



An  
Bord  
Pleanála

## Inspector's Report PL.27.RL3576

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<b>Question</b>	Whether replacement shed is or is not development or is or is not exempted development.
<b>Location</b>	Ballinrush Estate, Roundwood, Co. Wicklow.
<b>Declaration</b>	
Planning Authority	Wicklow County Council.
Planning Authority Reg. Ref.	11/17.
Applicant for Declaration	Chandler Kohli.
Planning Authority Decision	The replacement shed is development and is not exempted development.
<b>Referral</b>	
<b>Referred by</b>	First Party.
<b>Owner/ Occupier</b>	Chandler Kohli.
<b>Observers</b>	None.
<b>Date of Site Inspection</b>	25 <sup>th</sup> July 2017.
<b>Inspector</b>	Dáire McDevitt.

## **1.0 Introduction**

Chandler Kohli has referred to the Board, for review, a declaration issued by Wicklow County Council under Section 5 of the Planning and Development Act 2000, as amended that a replacement shed at Ballinrush Estate, Roundwood, Co. Wicklow was development and was not exempted development.

## **2.0 Site Location and Description**

- 2.1 The structure is located within Ballinrush Estate on the shores of Lough Dan, on the southern side of the R759, accessed via a c. 3km long private unsurfaced track.
- 2.2 Ballinrush Estate is located in a valley, bounded to the north by the Cloghoge River, which connects Lough Dan and Lough Tay, and the Luggala Estate (Guinness Estate) in the heart of the Wicklow Mountains, south of the Sally Gap and is part of the 'Wicklow Way' mountain walking trail. It is c.4.5km from Roundwood village in Co. Wicklow. There are a number of structures scattered across the Estate which is held in commonage between four families with few internal boundaries marked out. The Estate has extensive trees throughout and is bounded to the south by woodland. Lough Dan forms the western boundary.
- 2.3 The relevant house is identified as 'Araby', located c. 900m to the north east of the shed along the access track. There is a low timber fence in a state of disrepair at Araby. Another house identified as the 'bungalow' with no defined boundaries is located c. 60m east of the shed which is the subject of this referral.
- 2.4 The structure in question resembles a timber cabin, with two windows with external shutters and a door to the front. Access is via steps as it is elevated above the ground level and it has a small veranda area to the front.

## **3.0 The Question**

- 3.1 Whether a replacement shed is or is not development or is or is not exempted development.

## **4.0 Planning Authority Declaration**

### **4.1 Declaration**

Wicklow County Council issued a Declaration on the 6<sup>th</sup> April 2017 which stated that the replacement shed was development but was not exempted development.

### **4.2 Planning Authority Reports**

#### **4.2.1 Planning Reports**

The Area Planner concluded that having regard to the location of the shed at a point which is remote from and not within the immediate vicinity of the dwelling which it is to serve, the shed would not be considered to be located within the curtilage of this dwelling, and, therefore the shed as constructed would not come within the description of development as set out under Class 3, Part 1, Schedule 2 of the Planning and Development Regulations 2001, as amended.

#### **4.2.2 Other Technical Reports**

None.

## **5.0 Planning History**

**UD4672** refers to the shed which is the subject of this referral, and two garden type sheds which have been removed from the site.

## **6.0 Policy Context**

### **6.1 Wicklow County Development Plan 2016-2022**

Ballinrush Estate is located within the **Mountain Upland Landscape Area**, categorised as a **Mountain Area of Outstanding Natural Beauty**. A key characteristic of this area is its mountainous topography with u-shaped valleys, lakes and glacial topography and generally relates to lands immediately surrounding or above the 300+ contour line.

## **Landscape Objectives:**

**Objective NH49** sets out that all proposals shall have regard to the County landscape classification hierarchy in particular the key landscape features and characteristics identified in the Wicklow Landscape Assessment and the key development considerations for each one.

**Objective NH50** requires applications within the AONB (Area of Outstanding Natural Beauty) to be accompanied by a landscape/visual impact assessment.

**Objective NH51** to resist development that would significantly or unnecessarily alter the natural landscape and topography.

## **6.2 Natural Heritage Designations**

The site is located within the **Wicklow Mountains SAC (site code 002122)** and is c.100m from the nearest point of the **Wicklow Mountains SPA (site code 004040)**.

## **7.0 The Referral**

### **7.1 Referrer's Case**

- 7.1.1 The shed which is the subject of this referral has a gfa of c.24sq.m and replaces a shed with a gfa of c.82sq.m that had been on site for over 30 years. The referral includes photographs of the original structure. This shed had been used as a set for a TV series and the production company erected the new shed as the original one was in a state of disrepair and in danger of collapse. Due to seasonal flooding the referrer has outlined that it was not practical to refurbish it or replace it like for like.
- 7.1.2 The lake is a primary amenity for the four families who own the Estate and the shed is used by one of the families for the storage of kayaks, surfboards and other materials used for recreational purposes. It is also used as a shelter from inclement weather.
- 7.1.3 There is a small porch to the front of the shed which is excluded from the floor area calculations.

- 7.1.4 The referrer has set out that the dwellings the shed supports are dotted around the estate and argues that, due to the unusual shared nature of the estate and the dwellings within it, that the shed could be within the curtilage of any of the dwellings. The house it directly relates to has been identified in the documentation as the 'relevant' house. This refers to 'Araby'
- 7.1.5 The shed is located within the curtilage of 'Araby' (marked on a map on file as the relevant house) and while it is at a distance from the house and on the opposite side of the access track it is still considered to be within the curtilage of the relevant house. Although it is acknowledged that this is an unusual scenario, the referrer is satisfied that the shed is within the curtilage of this house and is not located to the front of the said house.
- 7.1.6 The referrer has argued that when seasonal flooding is taken into consideration, the height above flood level is less than 4m. This is recognised as an unusual precedent but the referrer is of a mind that it is reasonable to set the base level for measurements above the flood level (Drawing 5071). Anecdotal evidence from the previous shed suggests the need to have the floor level c.600mm above that of the previous structure.

## 7.2 **Planning Authority Response**

None.

## 8.0 **Statutory Provisions**

The relevant provisions of the Planning and Development Act 2000 as amended and the Planning and Development Regulations 2001 as amended are summarised below.

### 8.1 **Planning and Development Act, 2000 as amended.**

#### 8.1.1 **Section 2(1)** provides the following interpretations:

**Structure:** *'any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and where the context so admits, includes the land on, in or under which the structure is situate'*.

**Works:** *‘any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior of a structure’.*

8.1.2 **Section 3(1)** provides the following interpretations:

**Development:** *‘except where the context otherwise requires, the carrying out of any works on, on, over or under land or the making of any material change in the use of any structures or other land.’*

8.1.3 **Section 4(2)(a)** states *‘The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that:-*

- (i) By reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development.*

8.1.4 **Section 4(2)(b)** states *‘Regulations under paragraph (a) may be subject to conditions and be of general application or apply to such area or place as may be specified in the regulations’.*

8.1.5 **Section 4(4)** states *‘Notwithstanding paragraph (a), (i) and (l) of subsection 1 and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.*

## **8.2 Planning and Development Regulations, 2001 as amended.**

8.2.1 **Article 6(1)** identifies that, subject to Article 9, certain development shall, subject to conditions and limitations, be exempted development for the purposes of the Act, as per Schedule 2 of the Regulations 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 said column 1.

8.2.2 **Article 9(1)** states that Development to which article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would:

**(vi)** interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan.

**(viiB)** comprise development in relation to which a planning authority or An Bord Pleanala is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site.

8.2.3 **Class 3 of Part 1 of the Second Schedule (General)** refers to development within the curtilage of a house.

*Column 1 (description of development):*

*The Construction, erection or placing within the curtilage of a house of any tent, awning, shade or other object, greenhouse, garage, store, shed or other similar structure.'*

*Column 2 (conditions and limitations):*

- 1. No such structure shall be constructed, erected or placed forward of the front wall of a house.*
- 2. The total area of such structures constructed, erected or placed within the curtilage of a house shall not, taken together with any other such structures previously constructed, erected or placed within the said curtilage, exceed 25 square metres.*
- 3. The construction, erection or placing within the curtilage of a house of any such structure shall not reduce the amount of private open space reserved exclusively for the use of the occupants of the house to the rear or the side of the house to less than 25 square metres*

4. *The external finishes of any garage or other structure constructed, erected or placed to the side of a house, and the roof covering where such structure has a tiled or slated roof, shall conform with those of the house.*
5. *The height of any such structure shall not exceed, in the case of a building with a tiled or slated pitched roof, 4 metres or, in any other cases, 3 metres.*
6. *The structure shall not be used for human habitation or for keeping of pigs, poultry, pigeons, ponies or horses, or for any other purpose other than a purpose incidental to the enjoyment of the house as such.*

## **9.0 Assessment**

### **9.1 Introduction**

9.1.1 The purpose of this referral is not to determine the acceptability or otherwise of the shed in respect of the proper planning and sustainable development of the area, but rather it is to determine whether or not the shed in question constitutes development, and if so falls within the scope of exempted development.

### **9.2 Is or is not development**

9.2.1 The initial question arises in relation to whether the construction as carried out is or is not development.

9.2.2 The structure in question resembles a timber cabin, with two windows with external shutters and a door to the front. Access is via steps as it is elevated above the ground level and it has a small veranda area to the front.

9.2.3 Section 3 defines development, except where the context otherwise requires, as 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. Works as defined in section 2 (1) includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. The shed, therefore, constitutes development.



### 9.3 Is or is not exempted development

9.3.1 As indicated in the Planners Report, the basis for the planning authority's determination was that the shed was not considered to be within the curtilage of the relevant house (Araby) as it is located at a point which is remote from and not within the immediate vicinity of that dwelling which it is to serve.

9.3.2 In considering this argument it is necessary to consider what is meant by the curtilage of a house. The term curtilage is not defined under the Planning and Development Act 2000. I note that the reporting inspector for PL.02.RL3472 in their assessment referred to the Oxford Dictionary definition of curtilage 'an area of land attached to a dwelling-house and forming one enclosure with it' and to the Department of Environment Heritage and Local Government Guidelines on Architectural Heritage Protection (in the context of Protected Structures) which state *'By definition, a protected structure includes the land lying within the curtilage of the protected structure and other structures within that curtilage and their interiors. The notion of curtilage is not defined in law, but for the purposes of these Guidelines Curtilage is taken as meaning the parcel of land immediately associated with that structure and which is (or was) in use for the purpose of the structure'*.

9.3.3 These Guidelines refer to the following three considerations when determining curtilage:

1. a functional connection between the structures;
2. an historical relationship between the main structure and the structure;
3. and the ownership past and present of the structures.

9.3.4 In this instance, the referrer has outlined that the overall Estate is held in commonage by four families and that the estate has been in the family ownership since the 1850s and is used for recreational purposes. There are a number of uninhabited structures/houses scattered throughout the Estate and 'Araby' has been identified by the referrer as the relevant house. The

'Bungalow' is located adjacent to the shed which is the subject of this application. There is limited access to the shed and the 'Bungalow' at certain times of the year due to flooding as shown on photographs submitted with the file. The 'bungalow' has been labelled 'adjacent but not relevant' on the maps submitted with the referral. The referrer notes that due to the unusual shared ownership nature of the Estate, it could be argued that the replacement shed is within the curtilage of any of the dwellings on the Estate.

9.3.5 While the overall Estate is not demarcated into four parts, there is some fencing around individual structures. There is post and wire fencing at Araby. The replacement shed is very clearly not on land immediately associated with the 'relevant' house and is not included within the rudimentary boundaries around it.

9.3.6 The referrer's argument that the shed could be considered to be within the curtilage of any of the houses within the Estate would require compliance with one or all of the criteria set out in section 9.3.3 above. I accept that there is a functional relationship between the shed and the relevant house 'Araby', as the shed serves and is used by one of the families who own the Estate. As the Estate is held in commonage, I contend that there is a functional and ownership connection between all the houses (not occupied) on the Estate and the shed that is the subject of this referral. Therefore, in this instance the shed could be considered to be within the curtilage of the relevant house. I note that the 'bungalow' shown on the maps and observed at the time of inspection is closer to the shed.

9.3.7 I refer to PL.20.RL2847 relating to jetties. The referrer in this case referred to 'The Sinclair Lockharts'<sup>1</sup> case which defined 'curtilage' as 'lands reasonable used and incidental to the enjoyment of the dwelling'. The reporting inspector concluded that the location of the jetties off a small agricultural field

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<sup>1</sup> Sinclair-Lockhart's Trustees v. Central Land Board (1950) IP&CR 195, where it was held that the ground which is served for the comfortable enjoyment of a house or other building may be regarded in law as being within the curtilage of that house or building and thereby as an integral part of the same although it has not been marked off or enclosed in any way. It is enough that it serves the purpose of the house or building in some necessary or useful way.

(notwithstanding it was not used at the time for agricultural purposes) on the opposite side of a county road to the relevant house could not be considered to be within the curtilage of the house notwithstanding that it is within the same ownership. In this instance, the Board concluded that the field in which the mooring facility had been constructed, including the harbor and jetty, did not form part of the curtilage of the house on the opposite side of a county road.

9.3.8 I contend that the scenario described above does not apply to the current case as Ballinrush Estate is used by its owners for recreational purposes. There was no evidence at the time of inspection of the estates being used for agricultural purposes and the estate is not bisected by a public road. Therefore the implications for defining curtilage that arose under PL.20.RL2847 do not apply.

9.3.9 I also refer to PL.15.RL2457 which related to a wind turbine within the curtilage of a house and the reporting inspector concluded that the house was separated from the field by fencing and screen planting with a separate access off the public road. The inspector, in reaching this conclusion, referred to the Concise English Dictionary (New Oxford) which defined curtilage as a 'piece of ground lying near and belonging to a dwelling and included within the same fence.' The Board, however, concluded that the development would constitute development of a type which would generally come within the scope of Class 2(b) of Schedule 2, Part 1 which related to the construction, erection or placing within the curtilage of a house of a wind turbine, but that the said wind turbine would interfere with the character of the landscape and a view or prospect of special amenity value and, therefore, by reason of the provision of Article 9(1)(a)(vi) of the said regulation, the wind turbine would not come within the exempted development provisions and was not exempted development.

9.3.10 I note that there is no reference in this definition of curtilage to the question of whether or not the house must be occupied.

9.3.11 In the absence of a definition of curtilage in the Planning and Development Act 2000, as amended. I shall use the considerations set out in the in the Department of Environment Heritage and Local Government Guidelines on

Architectural Heritage Protection (in the context of Protected Structures to determine if the shed falls within the curtilage of a house or not.

9.3.12 The shed is in use for the storage of recreational equipment associated with the Lough and is used by the one of the four families who hold Ballinrush ownership in commonage. The referrer has demonstrated a clear functional link between the relevant house and the shed due to the nature of the ownership of the Estate.

9.3.13 The dwellings within the Estate are not used as permanent places of residence. They serve as recreational accommodation for the families. On balance, notwithstanding that the individual houses may be used by different families, their ownership appears to be communal. Therefore, I would conclude that, as the shed is located on lands within the same ownership as the relevant house and there is an ownership and functional link with the Estate, the shed is within the curtilage of a house.

#### **9.4 Restrictions on exempted development**

9.4.1. Notwithstanding the issue of curtilage, the shed does not fall within Class 3, Part 1, Schedule 2 of the Planning and Development Regulations 2001. Column 2 sets out restrictions/limitations to Class 3. Condition/limitation No. 5 clearly sets out that *The height of any such structure shall not exceed, in the case of a building with a tiled or slated pitched roof, 4 metres or, in any other cases, 3 metres.*

9.4.2 The referrer has argued that, due to the seasonal flooding of the site, the base of the shed has been raised above the flood level. The height of the shed when be measured from the base of the structure, is c. 3.82m, therefore, complies with the limitations on height set out in Class 3.

9.4.3 The shed has a height of c. 4.23m when measured from the ground level, limitation no. 5 clearly sets out that the height of any such structure shall not exceed, in the case of a building with a tiled or slated pitched roof, 4 metres or, in any other cases, 3 metres.

9.4.4 Therefore the shed does not comply with the conditions and limitation within Class 3 and is not exempted development.

## **9.5 Appropriate Assessment**

9.5.1 The shed is located within the Wicklow Mountains SAC (side code 002122). This SAC encompasses parts of Dublin and Wicklow.

9.5.2 Relevant Qualifying Interests:

- Oligotrophic waters containing few minerals of sandy plains.
- Natural dystrophic lakes and ponds.
- Northern Atlantic wet heaths with *Erica tetralix*.
- European dry heaths.
- Alpine and Boreal heaths.
- Calaminarian grasslands to the *Violetalia Calaminariae*.
- Species-rich *Nardus* grasslands, on siliceous substrates in mountain areas.
- Blanket Bogs (if active bog).
- Siliceous scree of the montane to snow levels.
- Calcareous rocky slopes with chasmophytic vegetation.
- Siliceous rocky slopes with chasmophytic vegetation.
- Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles.
- *Lutra lutra* (otter)

7.5.3 The shed is used for storage purposes with no sanitary facilities. It is set back c.25m from the shore of Lough Dan. The area is prone to flooding and the base of the structure is raised above the flood line. There are no priority habitats identified at this location. The Wicklow Mountains SAC has prepared conservation objectives for natural dystrophic lakes and ponds. Owing to their altitude, all pools and lakes, with the exception of the Lower Lake (Glengdalough) and Lough Dan, have been mapped as potential sites. Lough Dan is a lower pater-noster lake.

7.5.4 Having regard to the nature and scale of the development and its location relative to European sites, I consider it is reasonable to conclude, on the basis of the information on the file, which I consider adequate in order to issue a

screening determination, that the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on European Site No.002122 Wicklow Mountains SAC or any other European site, in view of the site's Conservation Objectives, and a Stage 2 Appropriate Assessment (and submission of a NIS) is not therefore required.

## 8.0 Recommendation

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

**WHEREAS** a question has arisen as to whether a replacement shed at Ballinrush Estate, Roundwood, Co. Wicklow is or is not development or is or is not exempted development:

**AND WHEREAS** Chandler Kohli requested a declaration on this question from Wicklow County Council and the Council issued a declaration on the 6th day of April, 2017 stating that the subject shed was development and was not exempted development:

**AND WHEREAS** Chandler Kohli referred this declaration for review to An Bord Pleanála on the 28<sup>th</sup> day of April 2016:

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

- (a) Section 2 (1), 3 (1), and 4(1)(a) of the Planning and Development Act 2000 as amended.
- (b) article 6 (1) of the Planning and Development Regulations, 2001, as amended,
- (c) Parts 1 (Class 3) of Schedule 2 to the Planning and Development Regulations, 2001, as amended, and

- (d) The application of the concept of 'curtilage' in the circumstances of this referral, and
- (e) the information on file and the report of the inspector.

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

- (a) The shed constitutes works and is development within the meaning of the Act.
- (b) the shed can be regarded as being located within the curtilage of a house.
- (c) However, as the height of the shed exceeds 4 metres, it does not come within the scope of Class 3, Part 1 of Schedule 2 of the Regulations.

**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** shed at Ballinrush Estate, Roundwood, Co. Wicklow **is development and is not exempted development.**

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Daire McDevitt  
Planning Inspector  
22<sup>nd</sup> June 2018