

Referral of Section 5 Declaration

Use of first floor unit as residential and
associated internal alterations

Unit above Spar, Main Street, Shankill, Co. Dublin

Dun Laoghaire-Rathdown County Council Ref. No. Ref1618

5th April 2018

AN BORD PLEANÁLA
Received: 5/4/18
Fee: € 2200
Receipt No: _____

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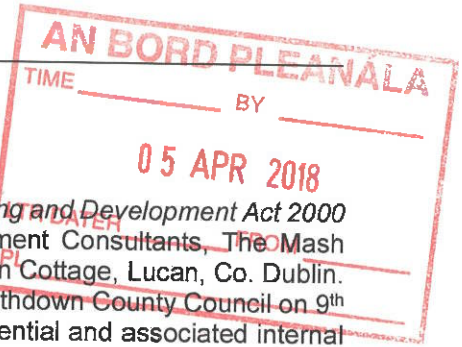
Submitted on behalf of:

Libratech Limited,
Ballyowen Cottage,
Lucan,
Co. Dublin.



Hughes Planning & Development Consultants

The Mash House, Distillery Road, Dublin 3
+353 (0)1 539 0710 – info@hpdc.ie – www.hpdc.ie



1.0 Introduction

This referral to An Bord Pleanála, pursuant to Section 5(3)(a) of the *Planning and Development Act 2000 (as amended)*, has been prepared by Hughes Planning and Development Consultants, The Mash House, Distillery Road, Dublin 3, on behalf of Libratech Limited, Ballyowen Cottage, Lucan, Co. Dublin. The referral relates to a Section 5 declaration made by Dun Laoghaire-Rathdown County Council on 9th March 2018 under Ref. Ref1618, regarding use of first floor unit as residential and associated internal alterations.

We request that An Bord Pleanála review the Section 5 declaration issued by Dun Laoghaire-Rathdown County Council and to make a determination that use of the first floor for residential and associated internal alterations constitute exempted development pursuant to Class 37, Part 1, Schedule 2 of the *Planning and Development Regulations 2001-2015*.

In this regard, we would pose the following question to An Bord Pleanála:

'Whether the use of the first floor unit as residential and internal alterations at Unit above Spar, Main Street, Shankill, Co. Dublin, is, or is not, exempted development'.

The prescribed fee of €220.00 is enclosed, along with a copy of the declaration issued Dun Laoghaire-Rathdown County Council.

This report sets out the planning rationale for the use and associated alterations to be deemed exempted development.

2.0 Section 5 Declaration issued by Dun Laoghaire-Rathdown County Council

On 9th March 2018 Dun Laoghaire-Rathdown County Council issued the following notice with regards to the declaration sought for the use and associated alterations (a copy of which is provided at Appendix A):

Whereas a question has arisen as to whether the use of the first floor unit as residential and internal alterations at Unit above Spar, Main Street, Shankill, Co. Dublin, is, or is not, exempted development, and whereas Dun Laoghaire-Rathdown County Council, in considering this application, had particular regard to –

- (a) *Sections 2, 3 and 4(1)(h) of the Planning & Development Act, 2000 (as amended) and Articles 5(1), 10(1) and 10(6) of the Planning and Development Regulations 2001 to 2018.*
- (b) *The documentation submitted as part of application reference 1618.*

The conclusion is that the use of the first floor unit as a residential dwelling and associated internal alterations IS Development and IS NOT Exempted Development.

2.1 Grounds for Referral

The applicant's grounds for referral can be summarised by the following points:

- The original change of use from 'residential' to use as a 'shop (hairdressing salon)' constituted unauthorised development and reverting back to a 'residential' use does not require a planning permit;
- Abandonment of the 'residential' use has not occurred as a planning permit was not granted for the 'shop (hairdressing salon)' use and it therefore constitutes an unlawful use; and
- Extinguishment of the 'residential' use has not occurred the absence of a planning approval for the 'shop (hairdressing salon)' use.

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3.0 Site Description

The subject site is located on the western side of Main Street, Shankill, Co. Dublin. The site forms part of a row of two to three storey shops, with Lloyds Pharmacy sitting immediately north and Bernardo's take-away sitting immediately south of the subject site. The building comprises a 3-storey building with an overall floor area of approximately 340sq.m. The building currently comprises a shop (Spar) at ground floor level (with storage to the rear at ground and first floor level) and 2 no. apartments at first and second floor level. Since the buildings construction, its first-floor level has been used for residential accommodation and as a hairdressing salon at differing times. This is discussed further in Section 5.1 of this submission.

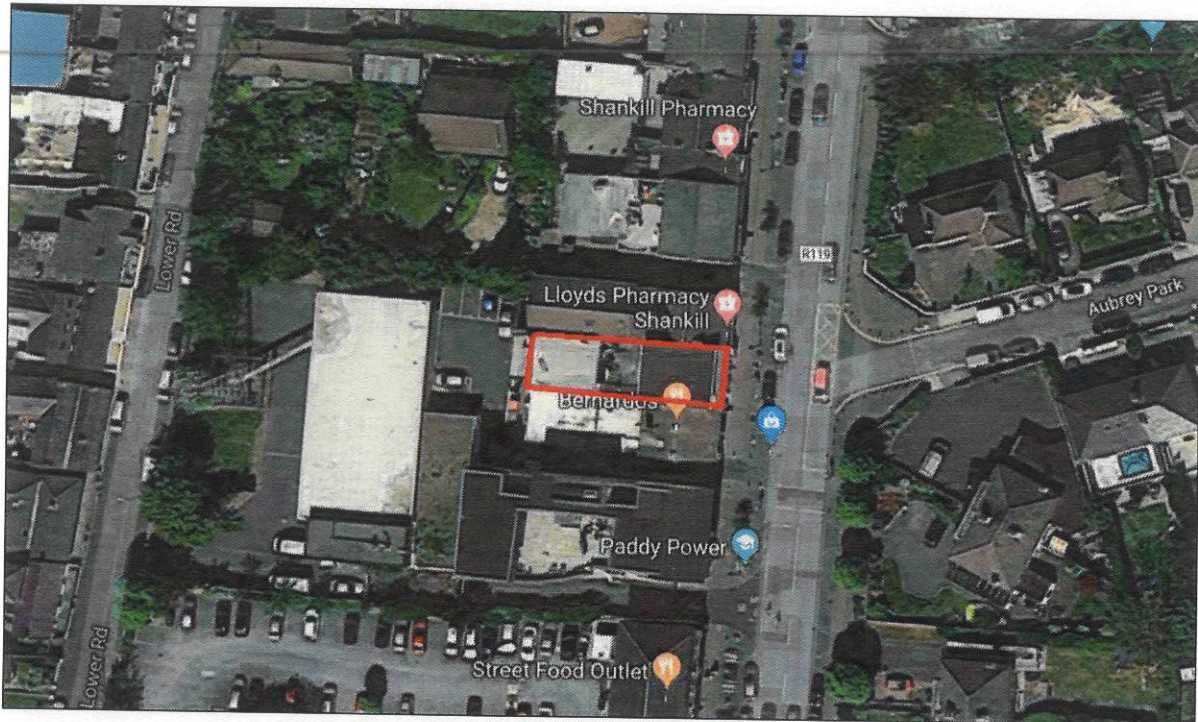


Figure 1.0 Aerial image showing the location of the application site (outlined in red).



Figure 2.0 Exterior of building on Main Street, Shankill (red line indicates the subject site)

The following is a timeline of the use of the properties upper floors since its initial construction to date:

Event	Date	Land Use
Construction of double storey building and commencement of use of first floor for residential purposes	c.1940-early 1970's	Residential
Construction of second floor extension and commencement of use of first floor as hairdressing salon	Early 1970's-2015	Hairdressing salon
Recommencement of use of the first floor for residential purposes	Mid-2016 to present	Residential

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Table 1.0 Land Use Timeline

3.2 Planning History

A review of the Dun Laoghaire-Rathdown County Council planning register revealed two applications on the subject site, Reg. Refs. D03A/0753 and D15A/0811.

Reg. Ref. D03A/0753 dates from 2003, when permission was sought by the previous owner of the building for the construction of a first floor extension to rear of the SPAR Retail Unit (in a separate part of the building to the rear of the site).

It is worth noting, Reg Ref. D03A/0753 described the use of the buildings upper floors as follows:

'...on the first floor is a hairdressers and an apartment on the second floor...'

In 2015, Reg. Ref. D15A/0811 sought permission for provision of an off-licence (6.2sqm within the existing shop footprint) subsidiary to the main retail use.

4.0 Dun Laoghaire-Rathdown County Development Plan 2016-2022

Under the Dun Laoghaire-Rathdown County Development Plan 2016-2022, the application site is zoned 'NC', the objective of which is *'to protect, provide for and-or improve mixed-use neighbourhood centre facilities.'*

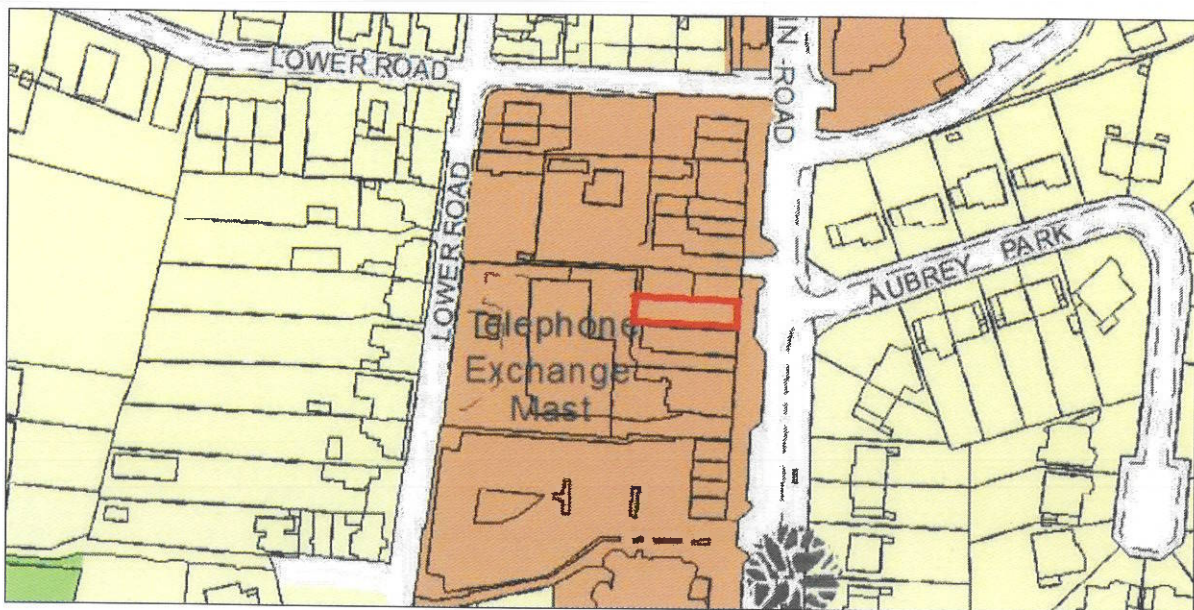


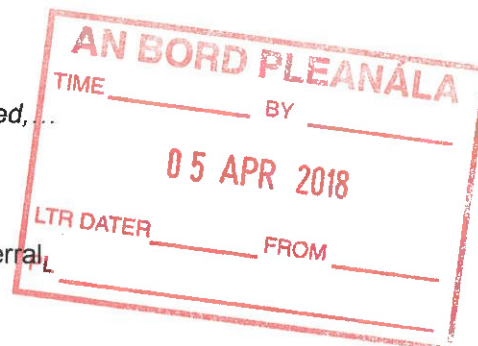
Figure 3.0 Extract from Zoning Map 10 in the Dun Laoghaire-Rathdown County Development Plan 2016-2022 showing the site (outlined in red) zoned 'NC'

The zoning matrix included in the Development Plan indicates 'permitted in principle' and 'open for consideration' uses in 'NC' zones. Permitted in principle uses are generally acceptable subject to the normal planning process and compliance with the relevant policies and objectives, standards and requirements set out in the Plan. These permitted in principle uses include 'residential' and 'shop-neighbourhood'.

A hairdressing salon comes under the definition of 'shop', as outlined in the *Planning and Development Regulations, 2001*. A 'shop' is defined as:

'...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,*
- b) as a post office,*
- c) for the sale of tickets or as a travel agency,*
- d) for the sale of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and "wine" is defined as any intoxicating liquor which may be sold under a wine retailer's off-licence (within the meaning of the Finance (1909-1910) Act, 1910), 10 Edw. 7. & 1 Geo. 5, c.8,*
- e) for hairdressing,*
- f) for the display of goods for sale,*
- g) for the hiring out of domestic or personal goods or articles,*
- h) as a launderette or dry cleaners,*
- i) for the reception of goods to be washed, cleaned or repaired,*



5.0 Grounds for Referral

This section of the report will seek to expand further on the grounds for referral.

5.1 Unauthorised Development

The building's first floor was used entirely for the purpose of residential accommodation since the building's construction until c. the early 1970's. In the early 1970's, the first floor was converted from a residential use to commercial use with a dormer extension added above to create a new apartment and living area. Use of the building's first floor as a hairdressing salon (Rene's Place) commenced soon after (see letter at Appendix B and google street view images at Figures 4.0 and 5.0). This use continued until 2015.



Figure 4.0 Google street view image of the subject site, dated August 2009

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Figure 5.0 Google street view image of the subject site, dated September 2014

During the period of use of the site as a hairdressing salon, use of the building's second floor for the purpose of residential accommodation continued. The building was offered for sale in early 2016. Following our client's purchase of the building, a residential use recommenced at first floor level (in the form of two apartments across first and second floor level) and it continues to be used in this manner.

Pursuant to Section 4 of the *Planning and Development Regulations, 2001*, 'residential accommodation' is a Class 9 use and 'shop' is a Class 1 use. Given the two uses fall under different classes of use, in Part 4 of Schedule 2 of the *Planning and Development Regulations, 2001*, the change of use does not constitute exempted development and a planning permit is required to change from use of the buildings first floor as 'residential accommodation' to use as a 'shop'.

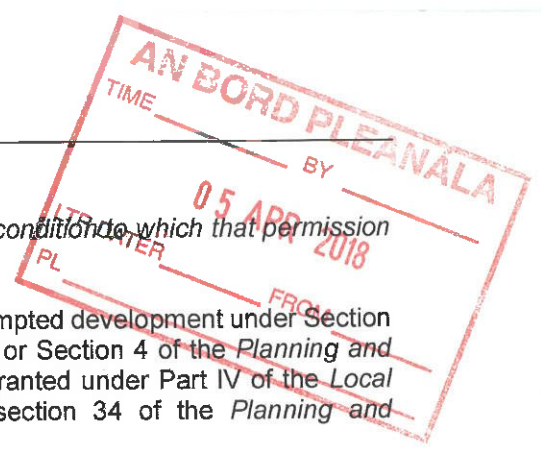
In accordance with Section 2(1) of the *Planning and Development Act 2000* (as amended), the 'permitted' use of a property is the use which existed at 1st October 1964 (the date on which the *Local Government (Planning and Development) Act 1963*, came into effect), or alternatively the use granted (and enacted) by a planning permission post 1st October 1964.

A review of the Dun Laoghaire-Rathdown County Council planning register details two planning approvals for the subject site, neither of which permitted a change of use (see Section 3.2 for more information on previous approvals for the site).

Given the hairdressing salon use commenced post-1 October 1964, it does not constitute a change of use not requiring permission. We would argue that the original change of use from 'residential' to use as a 'shop' (hairdressing salon) constituted unauthorised development. 'Unauthorised use' is defined as follows, in Section 2 of the *Planning and Development Act, 2000*:

"Unauthorised use" means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and 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*
- b) *development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which*



is carried out in compliance with that permission or any conditions which that permission is subject;

It is noted that the subject use does not fall under the category of exempted development under Section 4 of the *Local Government (Planning and Development) Act, 1963*, or Section 4 of the *Planning and Development Act, 2000*, and was not the subject of a permission granted under Part IV of the *Local Government (Planning and Development) Act, 1963*, or under section 34 of the *Planning and Development Act, 2000*.

Pursuant to Section 151 of the of the *Planning and Development Act, 2000*:

Any person who has carried out or is carrying out unauthorised development shall be guilty of an offence.

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

Given use of the first floor as a hairdressing salon constituted an unauthorised use, reverting back to a 'residential' use does not require a planning permit.

It is noted that the reverting back to the 'residential' use at first floor level is consistent with the rectification measures outlined in relation to unauthorised development, in Section 160(1) of the *Planning and Development Act, 2000*, which states that:

Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

- a) *that the unauthorised development is not carried out or continued;*
- b) *in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
- c) *that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.*

4.2 Abandonment of Use

Dun Laoghaire-Rathdown County Council, in the Record of Executive Business Chief Executive's Orders accompanying the Section 5 Declaration, express the view that the shop (hairdressing salon) had become established and that the original use had been abandoned. The record stating that:

Notwithstanding the fact that the previous hair salon use had been unauthorised, it is considered that this use, due to the length of time that it was exercised, being in excess of forty years, had become the established use of the first floor of the building and that the original residential use had been abandoned. As such, and having regard to Section 3(1) of the Planning and Development Act 2000 (as amended), it is considered that development has occurred comprising a material change of use and works to the interior of the structure.

We would argue to the contrary. In the absence of a valid planning permission, irrespective of how long the first floor has been used as a hairdressing salon, this use constitutes unauthorised use.

Abandonment is a legal concept used to describe the circumstances in which the rights to resume a use which has been lawfully carried out in the past may lapse because the use has ceased. The doctrine of 'abandonment' was adopted by Justice Costello in *Dublin County Council v. Tallaght Block Company Limited* [1985] I.L.R.M. 512, following the decision of the Court of appeal in *Hartley v. Minister for Housing and Local Government* [1970] 1 Q.B. 413, where the court concluded:

Where a previous use of land had been not merely suspended for a temporary and determined period, but had ceased for a considerable time, with no evidence of intention of resuming it at

any particular time, the tribunal of fact was entitled to find that the previous use had been abandoned, so that when it was resumed the resumption constituted a material change of use.

Lord Denning further stated:

...if it amounted to abandonment, it cannot be resumed unless planning permission is obtained.

However, abandonment cannot be considered to have occurred in circumstances where a lawful use is replaced by an unlawful use. In this instance, the resumption of the former (lawful) use would not constitute development. This was the view expressed by in *Young v Secretary of State for the Environment* [1983] All E.R. 1105 and subsequently adopted by Barron J. in *Rehabilitation Institute v. Dublin Corporation*, unreported, High Court, January 14, 1988.

In light of this, the first floor residential use cannot be considered abandoned as a planning permit was not granted for the hairdressing salon use and it therefore constitutes an unauthorised use.

It is worth noting that although the doctrine of abandonment is not applicable in this instance, the continued use of the building's second floor level for the purposes of residential accommodation and the retention of a floor plan layout conducive to residential use at first floor level (as illustrated in the floor plan excerpt included in Figure 6.0 below), is illustrative of an intention to resume residential use at first floor level.

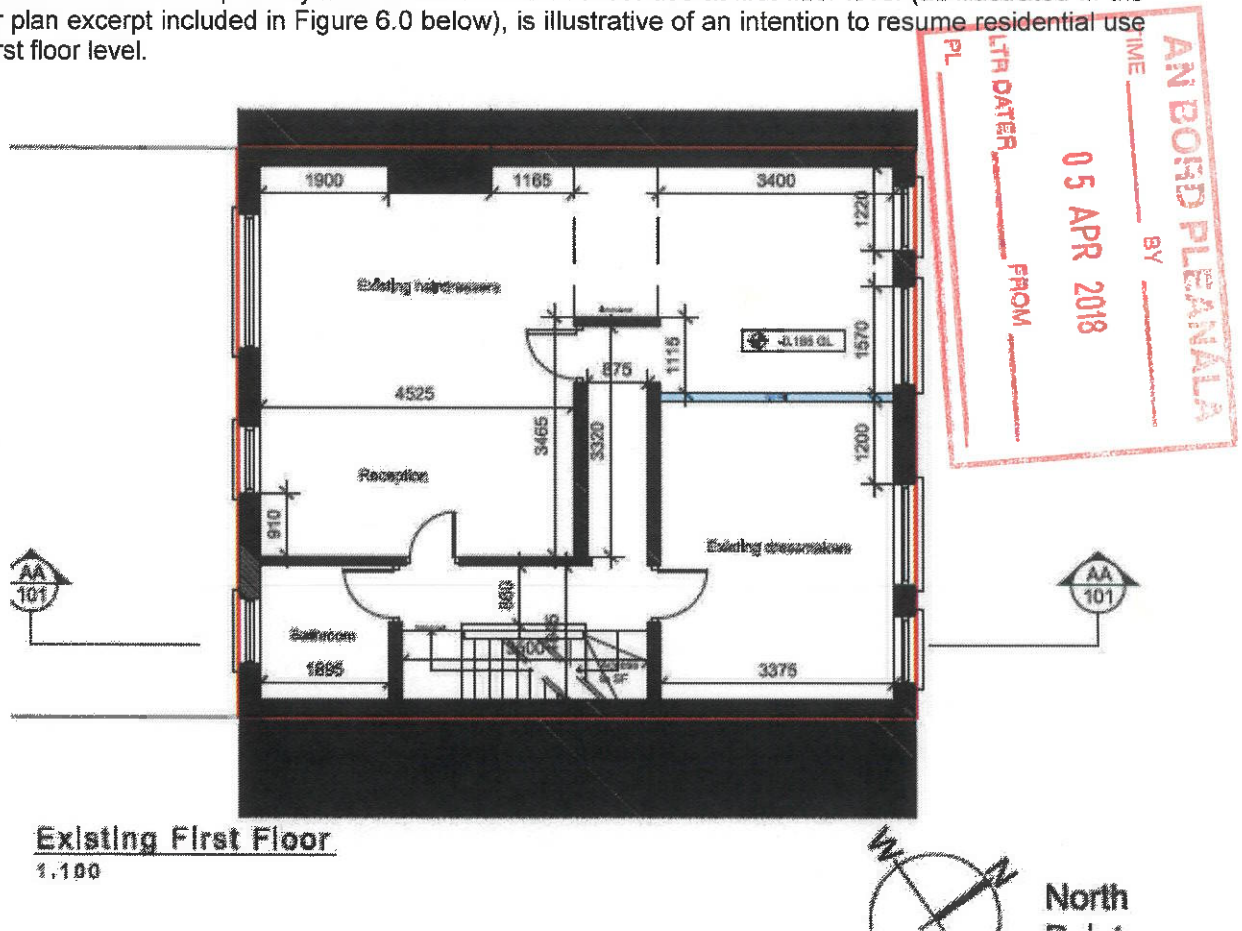


Figure 6.0 The layout of the buildings first floor plan at the time of purchase in 2016

4.3 Extinguishment of Use

As outlined, in *State (Kenny) v An Bord Pleanála*, unreported, Supreme Court, December 20, 1984; an established use may be lost if a planning permission inconsistent with that use is implemented on the site. In the absence of a planning approval for the 'shop (hairdressing salon)' use, the established 'residential' use cannot be considered extinguished.

5.0 Conclusion

The question before An Bord Pleanála is as follows:

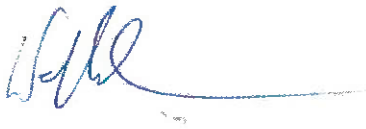
'Whether the use of the first floor unit as residential and internal alterations at Unit above Spar, Main Street, Shankill, Co. Dublin, is, or is not, exempted development.'

Accordingly, we respectfully request a declaration to this effect from An Bord Pleanála under Section 5 of the *Planning and Development Act 2000 (as amended)*.

It is worth noting that S.I. No. 30 of 2018 recently amended Article 10 of the Principal Regulations to provide an exemption for the change of use, and any related works, of certain vacant commercial premises to residential use without the need to obtain planning permission. The exemption applies to existing buildings that have a current commercial use with reference to Class 1, 2, 3, and 6 of Part 4 to Schedule 2 of the Principal Regulations. The subject first floor unit falls under this category. Although, this provision is not applicable in this instance, as the works have taken place prior to the period of time set out (8 February 2018 to 31 December 2021) and for the reasons set out above, it is worth noting as it is indicative of a shift to less rigid controls regarding shop-top conversions.

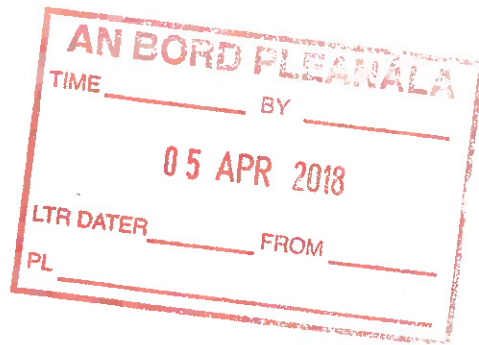
We trust that the Board will have regard to this submission and look forward to a decision in due course.

Yours sincerely,



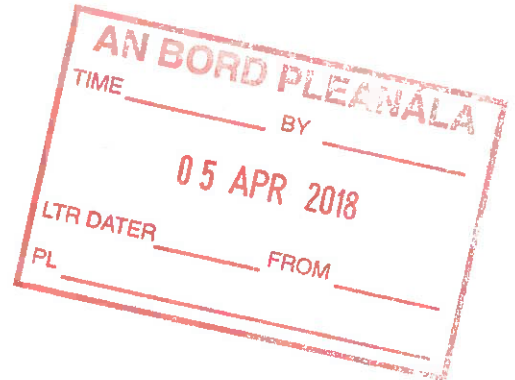
Kevin Hughes MIPI MRTPI
Director
For HPDC Ltd.

Enc. €220.00 Referral Fee



Appendix A

Dun Laoghaire-Rathdown County Council Section 5 Declaration (Ref. Ref1618)



AN BORD PLEANÁLA

TIME _____ BY _____

05 APR 2018

LTR DATER _____ FROM _____

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Planning Department
Rannóg Pleanála
Sharon O'Neill
Asst. Staff Officer
Direct Tel: 01 2047240
Fax: 01 280 3122

Bright Design Architects
4, Seafield Park,
Boosterstown,
Co. Dublin

9th March, 2018

Reference No.	Ref. Ref1618
Application Type:	Declaration on Development and Exempted Development – Section 5, Planning & Development Act, 2000, (as amended)
Registration Date:	12-Feb-2018
Location:	Unit above Spar, Main Street, Shankill, Co. Dublin, D18 P2Y3
Development Works:	Use of first floor unit as residential and associated internal alterations at Unit above Spar, Main Street, Shankill, Co. Dublin, D18 P2Y3

NOTIFICATION OF DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

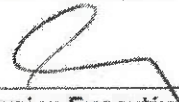
In pursuance of its functions under the Planning & Development Act, 2000 (as amended), Dun Laoghaire Rathdown County Council has, by Order No. 23/18 dated 09/03/2018 decided to issue a Declaration that:

Whereas a question has arisen as to whether the use of the first floor unit as residential and internal alterations at Unit above Spar, Main Street, Shankill, Co. Dublin, D18 P2Y3, is or is not Development and is or is not Exempted Development. And whereas Dún Laoghaire - Rathdown County Council, in considering this application, had particular regard to -

- Sections 2, 3 and 4(1)(h) of the Planning & Development Act, 2000 (as amended) and Articles 5(1), 10(1) and 10(6) of the Planning and Development Regulations 2001 to 2018.
- The documentation submitted as part of application reference 1618.

The conclusion is that the use of the first floor unit as a residential dwelling and associated internal alterations IS Development and IS NOT Exempted Development.

Date of issue: -----09/03/2018.

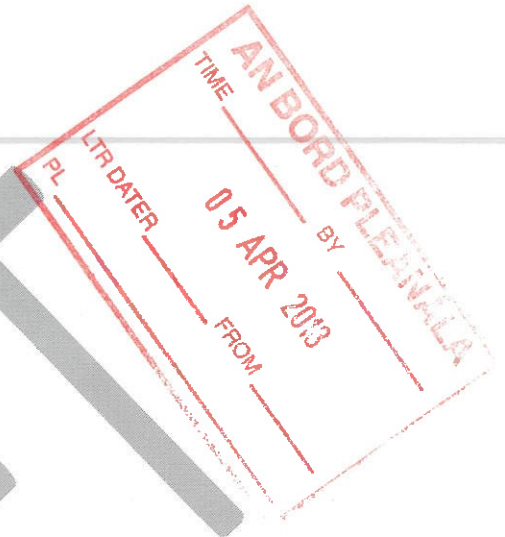
Signed: 
Senior Executive Officer.

NOTE: Where a Declaration is issued under Section 5, any Person issued with such a Declaration, may, on payment to An Bord Pleanála, 64, Marlborough Street, Dublin 1, of a fee of 220 euro, refer the Declaration for review, **within 4 weeks** of the date of issue of the Declaration.



Appendix B

Submission made to Dun Laoghaire-Rathdown County Council in relation to Reg. Ref. D03A/0753



DRAFT

OBJECTION TO PLANNING APPLICATION D03A/0753



15/8/03

Dear Sir,

Ashglen Property Company Limited of 23 Fitzwilliam Square, Dublin 2 are the owners of a property in the Main Street of Shankill, comprising a ground floor retail shop 'Spar', a first floor hairdressing salon, 'Rene's Place', and a second floor apartment. I, Rory Corvin, am the tenant who rents the hairdressing salon and the apartment from the owners, Ashglen, and have been a tenant of the property for thirty years. At the back of the hairdressing salon is a flat roof measuring 16,080 mm x 7,600mm on which Ashglen Property proposes to erect an office and warehouse. The proposed building would stand 5,195mm to the apex of its roof and would be 5,080mm from the back of the hairdressing salon. M.A

It is my contention that the proposed building would directly interfere with the natural light from the two windows into the hairdressing salon. The area to the back of the salon is, and has been for thirty years, a work area for colouring and permanent waving. Natural light is an essential constituent of customer care, allowing clients to see precisely what colour or effect has been achieved without artificial light. The proposed building standing just five metres from those windows, would cast this work area into perpetual shadow, to the detriment of myself and my clients. For this reason I object most strongly to the building of this office and warehouse by Ashglen Property company limited.

If the building were to go ahead additional lighting would undoubtedly be required at considerable expense and with a consequent increase in energy consumption as there would be a reduction of up to 30% in light throughout the entire small salon.

Yours sincerely,


Rory P. Corvin

