Relocating the house 5m closer to the public road.
- Relocating the location of the domestic garage 5m forward.
- Construction of roof terrace balcony at first floor front elevation in lieu of flat roof.
- Porch door in lieu of window on front elevation.
- Omission of side extension for family / play room.
- Plaster render finish in lieu of stone cladding on front elevation.
- French door in lieu of dormer window on front elevation.

- Changes of height of front elevation for ground floor wall and ground floor window and relationship of these with eaves on the dormer roof.
- Omission of chimney on north east elevation.
- Modifications of arrangement of rear windows / roof lights on north west elevation.
- Provision of extra first floor gable window on south west elevation.
- Provision of embankment retained by a stone wall at road boundary in lieu of a graded slope with timber post fence.

The remaining four questions (i.e. no. 14 – 17 inclusive) are summarised as follows;

- Whether the alterations to the structures individually or cumulatively are within the scope of Section 4(1)(h) on the basis that they were carried out during the construction of the house.
- Whether the alterations to the structures individually or cumulatively are within the scope of Section 4(1)(h) on the basis that they materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure.
- Whether any possible exemptions available to the developer are restricted by Article 9(1)(a)(i).
- Whether the alterations to the house individually or cumulatively carried out to improve the energy performance of the building are or are not development and are or are not exempted development.

## 6.0 Respondent

Donal & Marion Kissane submitted a response. The response submission included Part A and Part B. Part A outlines the background to the complaint whereas Part B responds to the individual questions posed by Cork County Council.

The following is the summary of the relevant points in the submission of Part A;

### Part A

- The house built on site no. 1 is substantially compliant with planning permission L.A. Ref. 08/6647.
- Any minor as-built alterations are clearly non-material.
- No alterations have been made to the character, scale, form and height.
- No alterations would result in overlooking or overshadowing of the surrounding dwelling.
- No alterations will have any environmental impact.
- It is contended that any adjustments are not material as they have;
  - No impact and are consistent with the overall design of development.
  - No impact on the proper planning & sustainable development of the area.
  - No impact on members of the public.
  - No impacts on occupants of adjacent properties
- Minor non-material alterations are inevitable in any construction process and this includes developments which do not
  - Materially alter the exterior of the structure or render the appearance inconsistent with the character of the structure,

- It is submitted that the certificate of material compliance was confirmed by an Architect and a Chartered Engineer. These compliances are contained in Appendix C of the response submission.
- It is submitted that the alterations and modifications are consistent with Section 1.5.2 of the Development Management Guidelines.
- It is submitted that Cork County Council have been inconsistent in their approach in relation to non material minor alterations with regard to house on site no . 3 and house on site no. 1.
- It is submitted that alterations are a normal part of the building process as such alterations are considered non-material in the context of Section 2(1) of the Planning and Development Act.
- It is submitted that the alterations are consistent with Section 4(1)(h) of the Planning and Development Act, 2000.
- It is noted that Cork County Council concluded that minor alterations have no adverse impact on any dwelling in the vicinity.
- The minor alterations do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure permitted or any neighbouring structure.

## Part B

### Question 1

- Minor amendments to the house location were required due to excavations.
- When the excavation works were complete it was necessary to alter the location of the house.
- The overall footprint of the building has been reduced.
- It is submitted that any alteration to the location of the house of circa 3 - 5 metres is not considered material when considered in the context of a reduced as-built house footprint.

- Appendix B1 includes 'As Built Plan View layout' and the 'As Permitted Plan layout'. On the basis of the two drawings it is submitted that;
  - Minor amendments would not materially affect the exterior of the structure.
  - The minor amendments will not alter the character, scale, form or height of the structure and will not therefore have an adverse impact on adjacent residential amenities.
  - The minor amendments move the house away from adjacent properties to the north which will reduce the potential for overlooking and overshadowing.
  - Minor amendments do not have any environmental impact.

#### Question 2

- Minor amendments to the location of the garage were required due to excavations.
- Appendix B1 includes 'As Built Plan View layout' and the 'As Permitted Plan layout'. On the basis of the two drawings it is submitted that;
  - Minor amendment would not materially affect the exterior of the structure.
  - The minor amendments will not alter the character, scale, form or height of the structure and will not therefore have an adverse impact on adjacent residential amenities.
  - The minor amendments move the house away from adjacent properties to the north which will reduce the potential for overlooking and overshadowing.
  - Minor amendments do not have any environmental impact.



### Question 3

- An objective of the build was to complete a house of passive design.
- A balcony of 12m sq. was permitted on the first floor west gable however during construction and due to the exposed nature of the site, it was found that a balcony at this location is not feasible.
- A reduced balcony is located approximately 4m to the east.
- The as-built area of the balcony was reduced by 37% over that permitted.
- The reason for the move was energy efficiency. The purpose for the balcony relocation was to eliminate a thermal bridge by moving the balcony to a free standing location.
- This minor amendment will not materially affect the exterior of the structure or render the appearance inconsistent with the character of neighbouring structures.
- The minor amendments will not alter the character, scale, form or height of the structure and will not therefore have an adverse impact on adjacent residential amenities.
- The proposed balcony move relocates the balcony 4m further west from a neighbouring property.
- The minor impact improves the environmental impact by improving energy performance of the building.

### Question 4, 5, 6, 7

- Cork County Council have already concluded in their decision dated 29<sup>th</sup> July 2016 that this is a non-material alteration.

### Question 8

- It is submitted that the dormer eaves have been surveyed and are all within the permitted 3.3m height from first floor level.

- It is contended that the only minor non-material alterations are changes to fascia detail which is in accordance with planning conditions.
- Overall the minor amendment will not render the development inconsistent with neighbouring structures, nor will the minor amendment have an adverse impact on any dwelling in the vicinity.
- The minor amendment reduces the glazed area and therefore reduces potential for overlooking. The minor amendment improves the energy performance of the building via solar gain.

#### Question 9, 10

- Cork County Council have already concluded in their decision dated 29<sup>th</sup> July 2016 that this is a non-material alteration.

#### Question 12

- A large first floor window was replaced by two smaller windows and a roof window has been omitted.
- The reason for omitting the roof window relates to energy efficiency.
- Roof windows are unavailable as triple glazed specifications and therefore are not as energy efficient as standard triple glazing windows.
- The as built glazed area on the south west elevation is now reduced by 20% or 0.6m sq.
- Overall the minor amendment will not render the development inconsistent with neighbouring structures, nor will the minor amendment have an adverse impact on any dwelling in the vicinity.
- The minor area reduces the glazed area and therefore reduces potential for overlooking.
- The minor amendment improves the energy performance of the building via solar gain.

### Question 13

- Cork County Council have already concluded in their decision dated 29<sup>th</sup> July 2016 that this is a non-material alteration.
- The site owner also submitted details to Cork County Council outlining his intentions to undertake the work.

### Question 14

- It is submitted that only minor alterations to the design of that permitted have been undertaken.
- These minor amendments are consistent with the principles of the proper planning and sustainable development of the area.

### Question 15

- Minor amendments will not render the development inconsistent with neighbouring structures, nor will the minor amendment have an adverse impact on any dwelling in the vicinity.
- It is submitted that a number of separate and distinct minor alterations cannot somehow become cumulatively material.
- It is contended that all aesthetic components such as utility, composition, contrast and scale together make up the character of a building. The character of the house granted permission, the house constructed and neighbouring houses are modern energy efficient dormer bungalows.

### Question 16

- In relation to Article 9(1)(a)(i) it is submitted that the minor non alterations clearly do not materially contravene any condition of 08/6647 and the use of the building is unchanged.

## Question 17

- It is contended that material alterations which enhance the energy performance of the building are consistent with the established principles of proper planning and sustainable development.
- The provision for improved environmental sustainability in the planning process is an objective of the National Planning Framework, Cork County Development Plan, Quality Housing for Sustainable Communities, 2007, and the Guidelines on Sustainable Residential Development in Urban Areas, 2009.

## 7.0 Evaluation

### 7.1. Relevant Case Law

#### 7.1.1. Horne v Freeney (1982)

Internal alterations were undertaken during the course of construction of an amusement arcade. Here it was held that the permission was indivisible and that the planning permission should have been undertaken in its entirety. Mr. Justice Murphy considered that it was not possible to undertake alterations during the construction simply because the variation would have been exempted once the building was completed.

#### 7.1.2. Cairnduf vs O'Connell

In this instance, works were carried out to a terraced house including a side window a patio and steps. The Supreme Court (Finlay C. J.) considered that the works did materially affect the external appearance of the structure but did not render such appearance inconsistent with the character of the structure nor of neighbouring structures. Therefore, the development was exempted under Section 4(1)(g) of the 1963 Act. The findings of the judgement are relevant as it considered that the

character of a terraced house would be more dominantly affected by its street appearance rather than its rear appearance. Also of importance is that character must relate in general, to the shape, colour, design, ornamental features and layout of the structure concerned. Invasion of privacy of neighbouring structure, is not a consideration which would render development inconsistent with the character of the structure of that house.

## 7.2. **Statutory Provisions**

I consider the following statutory provisions relevant to this referral case:

### Planning and Development Act, 2000

**Section 2 (1) states: -**

*“alteration’ includes*

*(a) plastering or painting or the removal of plaster or stucco  
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 land, or any part of a structure so defined.”*

*“unauthorised development” means, in relation to land, the carrying out of any unauthorised works (including construction), erection or making of any unauthorised structure) or the making of any unauthorised use.*

*“unauthorised structure” means a structure other than –  
a structure which was in existence on 1 October 1964, or*

*a structure, the construction, erection or making of which was the subject of a permission for development granted under part IV of the Act of 1963, or deemed to be such under section 92 of that Act or under Section 34 of this Act, being a permissions which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act).*

*“works’ includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...”*

**Section 3 (1)** states:-

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

**Section 4** states: -

*(1) The following shall be exempted development for the purposes of this Act: -*

*(h) ‘development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures’.*

**Section 32 (1)** states that permission will be required under Part III;

*“(a) in respect of any development of land, not being exempted development, and (b) in the case of development which is unauthorised, for the retention of that unauthorised development”.*

Planning and Development Regulations, 2001

**Article 6 states:-**

*“(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) states:-**

*“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.”*

**7.3. Relevant Related Cases**

**7.3.1. RL2737**

This case was referred to the Board following a declaration by the Galway County Council. The Local Authority determined that a bay window to a rear of the house is development but not exempted development and that an opaque window situated on the side elevation of the house is development but not exempted development.

The reporting inspector in reviewing the case concluded that the bay window situated on the rear elevation would not be visible from the public road and therefore would not be inconsistent with the character of the structure on which it is located and furthermore would not be inconsistent with the character of neighbouring structures. On this basis the reporting inspector concluded that the provision of a bay

window in the rear elevation would be exempted development in accordance with Section 4(1)(h) of the Act. In relation to the opaque window located on the side elevation the reporting inspector concluded that this would not be exempted development having regard to its scale relative to the permitted window, which it replaced, and also given that the opaque window is visible from the public road. However in conclusion the planning inspector noted the judgement of *Horne v Freaney* was relevant to this case. This judgement stated that for any development to avail of exempted development rights in terms of Section 4(1)(h) exemptions, it must first have been completed in full accordance with its permission. Accordingly any exemptions would only apply to development fully completed in accordance with its permission. The Board agreed with the reporting inspector and concluded that the bay window and the opaque window were development and not exempted development.

#### 7.3.2. RL2632

This referral related to a question whether the relocation of a house by approximately 7 – 11 metres from the location as permitted in accordance with condition no. 1 is or is not development and is or is not exempted development. The owner of the property submitted it was necessary to relocate a house due to the discovery of a spring during excavations. The Board decided that the relocation of the house was development and was not exempted development.

#### 7.4. **Assessment**

##### *Are the alterations / amendments development*

The planning reference L.A. Ref. 08/6647 relates to a grant of planning permission by Cork County Council for a dwelling house and a detached garage. The as built dwelling house was constructed with several alterations / amendments to the permission granted in accordance with L.A. Ref. 08/6647. These alterations / amendments to the permitted house are outlined in Section 5.0 of this report and in summary include the following;



- Relocation of house by 5 metres
- Relocation of garage by 5 metres
- Roof terrace balcony at first floor level
- Porch door at front elevation
- Omission of family / play room to side
- French door in lieu of dormer window
- Changes in height to front elevation
- Omission of chimney
- Modifications to windows / roof light to north west elevation
- Extra first floor gable window on south west elevation
- Embankment retained by stone wall to front in lieu of graded slope

I would consider that all of the above alterations / amendments outlined involve the act of construction, and hence would involve “works” within the meaning of Section 3 of the Planning and Development Act, 2000 (as amended). Such works constitute “development” within the meaning of the Act.

*Are the alterations / amendments exempted development*

The alterations outlined above include a wide range of amendments and a consideration for the Board is whether these alterations / amendments are, either individually or collectively, are a material or immaterial departure from the development permitted. Section 4 (1) (h) of the Planning and Development Act, 2000 (as amended), states that *‘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’*.

In considering whether a material alteration has occurred I would have regard to a previous Board decision, i.e. RL2632. In this case the Board decided that the relocation of a house from its permitted location by approximately 7 – 11 metres is development and not exempted development. I would also have regard to the Board's decision in relation to RL2737. In this case one of the questions related to the provision of an opaque window on the a side gable in lieu of a smaller window. The reporting inspector concluded that this is not exempted development as it would be visible from the public road. This conclusion is relatively consistent with the judgement of Finlay C.J. in Cairnduff v O'Connell. The Board decided that development had taken place that was not exempted development.

I have inspected the subject site and I have noted based on a visual observation of the area the alterations / amendments to the front elevation primarily include provision of balcony at first floor level, a porch door in lieu of windows at ground floor level, omission of a family / play room and modifications to the number of velux roof windows throughout the house build. A notable alteration is the relocation of both the dwelling house and the domestic garage within the site. Overall I would consider that these alterations are materially different from that permitted in accordance with condition no. 1 of L.A. Ref. 08/6647 as the alterations would be largely visible from the public road and this view is consistent with previous Board decisions, i.e. RL2632 and RL2737. On the basis that the alterations are visible from the public road and having regard to the scale and quantity of alterations I would not consider that the said alterations / amendments are exempted development in accordance with Section 4 (1) (h) of the Planning and Development Act, 2000 (as amended).

I am satisfied that these alterations / amendments, which might reasonably be categorised as being for the improvement of the structure, does materially affect the external appearance of this dwelling since, as they are visible from the public road. I would conclude that the alterations / amendments renders the appearance inconsistent with the character of the structure as permitted.

In addition to above it is important to note the judgement in relation to Horne v Freaney which concluded that for any development to avail of exempted development provisions in terms of Section 4(1) (h) exemptions of the Planning and Development Act, 2000 (as amended), it must have been completed in full accordance with its permission. The constructed house was not completed in accordance with condition no. 1 of the relevant permission pertaining to the site accordingly any exemptions would not apply to the property having regard to the judgement Horne v Freaney. Mr. Justice Murphy states in this judgement that permission is not indivisible and planning permission granted requires that the totality of the works are carried out. The judgement essentially concludes that a developer cannot partially carry out a development as distinct from the whole of the permission and any exemptions can only be applied to a built structure. As such any arguments that the alterations / amendments are exempted development having regard to Section 4 (1) (h) of the Act would fall.

## 8.0 Recommendation

### 8.1. Conclusions and Recommendations

**WHEREAS** a question has arisen as to whether the works undertaken relating to the following;

- a. Change to the location of the dwelling
- b. Change to the location of the detached garage
- c. Provision of roof terrace balcony at first floor level
- d. Provision of porch door at front elevation
- e. Omission of family / play room
- f. French door in lieu of dormer window
- g. Changes in height to front elevation
- h. Omission of chimney
- i. Modifications to windows / roof light to north west elevation
- j. Extra first floor gable windows on south west elevation
- k. Embankment retained by stone wall to front

to a dwelling house at site no. 1 Atlantic View, Ballinluska, Myreteville, Co. Cork is or is not development and is or is not exempted development.

**AND WHEREAS** the said question was referred to An Bord Pleanála by Cork County Council on the 11<sup>th</sup> of April 2017.

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

- a. Section 3 (1) of the Planning and Development Act, 2000,
- b. Section 4 of the Act
- c. The planning history of the site, including the permission in respect

of a house on the lands, granted by the planning authority under Ref. No. PD 08/6647 and, in particular, Condition No.1 thereof.

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

- a. The works undertaken include all alterations / amendments to the permitted development in accordance with Ref. No. PD 08/6647.
- b. The said works do not accord with the terms of the planning permission Ref. No. PD 08/6647, including Condition No.1 thereof.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) of the 2000 Act, hereby decides that the works undertaken to change the location of the dwelling house constitute development and which is not exempted development.

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Kenneth Moloney  
Planning Inspector

19<sup>th</sup> January 2018