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25 October 2018

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1

**LAND AT 3 WELFIELD CLOSE WICKLOW TOWN
WICKLOW COUNTY COUNCIL REG. REF. EX 50/18**

AN BORD PLEANÁLA	
LDG-	009681-18
ABP-	
31 OCT 2018	
Fee: €	220- Type: Cheque
Time:	By: Post.

Dear Sir

We refer to the above and we act for Seamus Mitchell of 3 Wellfield Close, Monkton Row, Wicklow.

We hereby lodge a referral pursuant to section 5 of the Planning and Development Act, 2000 (as amended) in relation to a development on the above land, which is owned by our client, the details of which are set out in the attached documents. Specifically, this matter is now being referred to An Bord Pleanála under section 5(3)(b) of this Act, on the basis that the Planning Authority has not made a decision on our submission within the statutory timeframe for doing so and, in accordance with its reply of 16 October 2018 (see attached), it would seem that the Council has no intention of doing so.

This is highly regrettable given that the Planning Authority has taken enforcement action against Mr. Mitchell with considerable vigour and it is disappointing that it has not sought to assist in the referrer's quest for a solution to such difficulties. In short, the Council has been prepared to dedicate resources to litigation, but has been unable to decide this simple submission, in accordance with planning law.

The Board will be aware from ref. 302175-18 that Mr. Mitchell has already sought to establish whether this garden shed comprises exempted development and, in order to assist in this process, his first referral sought to omit three features which were of concern to the Council (with this earlier request including 'the removal of three features comprising a walkway...a railing atop this shed and a timber fence beside the roof of this same feature'). However, when making its decision on that first occasion, the Council argued that it would still be theoretically possible to ascend into the roof of this shed, no matter how unlikely, using a small set of steps on the front elevation of the subject structure.

It was for this reason that our submission to An Bord Pleanála of 25 July 2018 specifically contemplated a further referral, which sought to address this concern and advised the Board as follows:

'Notwithstanding this, we take the opportunity to advise that the referrer is presently lodging a fresh referral with the Council which shows how this stepped roof element can be omitted. This course is being pursued on the basis that the Board, if faced with an amended referral, may conclude that it can only consider cases which have already been presented to the relevant planning authority and as such a varied referral would not have been considered by Wicklow County Council beforehand, we fear that such an exercise may be unfruitful. However, as the party's differences on groundworks issues are likely to remain, we forecast that this second submission may ultimately be presented to the Board.'

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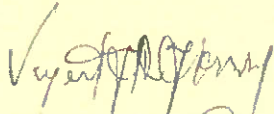
In the absence of any decision from the Planning Authority in the current case, we take this opportunity to pose the same question as that which we presented to Wicklow County Council in our second referral submission dated 15 September 2018 which we reproduce as follows, for ease of reference:

'whether, following the removal of three features comprising a walkway (between the house and the roof of the shed), a railing atop this shed and a timber fence beside the roof of this same feature, the retention of a garden shed which contains 19.1 sq. metres and which is located to the rear of a dwelling at 3 Wellfield Close, Monkton Row, Wicklow, comprises exempted development. This referral specifically excludes the use of the roof of this structure for sitting out purposes and expressly entails the removal of steps which lead from the surface within this site to this roof.'

The proposed development is as illustrated on architectural drawings which form part of this referral, which we now attached for the Board's convenience and we invite An Bord Pleanala to also consider the points raised in our more recent submission to Wicklow County Council, which we also enclose.

The Planning Authority unequivocally accepts that the shed satisfies all of the regulatory prerequisites for exempted development status, in terms of height, size, position and use, so that just two issues separate the parties, one of which concerns the use of its roof and as this matter has been specifically excluded from this referral, with the access thereto now being proposed for omission, the substantive issue on which the Planning Authority concludes that this shed requires permission comprises a belief that ground levels were altered to facilitate this feature. However, as previously explained, aside from basic works associated with the provision of a structural foundation, there is simply no evidence before the Board which supports such a conclusion and indeed, the available material, including earlier correspondence between the parties, would tend to question, rather than to corroborate, the conclusion which has been adopted by Wicklow County Council (with reference to papers on ref. no 302175-18).

Yours faithfully



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15 September 2018

Senior Executive Officer
Planning Department
Wicklow County Council
County Hall
Wicklow

LAND AT 3 WELLFIELD CLOSE WICKLOW

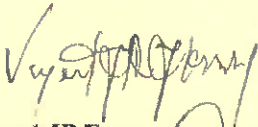
Dear Sir or Madam

We refer to the above and we confirm that we act for Seamus Mitchell of 3 Wellfield Close, Wicklow.

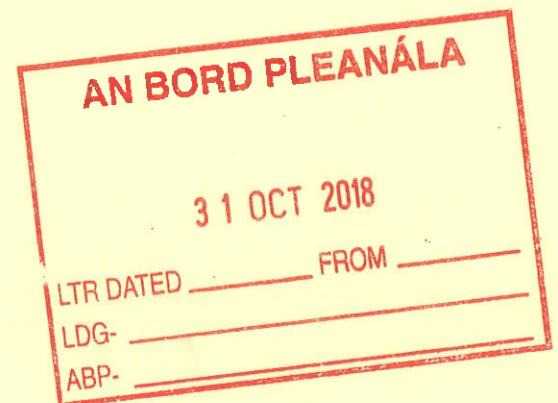
We hereby lodge a referral pursuant to s.5 of the Planning and Development Act, 2000 in relation to development on this land, which is owned by our client, the details of which are set out hereunder.

We invite the Council to confirm that the referror's garden shed comprises exempted development.

Yours faithfully



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REFERRAL REPORT IN RELATION TO A DEVELOPMENT ON LAND AT 3 WELLFIELD CLOSE WICKLOW

REPORT PREPARED ON BEHALF OF THE REFERROR
MR. SEAMUS MITCHELL

AN BORD PLEANÁLA

31 OCT 2018

LTR DATED _____ FROM _____
LDC _____
ABP _____

Vincent JP Farry BA MRUP LLB MSc PDipEnvEng MRTPI MIPL MAPI

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AN BORD PLEANÁLA

31 OCT 2018

LTR DATED _____

LDG- _____

ABP- _____

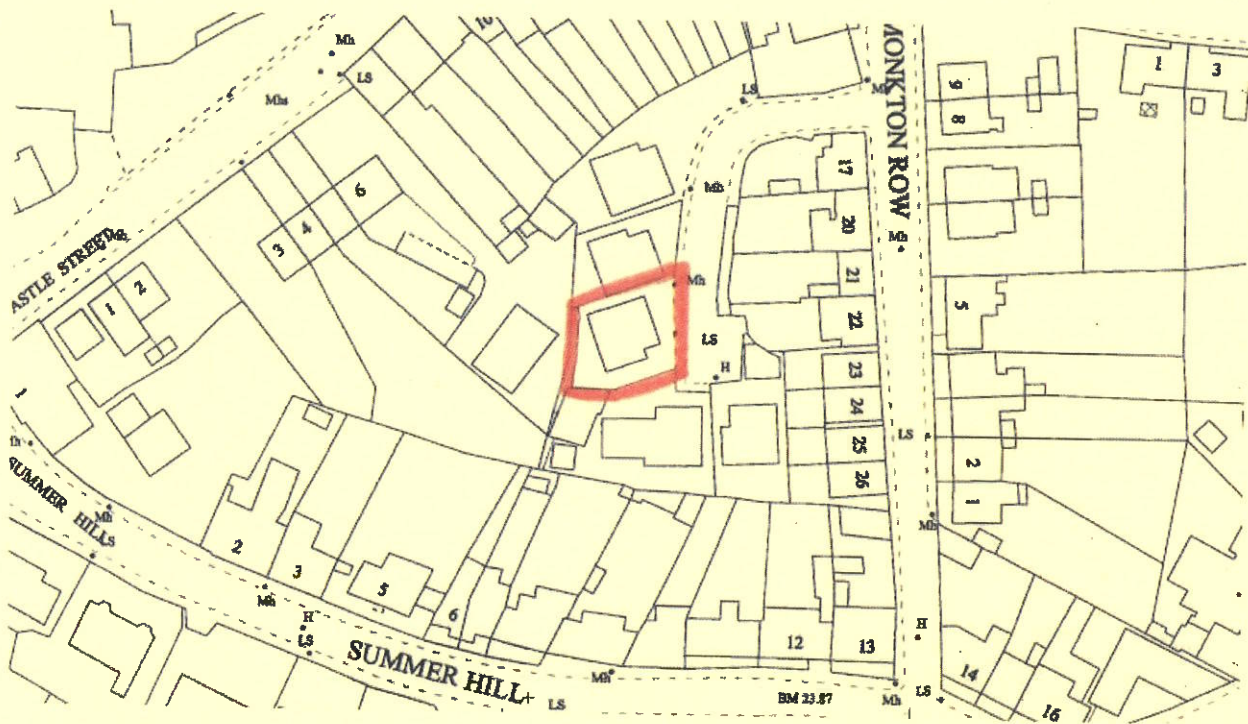
FROM _____

1. Introduction

This planning submission has been drafted on behalf of the owner of a tract of land at 3 Wellfield Wicklow and has been prepared for lodgement with Wicklow County Council in its capacity as the statutory planning authority for the area within which the subject site is situated. The document comprises a referral under section 5 of the Planning and Development Act, 2000 (as amended) and seeks to show that a particular development is exempt from the need to obtain planning permission.

2. The Site and its Surroundings

The referral site is located on Wellfield Close, a residential no-through-road which is itself located off Monkton Row, Wicklow. The site comprises a regularly-shaped allotment which covers an area of 0.022ha (0.05 ac.) and which is located within a mature residential area on the edge of the town centre.



Map 1: The subject site comprises a regularly-shaped tract of land which is located on Wellfield Close, Wicklow

The land accommodates a detached house which contains two levels of accommodation which together provide a floorspace of approximately 160 sq. metres. This building is illustrated overleaf.

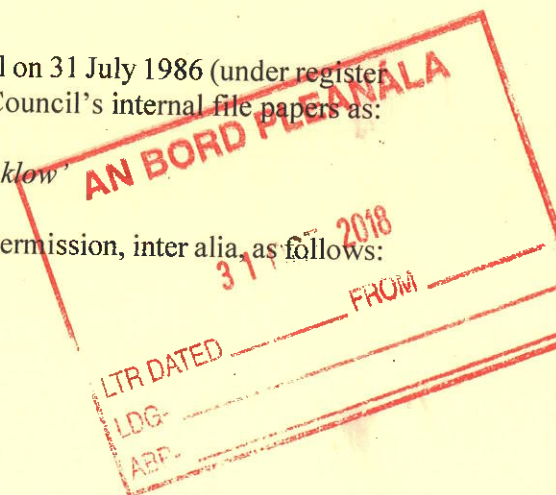
The site also accommodates a detached garden shed which is positioned to the rear of this house and this shed is the subject of the present submission. The referral question is set out in s. 4 of this report.

3. Planning History.

Planning permission was initially granted by Wicklow County Council on 31 July 1986 (under register reference no. 1377/86) for a development which is described on the Council's internal file papers as:

'Residential development at Monkton Row Wicklow'

We take this opportunity to reproduce condition no. 11 and 12 of this permission, inter alia, as follows:



11. The open spaces in this development shall be levelled, drained, cultivated and topsoiled if necessary with vegetable soil...

Reason: To ensure that the amenity open space shall be left in a satisfactory and useful condition on completion of the development and will be available for amenity and recreational purposes to the residents of the estate.

12. Adequate precautions shall be taken to provide for the structural stability of houses built on made-up ground...any steep slopes shall be fenced or otherwise protected to prevent injury to persons...

Reason: In the interests of safety and to ensure a proper standard of development works'.



Photograph 1: The site accommodates a detached house which is the referrer's home.

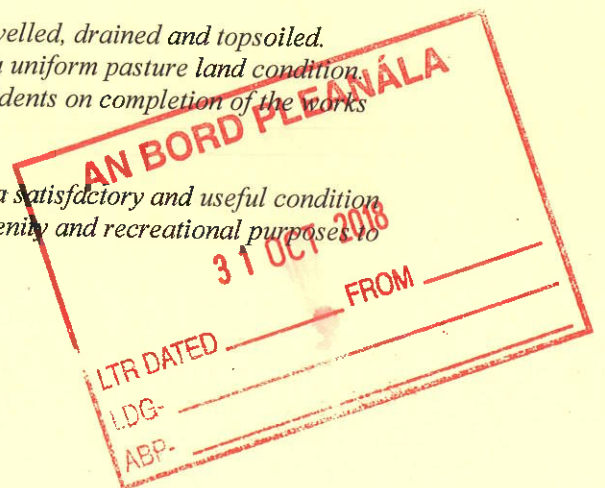
Permission was later granted in the year 1993 under reg. 1823/92 for the following (this description having been taken from the County Council's Notification of Decision which is dated 26 March 1993):

'Revised house types at Monkton Row, Wicklow for Wellfield Developments Ltd'.

Condition no. 5 of this planning permission is reproduced, in full, for ease of reference, as follows:

- '5 (a) All open spaces shown on the site layout map shall be levelled, drained and topsoiled.
Open space areas shall be sown with grass seed to give a uniform pasture land condition.
(b) Open space areas shall be dedicated to the use of the residents on completion of the works of the development of the estate.

Reason: To ensure that the amenity open space shall be left in a satisfactory and useful condition on completion of the development and will be available for amenity and recreational purposes to the residents of the estate'.



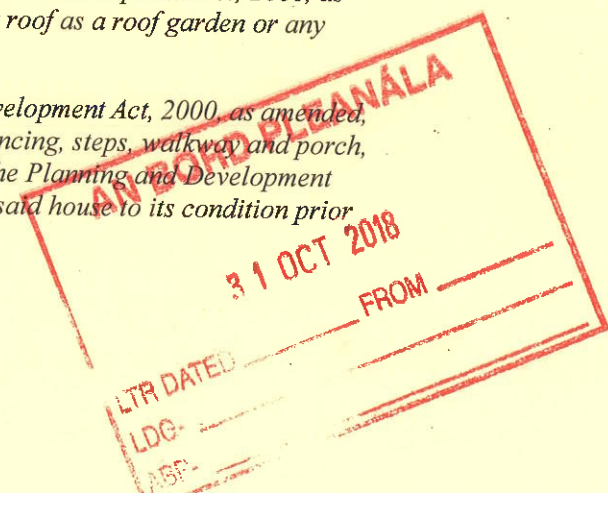
1. Cease all use of both the interior and the roof of the two sheds.
2. Demolish and remove the two sheds, associated railings and the above-ground level walkway linking the dwelling to the roofs of the said sheds.
3. Remove the timber fencing and recently added rows of concrete blocks from the rear boundary wall of the site.
4. Remove the recently added patio door from the rear first floor of the dwelling.
5. Restore the lands to their condition prior to the commencement of development in so far as it practicable'.



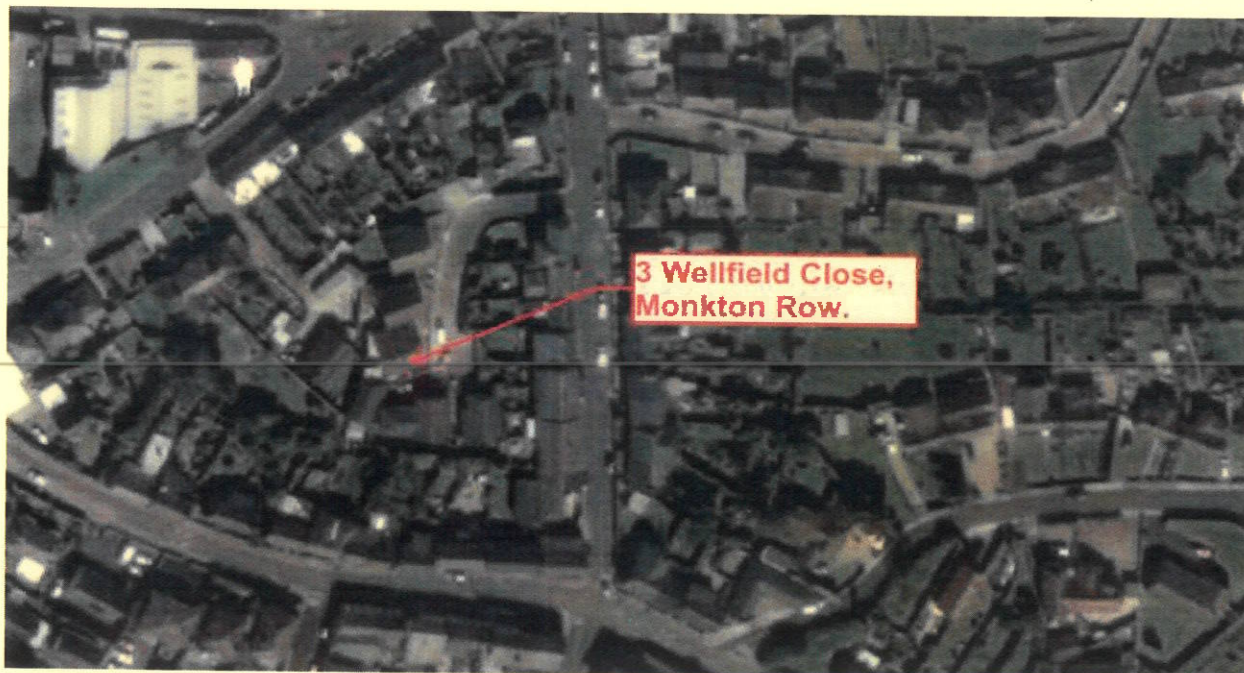
Photograph 3: The subject shed is used for the storage of home heating oil and for a variety of household items and appliances.

By Notice of Motion to the Circuit Court, the Council subsequently sought the following Orders:

1. An Order pursuant to Section 160(1) of the Planning and Development Act, 2000, as amended, restraining the Respondent from carrying on or continuing the following unauthorised development features at his lands and premises situate at 3, Wellfield Close Wicklow, in the County of Wicklow:
 - a) the construction of two sheds thereon with a single flat roof
 - b) the erection of a railing on the said flat roof;
 - c) the installation of fencing adjacent to the said flat roof;
 - d) the construction of a walkway leading from the house to the said flat roof;
 - e) the construction of a porch at the said house.
2. A further Order pursuant to Section 160(1) of the Planning and Development Act, 2000, as amended, restraining the Respondent from using the said flat roof as a roof garden or any other form of residential amenity.
3. An Order pursuant to Section 160(2) of the Planning and Development Act, 2000, as amended, directing the Respondent to remove the said sheds, railing, fencing, steps, walkway and porch, together with a further Order pursuant to Section 160(1) of the Planning and Development Act, 2000 directing the respondent to restore the front of the said house to its condition prior to the construction of the aforesaid porch'.



This latter stipulation has been superseded by events to the degree that the Council, under application reg. 17/1424, granted permission for the retention of the porch which is to the front of the dwelling.



Aerial Image 1: The site is positioned in a residential area within Wicklow Town.

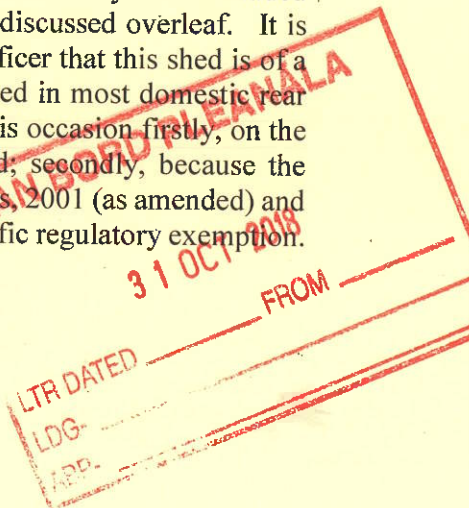
On 27 June 2018, under ref. Ex. 28/18 the Council decided that the subject works do not constitute exempted development and that this garden shed requires permission, with Director of Services Order No. 1202/18 concluding under the heading 'Main Reasons with respect to Section 5 Declaration' that:

'The proposed development does not come within the scope of the development set out in Class 3 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended) because:

- a) The degree and scale of the works (which would not be exempted development having regard to the Planning and Development Regulations 1992 onwards) required to facilitate the construction of the shed*
- b) The incorporation of a flat roof that is accessed via external steps which facilitate the use of the roof as an amenity space'*

The Report of the Planning Officer accepts that the structure is within the referrer's garden ('private amenity space') and acknowledges that the shed is used for 'domestic storage purposes' (both citations being from page 1 thereof). Equally, although not directly discussed in this Council assessment, the Planning Authority does not suggest that the development requires permission by reason of its position (not being 'forward of the front wall of a house' as per the Regulations), its size ('does not exceed 25 sq. metres', which is the exempted development threshold) and or its height, being no taller than 3m, which is the maximum height which a garden shed of this nature can attain as exempted development.

Based on this assessment, there are just three reasons as to why the Planning Authority has concluded that this structure does not comprise exempted development and these are discussed overleaf. It is immediately apparent from a brief perusal of the Report of the Planning Officer that this shed is of a type, height, size and position that it would not require permission, if erected in most domestic rear gardens. In this regard, the Council concludes that consent is needed on this occasion firstly, on the basis that groundworks were undertaken for the construction of this shed; secondly, because the development breaches article 9 of the Planning and Development Regulations, 2001 (as amended) and thirdly, that the use of its roof for amenity purposes is not covered by a specific regulatory exemption.



As noted below, this present submission comprises a refined version of our earlier referral to the degree that the attached drawings show the removal of the steps which lead to the roof of this shed.

4. Referral Question

We take this opportunity to pose the following referral query for the County Council's consideration:

'whether, following the removal of three features comprising a walkway (between the house and the roof of the shed), a railing atop this shed and a timber fence beside the roof of this same feature, the retention of a garden shed which contains 19.1 sq. metres and which is located to the rear of a dwelling at 3 Wellfield Close, Monkton Row, Wicklow, comprises exempted development. This referral specifically excludes the use of the roof of this structure for sitting out purposes and expressly entails the removal of steps which lead from the surface within this site to this roof'.

The proposed development is as illustrated on architectural drawings which form part of this referral.

5. Planning Law

(i) Statutory Provisions

Section 163 of the Planning and Development Act, 2000 reads as follows, for ease of reference:

'Notwithstanding Part III, permission shall not be required in respect of development required by a notice under section 154...'

(ii) Regulatory Provisions

Article 6 of the Planning and Development Regulations, 2001 (as amended) states inter alia as follows:

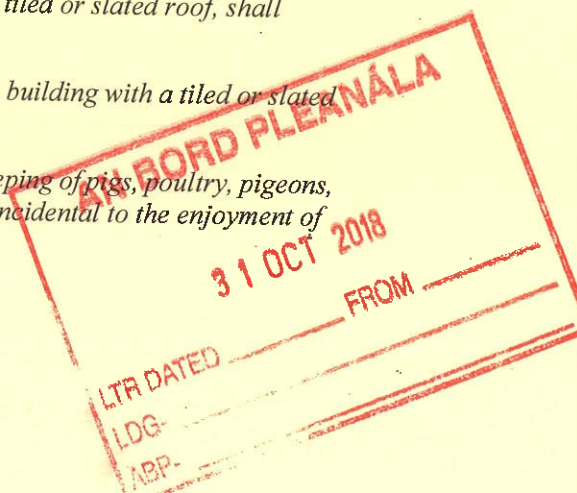
'Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1'.

Class 3, Part 1 of the Second Schedule to this Instrument is reproduced as follows for ease of reference:

'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'.

This regulatory entitlement is subject to a number of pre-conditions, which are set out hereunder:

- 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 to 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 any 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 case, 3 metres.*
- 6. The structure shall not be used for human habitation or for the 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'.*



6. Submission

(i) Introduction

The Planning and Development Act, 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended) together prescribe a series of developments for which planning permission is not required in the first instance and, as illustrated in section 5 of this present referral submission, such works include the provision of various outbuildings within the curtilage of a dwellinghouse, subject to conditions. As depicted on the accompanying drawings, the subject structure in this instance comprises a detached out building of 19.1 sq.m stable block and we invite the Council to accept, as a preliminary point, that this feature is beneath the size threshold in Class Three, Pt 1 of the Second Schedule to the Planning and Development Regulations, 2001 (as amended).

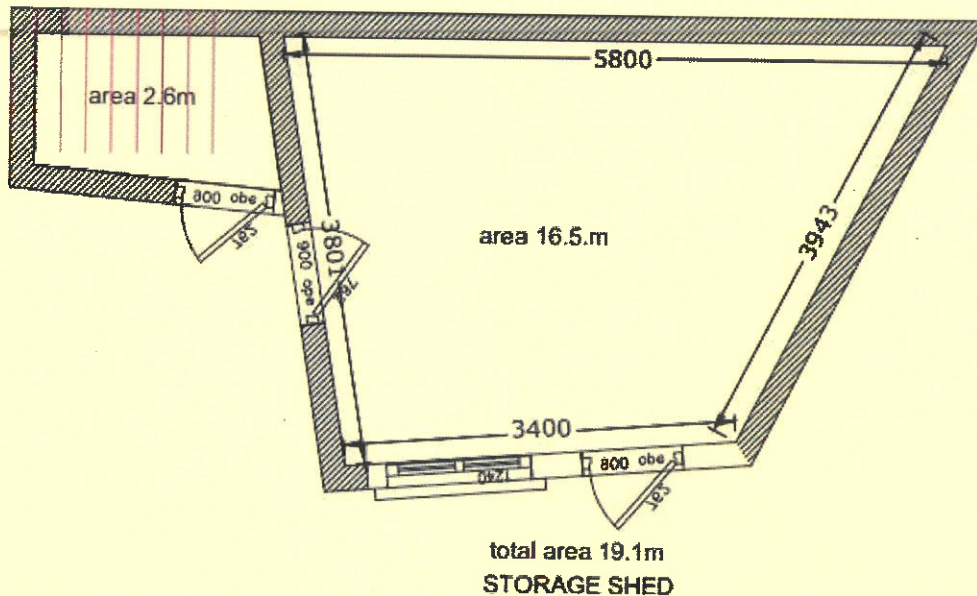


Fig. 2: The subject structure contains a total floorspace of 19.1 sq. metres

We invite the Council to accept no part of this structure is forward of the front wall of the house, that there are no other buildings within the curtilage of this dwelling which would bring the total floorspace of such features above 25 square metres and that the referrer would still benefit from private open space of 25 sq. metres. We also ask the Planning Authority to accept that the external finishes of the building conform with those of the host house, that the shed, as modified (see below) is under 3 metres in height and that it is used exclusively for purposes incidental to the enjoyment of the house, as such.

(ii) Alterations to the Existing Development

The works which are required to change this structure into a building which complies with the provisions within Class 3, Pt 1 of the Second Schedule to the Planning and Development Regulations, 2001 (as amended) entail the demolition of the existing railings (metallic and timber) atop the subject shed, along with the removal of the walkway between the house itself and the roof of this structure.

These works, although identified in the referral, have been expressly and explicitly excluded from the query which is presented for consideration; this is because such alterations, by law, do not require planning permission, not because of a provision relating to exempted development *per se*, but rather because of section 163 of the Planning and Development Act, 2000 (as amended). As the Council is only empowered under section 5 of the Act of 2000 (as amended) to consider whether particular works comprise development or exempted development and not whether proposed changes fall within s.163 thereof, we have not asked whether the removal of these existing features is specifically exempt.

APPROVED PLAN
31 OCT 2008
LTR DATED _____ FROM _____
LDG- _____
ABP- _____

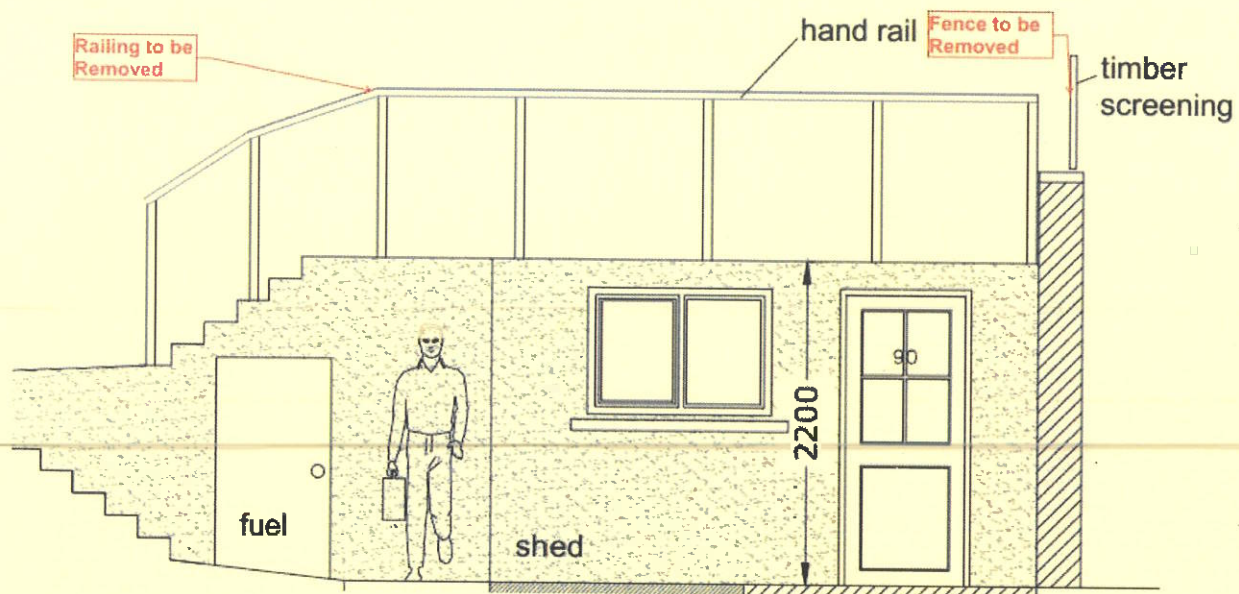


Fig. 3: The referror proposes to remove the railing and screen which are atop the shed.

We turn to address the issue of whether a development which the Planning Authority considers to be illegal, can subsequently be rendered lawful, specifically through compliance with the exempted development provisions of the Planning and Development Regulations, 2001 (as amended). By way of introduction, in the case of referral ref. PL29S.RL 2120 the Report of the Inspector reached the preliminary conclusion that the works were of a type which would normally comprise exempted development but opined that the Board should decide that consent was needed on the following basis:

'This case is complicated by virtue of the fact that it is proposed to alter an unauthorised structure. The planning authority in its declaration in this case, while it accepted that the provision of a velux window is exempted development by virtue of Section 4(1)(h), concluded that the development was no exempt by virtue of Article 9(1)(a)(viii) which 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-*
- (viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.*

The provisions of Article 9(1)(a)(viii) effectively de-exempts normally exempt development if the works proposed consist of the extension, alteration, repair or renewal of an unauthorised structure. In this case, the dormer window is unauthorised and the proposal involves the alteration of this unauthorised development by the provision of a velux window'.

However, the Board disagreed with this approach and, in recognition of the fact that s.4(1)(h) does not apply exclusively to lawful developments, formally determined that permission was not needed.

In ref. RL17..RL2748, the Board considered whether works to an unlawful building could comprise exempted development. The Report of the Inspector stated that the Council concluded otherwise on the basis that, as the house did not have consent, 'the proposed works did not constitute exempted development' as such operations are not within 'either (i) within the scope of section 4(1)(h) of the Planning and Development Act 2000 or (ii) within the exempted development provisions of ...the Planning and Development Regulations 2001'. However, this Board analysis concluded differently:

AN BORD PLEANÁLA
31 OCT 2018
 LTR DATED _____ FROM _____
 LDG- _____
 ASD- _____



COMHAIRLE CONTAE CHILL MhANTÁIN Wicklow County Council

Forbairt Pleanála agus Comhshaol
Planning Development and Environment

Áras An Chontae / County Buildings
Cill Mhantáin / Wicklow
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Suíomh / Website: www.wicklow.ie

16TH October 2018.

Vincent JP Farry & Co Ltd,
Suite 180, 28 South Frederick Street
Dublin 2.

RE: Application for Certificate of Exemption under Section 5 of the Planning & Development Acts 2000 (as amended) _ Ex 50/18 Seamus Mitchell, 3 Wellfeld Close Wicklow Town.

A Chara,

I refer to your recent application in the above regard and I am to advise that the Planning Authority will not be issuing a Declaration for the reason that it has effectively already undertook an assessment and issued a Declaration regarding this matter under Ref: Ex 28/18.

I would refer you to Section 5 (3) (b) of the Planning & Development Act 2000 (as amended) which states "in the event that no declaration is issued by the Planning Authority, any person who made a request under subsection (1) may , on payment to the Board (An Bord Pleanala) of such a fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a Declaration was due to be issued under subsection (2)

I would advise that in this regard, that the decision due date on this application (Ex 50/18) is 17th October 2018.

Mise le meas

STAFF OFFICER
PLANNING DEVELOPMENT & ENVIRONMENT

