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**Mary Tucker**

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**From:** Bord  
**Sent:** Thursday 6 June 2019 09:20  
**To:** procbordemail  
**Subject:** FW: Observation on Referral of Section 5 Declaration - For the Attn of: Stephen Deighan  
**Attachments:** FINAL\_Resoponse Letter\_ Referral \_ Florence House\_05.06.19 (4).pdf

**From:** Danielle O'Leary [mailto:danielle.oleary@hpdc.ie]  
**Sent:** Wednesday 5 June 2019 15:45  
**To:** Bord <bord@pleanala.ie>  
**Cc:** Kevin Hughes <kevin.hughes@hpdc.ie>  
**Subject:** Observation on Referral of Section 5 Declaration - For the Attn of: Stephen Deighan

Dear Sir/Madam,

In response to correspondence received from An Bord Pleanala dated 9th May 2019, relating to our clients property at Florence House, No. 199 Strand Road, Merrion Dublin 4, Please find attached an observation on the referral of Section 5 Declaration of Ref. ABP 304362-19.

Can you please acknowledge receipt of appeal response.

Kind Regards,

Danielle O'Leary

**Consultant Town Planner**

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The Secretary,  
An Bord Pleanála,  
64 Malborough Street,  
Dublin 1

05<sup>th</sup> June 2019

**Re: Response to Section 5 Referral - Construction of extension to rear of dwelling, Florence House, No. 199, Strand Road, Merrion, Dublin 4.**

**Address: Florence House 199 Strand Road, Merrion, Dublin 4  
An Bord Pleanála Ref: ABP-304362-19  
Dublin City Council Reg. Ref. 0111/19**

Dear Sir/Madam,

This letter has been prepared by Hughes Planning and Development Consultants, 70 Pearse Street, Dublin 2 on behalf of Brian McGettigan, Florence House No.199 Strand Road, Merrion Dublin 4, in response to correspondence received from An Bord Pleanála dated 9<sup>th</sup> May 2019, relating to our clients property, Florence House No. 199, Strand Road, Merrion, Dublin 4, with regard to the referral of a Section 5 Declaration (Ref. ABP- 304362-19).

We request that An Bord Pleanála review the decisions issued by Dublin City Council and make a determination that the proposed extension to the rear of the above property, constitutes **exempted development**.

## 1.0 Section 5 Decisions Issued by Dublin City Council

On 22<sup>nd</sup> February 2019 Dublin City Council issued the following notice with regards to a Section 5 declaration sought by the owner of the above property, Brian McGettigan, under Reg. Ref. 0523/18 for works to Florence House, No. 199 Strand Road, Dublin 4, including the construction of a part two storey, part single storey extension to rear (west facing) elevation, including rooflight (the single storey element is raised above Lower Ground Level); alterations to rear and side (south, north and west facing) elevations; landscaping; and all associated works to facilitate the development:

*'In pursuance of its functions under the Planning & Development Acts 2000(As Amended), Dublin City Council has by order dated 22-Feb-2019 decided to issue a Declaration that the above proposed development is EXEMPT from the requirement to obtain planning permission under Section 32 of the Planning & Development Acts 2000(As Amended).'*

The following reasons and considerations for the above determination were noted within the Case Officer's Report:

1. *The construction of a rear extension as shown on Drawing no.2008-33-EX-100 submitted as further information on the 4th February 2019 constitutes development by virtue of Section 3(1) of the Planning and Development Act 2000 as amended and is exempted development under Class 1 of Schedule 2 of the Planning and Development Regulations 2001 as amended insofar as the conditions and limitations of the relevant Column 2 are satisfied.*

2. *The alterations to rear elevation being the internal works associated with the opening up of the kitchen and hallway window to connect into the proposed rear extension constitutes development by virtue of Section 3(1) of the Planning and Development Act 2000 as amended and is exempted development under 4(1)(h) of the Planning and Development Act 2000 as amended insofar as the said works constitute works for the maintenance, improvement or other alteration of the*

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*structure which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and of neighbouring structures.*

*3. The landscaping works being the installation of a 5m deep x 10m wide permeable paving patio to the rear of the house constitutes development by virtue of Section 3(1) of the Planning and Development Act 2000 as amended and is exempted development under Class 6 of Schedule 2 of the Planning and Development Regulations 2001 as amended insofar as the conditions and limitations of the relevant Column 2 are satisfied.*

*4. Associated site works being the repairing of the plaster and lead flashing on the rear elevation constitutes development by virtue of Section 3(1) of the Planning and Development Act 2000 as amended and is exempted development under 4(1)(h) of the Planning and Development Act 2000 as amended insofar as the said works constitute works for the maintenance, improvement or other alteration of the structure which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and of neighbouring structures.*

In light of this decision, we strongly consider that the Planning Authority's assessment adequately addressed all key items.

Moreover, a second Section 5 declaration was sought by Richard Crowe, resident of the adjoining property, Knockaburra, No. 199B, Strand Road, Dublin 4, under Reg. Ref. 0111/19 for works to Florence House, No. 199 Strand Road, Dublin 4 including the following: construction of a part two storey, part single storey extension to rear (west facing) elevation (the single storey element is raised above lower ground level; (ii) Alterations to rear and side (south, north and west facing) elevations.

A decision notice was issued on 3<sup>rd</sup> April 2019 which stated the following in relation to the above Section 5 Declaration sought:

*'In pursuance of its functions under the Planning & Development Acts 2000(As Amended), Dublin City Council has by order dated 03-Apr-2019 decided to issue a Declaration that the above proposed development is EXEMPT from the requirement to obtain planning permission under Section 32 of the Planning & Development Acts 2000(As Amended).'*

With regards to the council's Case Officer's Report, we highlight the following commentary:

*1. The construction of a rear extension as shown on Drawing no.2008-33-EX-100 constitutes development by virtue of Section 3(1) of the Planning and Development Act 2000 as amended and is exempted development under Class 1 of Schedule 2 of the Planning and Development Regulations 2001 as amended insofar as the conditions and limitations of the relevant Column 2 are satisfied. The proposed development is not considered to be de-exempt under Article 9 of the Planning and Development Regulations 2001 as amended.*

*2. The alterations to elevations which are the internal works associated with the opening up of the games room, kitchen and hallway window to connect into the proposed rear extension constitutes development by virtue of Section 3(1) of the Planning and Development Act 2000 as amended and is exempted development under 4(1)(h) of the Planning and Development Act 2000 as amended insofar as the said works constitute works for the maintenance, improvement or other alteration of the structure which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and of neighbouring structures.*

In considering the above, we note that the applicant in this case, Richard Crowe is not the owner of the property to which this Section 5 Declaration relates, rather he occupies the adjacent property. We also emphasize that both Section 5 declarations issued by Dublin City Council under Reg. Ref. 0523/18 and 0111/19, determined the proposed extension to the rear of the subject property to be exempted development.

## 2.0 Basis of exemption

It is submitted that the proposed works constitute development that is exempted development. This submission is based in the development's compliance with both Class 1, Part 1 of Schedule 2 'Exempted Development – General' and Article 9 of the Planning and Development Regulations 2001-2018(as amended), both of which will be outlined in the following sections.

### Development

With regards to current planning legislation, we note the following.

Section 2(1) 'Interpretation' of the Planning and Development Act 2000 (as amended) states:

*'In this Act, except where the context otherwise requires'-*

*'Development'* has the meaning assigned to it by Section 3 ...

*'Works'* are interpreted as including "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 or exterior of a structure'.

Section 3 (1) of the Planning and Development Act 2000 (as amended) 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 in the use of any structures or other land'.*

Section 4 (1) sets out various forms and circumstances in which development is exempted development for the purposes of the Act.

Section 4 (2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The principal regulations made under this provision are the Planning and Development Regulations 2001 (as amended).

Article 6 of the Regulations states:-

*'6(1) Subject to article 9, development of a class specified in column 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'.*

### Exempted Development

In this regard we refer to Class 1, Part 1 of Schedule 2 'Exempted Development – General' of the Planning and Development Regulations 2001 (as amended) which states the following, in relation to 'Development within the curtilage of a house' describes the following type of development as exempt:

*'The extension of a house, by the construction or erection of an extension (including a conservatory) to the rear of the house or by the conversion for use as part of the house of any garage, store, shed or other similar structure attached to the rear or to the side of the house'.*

In this case, the proposed part two storey, part single storey extension is to the rear of the main dwelling Florence House, No. 199 Strand Road, Merrion, Dublin 4, with no element of the extension coming forward of the main rear building line.

We shall now respond specifically to the conditions listed within Class 1, Part 1, Schedule 2 of the Regulations, as follows:

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*'1. (a) Where the house has not been extended previously, the floor area of any such extension shall not exceed 40 square metres.'*

The works do not increase the gross floor area of the dwelling by more than 40sq.m.

*'1. (c) Subject to paragraph (a), where the house is detached, the floor area of any extension above ground level shall not exceed 20 square metres.'*

The proposed extension measures approximately 16.1sq.m at ground floor level and 19.1 sq.m above ground floor level which complies with the above criteria.

*3. Any aboveground floor extension shall be a distance of not less than 2 metres from any party boundary*

The proposed development is sited not less than 2m from any party boundary and is therefore compliant with Criteria No. 3.

*'4. (a) Where the rear wall of the house does not include a gable, the height of the walls of any such extension shall not exceed the height of the rear wall of the house.'*

The height of the walls of the proposed extension do not exceed the height of the rear wall of the main dwelling.

*'4. (b) Where the rear wall of the house includes a gable, the height of the walls of any such extension shall not exceed the height of the side walls of the house.'*

The height of the walls of the proposed extension do not exceed the height of the side walls of the main dwelling.

*'4. (c) The height of the highest part of the roof of any such extension shall not exceed, in the case of a flat roofed extension, the height of the eaves or parapet, as may be appropriate, or, in any other case, shall not exceed the height of the highest part of the roof of the dwelling.'*

The height of the highest point of the extension does not exceed either height of the roof of the main dwelling.

*'5. The construction or erection of any such extension to the rear of the house shall not reduce the area of private open space, reserved exclusively for the use of the occupants of the house, to the rear of the house to less than 25 square metres.'*

The residual area of private open space, post development is in excess of 25sq.m and therefore complies with the above criteria.

*'6. (a) Any window proposed at ground level in any such extension shall not be less than 1 metre from the boundary it faces.'*

*'6. (b) Any window proposed above ground level in any such extension shall be not less than 1 metre from the boundary it faces.'*

*'6. (c) Where the house is detached and the floor area of the extension above ground level exceeds 12 square metres, any window proposed at above ground level shall not be less than 11 metres from the boundary it faces.'*

The proposed extension provides for no side windows. Opaque glazing is proposed to the first-floor bathroom window facing west. The proposed development complies with criteria 6(a)(b) and (c)

*'7. The roof of any extension shall not be used as a balcony or roof garden.'*

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The roof of the extension is not used as either a balcony or roof garden.

It is noted that the dwelling in question has not been subject to a previous extension and, as such, condition nos. 2. (a), 2. (b) and 2. (c) do not apply. It is submitted that the construction or erection of an extension to the rear of a house is exempted development subject to compliance with the above relevant conditions and limitations.

The proposed extension, is therefore, considered to be exempt pursuant to Schedule 2 Part 1 Class 1 of the Planning and Development Regulations 2001 (as amended) as the extension falls within the maximum square meterage permitted for the extension of a house and is wholly situated to the rear building line of the existing dwelling.

We reiterate that the sole purpose of a Section 5 declaration of the Planning and Development Act 2000 (as amended), is to establish if a particular development is or is not an exempted development within the meaning of the Act. The referrer, Mr. Richard Crowe expresses concerns regarding the mass, scale, bulk and design of the proposed extension due to its location to the rear suggesting that it will have a seriously adverse impact on the residential amenity which is currently enjoyed at his property. In response to this point we contend that the impact of the proposal on the surrounding residential amenity is not a consideration in determining what exemptions apply or not to a particular development.

Additionally, the referrer procured the services of Professor Dermot O'Connell, Specialist in Daylight and Sunlight who prepared an assessment which details the potential loss of sunlight to Mr. Crowe's property at No. 199B, Strand Road. Notwithstanding the above, we would argue that this report is largely irrelevant given that issues of daylight/sunlight are not a factor in determining what constitutes exempted development.

We also note the following commentary from Mr. Crowe's report with regard to the perceived effects of the proposed development on the residential amenity of adjacent properties:

*'Insofar as the proposal relates to my property it presents itself as a solid wall 6.5 metres over ground level. It extends 4 metres out from the rear façade of the existing house (Florence House). This wall would seriously adversely affect the residential amenity of my dwelling due to its overbearing nature and the reduction of my access to daylight and my view of open sky'*

It is contended that the Section 5 Declarations are submitted if a question arises as to what, in any particular case is or is not development or is or is not exempted development within the meaning of the Planning and Development Act 2000. Therefore, the only considerations in determining a Section 5 application is whether or not the proposal complies with the conditions and limitations as detailed in Schedule 2, Part 1 Class 1 of the Act. Issues relating to residential amenity and overbearing impacts are not material considerations for the determination of Section 5 Declarations. In considering the above, we ask the Bord to reject the above concerns of the referrer.

Further to the above, Section 4(1) of the Act sets out various forms and circumstances in which development is exempted for the purposes of the Act.

In this regard, we note that Section 4(1)(h) of the Act 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;*

It is considered that the alterations to the existing elevations of the main dwelling are limited to internal works, including the opening up of the games room, kitchen and hallway window to connect into the proposed rear extension. These works are all considered to be exempted development under 4(1)(h) of the Planning and Development Act 2000 (as amended).

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### 3.0 Planning History

This section of the submission will review the relevant planning history associated with the subject site. Planning permission was granted by Dublin City Council under Reg. Ref. WEB1091/08 for development at Florence House, No. 199 Strand Road for the following: construction of a 2-storey extension (57sq.m approx.) to the rear of the existing dwelling, to accommodate a new living area at ground floor level and 2 no. additional bedrooms with shared bathroom at first floor level and all associated works. The Decision Order, issued by The Planning Authority on 16<sup>th</sup> December 2008, was subject to 2 no. third party appeals to An Bord Pleanála. We highlight that this permission has never been implemented.

Section 32 of the Planning and Development Act 2000 (as amended) provides, amongst other things, for the general obligation that any development of land, in respect of which permission is required, must be carried out under and in accordance with a grant of permission. However, by virtue of Section 32(1)(a), this general obligation does not apply in respect of any development of land which is exempted development. Thus, if development of land in any particular case is exempted development, and this exempted status is established in law by the making of a Section 5 declaration to that effect, it follows that there is no obligation to carry out such development under and in accordance with a grant of permission. Indeed, as set out by Hogan J. in the Court of Appeal decision in *Killross Properties Ltd v. Electricity Supply Board* [2016] 1 IR 541 at 552, if a Section 5 determination is made to the effect that certain development is exempted development, "*it necessarily follows that no planning permission is required*".

Furthermore, if a grant of permission has been obtained in respect of such developments but has not been implemented, the fact that such a grant of permission was made does not affect the determination of the separate question of whether the carrying out of such development *per se* is or is not exempted development. If such a grant of permission has been obtained, it is submitted that the key question is whether the grant of permission was or is being implemented and if the development has been or is being carried out pursuant to the grant of permission. If development is being carried out pursuant to a grant of permission, then such development must be carried out in accordance with that permission and any conditions to which that permission is subject – this is apparent, *inter alia*, from the wording of Section 160(1)(c)(i) of the Planning and Development Act 2000 (as amended) in the enforcement context. In light of the foregoing, it may therefore be said that the requirement to comply with the conditions of a grant of permission necessarily presupposes that the grant of permission has been or is being implemented. In the present case, in relation to the development the subject matter of this Referral, no grant of permission has been or is being implemented in relation to same.

In this instance, the referral makes reference to the applicability of Article 9 of the Planning and Development Regulations 2001-2018 (as amended) which lists the circumstances in which development that would be classified as exempted under Article 6 is not exempted. Specifically, he notes that Article 9 (1)(a)(i) states: -

*'(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,'*

We submit that the above restriction is not applicable to the proposed development to which this referral pertains. We note that the planning permission obtained under Reg. Ref. WEB1091/08 and ABP Ref. 29S.232521 is redundant and was in fact never implemented by the developer, therefore any offending conditions attached therein are irrelevant. Furthermore, we note that the above- mentioned planning permission subsequently expired on 3<sup>rd</sup> August 2014, pursuant to Section 251 of the Planning and Development Act 2000 (as amended) which states the following in relation to the calculation of appropriate period and other time limits over holidays:

*'Where calculating any appropriate period or other time limit referred to in this Act or in any regulations made under this Act, the period between the 24<sup>th</sup> day of December and the first day of January, both days inclusive, shall be disregarded'*

The effect of the above provision is to extend the life of the extant permission by a further 45 days.



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The applicant did not extend the duration of this application under Section 42 of the Planning and Development Act 2000 (as amended), thus the planning application is no longer effective and the developer is no longer obliged to comply with any condition attached to the relevant permission.

#### **4.0 Conclusion**

Upon reviewing the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001-2018 (as amended), we are of the view that in keeping with Dublin City Councils decisions dated 22<sup>nd</sup> February and 3<sup>rd</sup> of April 2019, the proposed development to the rear of the subject dwelling, Florence House, No. 199 Strand Road, Merrion, Dublin 4, constitutes exempted development pursuant to Class 1 Part 1, Schedule 2 and Section 4(1)(h) of the of the Planning and Development Act 2000 (as amended).

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

We trust that the Bord will have regard to this submission, and look forward to a decision in due course. Should you have any queries or require and further information including access to the building, please do not hesitate to contact the under signed.

Yours sincerely,



Kevin Hughes MIPI MRTPI  
Director  
For HPDC Ltd.

