JCK
SOLICITORS

JOHN C KIERAN & SON
16 Castle Street
Ardee
Co. Louth
DX 59 002 Ardee
Ph: 041 - 68 53327
Fax: 041 - 68 53139
Email: info@jckieran.com
Website: www.jckieran.com



The Secretary
An Bord Pleanala
64 Marlboro Street
Dublin 1

2nd December 2019

***Our Ref: JK***
***Your Ref:***

***RE: 6 Florence Terrace, Leeson Park Avenue, Dublin 6***
***Referral for Review by An Bord Pleanala of a Declaration by Dublin City Council made pursuant to Section 5 of the Planning and Development Act 2000 (as amended)***

Dear Sirs

We refer to your letter under Referral No. ABP/305802/19, Planning Authority Register Reference 0315/19 and in particular to a referral made by Patrick Maher and Anne Maher, Damian Keaney, John Kinnerk and Kate Kinnerk, Stephen Hanley and Sarah Hanley and Eileen Prendergast, all of whom live in, or close to, Leeson Park Avenue and who have referred to An Bord Pleanala for review a decision of Dublin City Council, and we refer to a copy of that determination which is referred to and exhibited within the submission made by the Referrers on the 24th October 2019.

An Bord Pleanala has decided in accordance with Section 129 of the Planning and Development Act 2000 that submissions or observations in writing may be made to the Board and having regard to the facility which the Board have offered, we make the following submission pursuant to your letter of the 4th November 2019.

The referral relates to a single storey extension at the rear of a dwelling house located at 6 Florence Terrace is or is not development and if the said works are development, whether or not they are exempted development.

It is not disputed that the works have been carried out at No. 6 Florence Terrace and that as such these works amount to development for the purposes of the Planning and Development Acts.

In respect of the works, there is no dispute that the works are all located to the rear of the property and comprise the demolition of an existing two storey rear annex of brick construction and a single storey lean-to attached to same and the construction of an extension which extends the footprint of the original house, although it is submitted that this is by any standards a modest extension and falls squarely within the exempted development provisions of the Planning and Development Regulations 2001.

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The reference to An Bord Pleanala refers to the scale of the works, which is stated cannot be overstated, and assert that the works completely overshadow the neighbouring property at No. 5 Florence Terrace, have resulted in a fundamentally altered view from the rear of other houses on the Terrace as well as being viewed from No. 11 Appian Way and make various comments about the manner in which the extension has affected the amenities of adjoining residences and properties in the vicinity.

While none of these matters are accepted, it is submitted that these are not in any event relevant considerations, given the jurisdiction which An Bord Pleanala exercises under Section 5 of the Planning and Development Act. The Legislator has provided in Section 4 of the Planning and Development Act that certain works can be carried out, in this case, within the curtilage of a dwelling house and that these will be exempted development subject to certain conditions and limitations being complied with.

The exemptions are contained in Section 4 of the Planning and Development Act, which provides specific exemptions in respect of the alteration of a structure within Section 4(1)(h) of the Planning and Development Act and under the Planning and Development Regulations, which are expressly provided for under Section 4.

Section 4(1)(h) provides that works for the improvement or alteration of a structure maybe carried out as exempted development so long as they are not inconsistent with the character of the structure concerned and/or the character of neighbouring structures. The provisions of Section 4(1)(h) apply without limitation or restriction subject only to the requirements of that particular provision and it is submitted that in that regard the works that have been carried out here fall within the provision of Section 4(1)(h) and render this development an exempted development.

The review sought from An Bord Pleanala arises from a decision of Dublin City Council made on the 30th day of September 2019 where the Planning Authority decided that having regard to the provisions of the Planning and Development Acts 2000 that the works amounted to an exempted development and the basis of the Dublin City Council decision as set out a Paragraph C of the submission of the 30th September 2019.

That decision records that the works, the subject matter of the extension at the rear of 6 Florence Terrace, meet the conditions and limitations set out in Class 1 of Schedule 2 of Part 1 of the Planning and Development Regulations 2001 and accordingly, the Planning Authority issued a Declaration that the works undertaken constituted exempted development.

It is in respect of that determination that the review is sought and the basis of the review is set out in seven number paragraphs on pages 3 and 4 of the submission.

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The works of demolition are an integral part of, and are ancillary to, the works deemed exempted development under Class 1 of Schedule 2 of Part 1 of the Planning and Development Regulations 2001. It is impossible to separate the refurbishment works as part of any structure which will invariably involve works of demolition of part of the structure, but in circumstances where these works are incidental and ancillary to activities which themselves are exempt under Class 1 of Schedule 2 on Part 1 of the Regulations, then these works must also be deemed to be exempted development.

In *The Rehabilitation Institute v Dublin City Council*, Barron J held that any use that is incidental or ancillary to a principle use forms part of that use and in that case held where that ancillary use was carried out it did not amount to development in circumstances where it formed part of the principle use. In this case, the works of demolition arise from, and are required by, the extensions that is to be carried out and does not entail the demolition of the total structure, merely the taking down of walls to foundation level and rebuilding those walls so that these are not works of demolition in the sense of Class 50, but are part of the alteration and improvement works that are exempt under Section 4(1)(h) and form part of and are incidental to the works deemed exempt under Class 1 of Schedule 2 of Part 1 of the Planning and Development Regulations 2001.

Class 50(b) of Schedule 2, Part 1 of the Planning and Development Regulations 2001 refers to self-contained and discreet works of demolition, the object being to demolish that part of the structure and does not envisage demolition works as part of reconstruction or alteration or improvement of a structure as if such an interpretation were to be applied, this would render the entirety of the planning code unimplementable as there maybe elements of any refurbishment of a structure which would necessitate works of demolition to some extent and it is submitted that Class 50(b) of Schedule 2 of Part 1 can only relate to specific works of demolition which are proposed for the permanent removal of a structure and can never be construed when they are ancillary to works of improvement or alteration of an existing structure and where that part of the structure where certain works of demolition have occurred are not rebuilt and indeed in this case are not rebuilt on precisely the same footprint, on the same foundations and in the same manner and in the same design as those which were there previously.

Indeed, Section 50(b) expressly provides that the demolition of part of a habitable house in connection with the provision of an extension or porch in accordance with Class 1 or 7 respectively of this part of this Schedule is an exempted development. It is difficult to see in those circumstances, how it could ever be argued given that it is accepted by all parties that the development relates to the demolition of part of a habitable house in connection with the provision of an extension, which falls within Class 1 of Schedule 2 of Part 1 of the Planning and Development Regulations could ever render the development not to be exempted development and the submission therefore made by the Referrers is entirely mis-conceived.

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In addition, the said works in any event be exempted development having regard to Section 4(1)(h) of the Planning and Development Regulations in circumstances where the totality of the works, namely those parts of the structure that was demolished and the extension built do no materially alter the character of the dwelling such as to render it inconsistent with its own character, or the character of adjoining structures and while it is not necessary to around Section 4(1)(h) having regard to the language of Section 50(b), it is nonetheless confirmatory of the position that is set out already above.

Equally, therefore, the submission contained at Part 2 on Page 3 of the submission is misconceived in circumstances where the City Council did precisely what was required and applied correctly the relevant provisions in holding that the development amounted to an exempted development and nothing in Class 50 is such as to in any way undermine the determination made and in that regard, therefore, any review in reliance of paragraphs 1 and 2 must be such as to uphold the decision of the Council.

The submission made furthermore misconstrues the decision of the City Council relative to Class 1 of Schedule 2 of Part 1 of the Planning and Development Regulations. There is no dispute, it is submitted, nor can there be that the extension falls within the provisions of Class 1 of Part 1 of Schedule 2 of the Planning and Development Regulations. The development is an extension of a house by the construction of an extension to the rear of the house, therefore falls squarely within the provisions of Class 1. The house has not been previously extended and the extension does not exceed 40sqm and therefore the development falls squarely within the exempted development provisions of the Planning and Development Regulations. The issue is not one of language but one of the increased area that has been provided and in circumstances where this increased area is less than, or does not exceed, 40sqm then the development, having regard to what is set out at Paragraph 3 of the submission, falls within the exemption and this part of the submission is equally misconceived.

In respect of Paragraph 4, the position in respect of the development is that the floor area of the dwelling has not exceeded the 40sqm threshold provided for within the exempted development Regulations, and it is clear from the Regulations that where either the house has not been previously extended or where the property has been extended before the 1st October 1964 the 40sqm limit applies and in such circumstances therefore the matters referred to at Paragraph 4 are fundamentally misconceived.

No new structure was built on or after the 1st October 1964, other than a garden shed which was approved by Dublin City Council, and having regard to the floor area of the existing dwelling as it existed before the works commenced, relative to the floor area of the new development the limit provided for in the Regulations are 40sqm has not been exceeded and consequently the works are exempted development and the decision of Dublin City Council and the approach that they adopted are consistent with and appropriate to the determination that was ultimately made. In those

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circumstances, the Bord should not disturb the decision of Dublin City Council in the review that is now sought on the basis of Paragraph 4.

In respect of Paragraph 5, the area reserved exclusively for the use of the occupants of the house at the rear is not less than 25sqm and indeed there is no basis for this assertion which An Bord Pleanala can verify by reference to the site. In the design of the extension the owners were particularly careful to ensure that any new extended area of the house would not exceed 40sqm and equally, that the areas of private open space reserved exclusively for the use of the entrance of the house to the rear would not be less than 25sqm and designed implemented the development in the knowledge of and conscious to comply with these obligations. Indeed, the owners of No.6 Florence Terrace engaged in detail with the Planning Authority designing and refining the development to ensure that they met the requirements of the Planning Authority such as to allow ultimately a Section 5 referral to issue. Specifically, in respect of Class 50(b) the development was specifically designed so that no issue would arise in respect of the issue of abutting the adjoining property so as to exclude any concerns that the Planning Authority would have in that regard.

Having engaged in the manner that they did, and having redesigned on a number of occasions the development, specifically in the light of issues raised by the Planning Authority and obtaining the necessary declaration of exemption, which has never been challenged, it is considered inappropriate that this matter should again be revisited as it would appear to amount to an oblique attack on a decision of the Planning Authority in a manner not provided for under the Legislation. In reliance on this determination, the owners of No.6 proceeded to implement the development and it is submitted entirely inappropriate and inconsistent with the scheme of consents provided for under Section 5 of the Planning and Development Act 2000, now that these works are completed having relied on the procedure provided for to give reassurance under Section 5, and which was availed of, that these should now seek to undermine and second guess that determination.

We do not make any comment as to whether the planning authority were correct in the manner in which they construed the previous authorisation and declarations which issued but it should be noted that in respect of 50(a) the reference is made to a building which forms part of a terrace and a building which abuts another building in separate ownership and the reference is not to a structure and not a part of a structure and it would appear therefore that the Planning Authority may have adopted an unduly restrictive approach to the interpretation of Class 50 but which in any event the owners of No.6 complied with and implemented in full. Accordingly, no issue can arise in respect of the matter set out at paragraph 5.

In respect of paragraph 6, on page 4, there is a concern about the manner in which Dublin City Council dealt with a complaint in respect of the insertion of windows in the red bricked gable wall of the 'front' of the house. The said windows were inserted to the side of the house and not to the front of it, as alleged. It is not clear as to what the complaint is and it is not asserted that

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the insertion of these windows is even development or is exempted development. While in theory perhaps the insertion of windows might amount to the carrying out of works, the said windows are clearly exempted development having regard to Section 4(1)(h) of the Planning and Development Acts as they do not in any manner alter the character of the structure into which they are located, nor do they amount to even a change much less a material change, in the appearance of the structure.

It should be noted that this is not a protected structure but even if it had that status, the windows that have been inserted to the side of the house and the windows that have been replaced at front of the house are in all material respects in keeping with the nature and style of the house and in that regard the submission under Paragraph 6 is again completely and fundamentally misconceived.

In respect of the shed it is correctly pointed out that Class 3 of Schedule 2 of Part 1 of the Planning and Development Regulations provide for the placing of such a shed without the need for planning permission. It is difficult to understand on what basis it is asserted that the City Council failed to deal with this issue, or how the limitations contained at 1 or 4 were misapplied in that regard.

In respect of Limitation 1, the structure is not placed forward of the front wall of the house. In respect of No.4 this only applies to a structure to be placed at the side of the house and clearly does not apply in the particular circumstances of this case.

In all of those circumstances therefore, the submission made discloses no matter which would on review entitle, it is submitted, An Bord Pleanala to set aside the determination of Dublin City Council.

At paragraph D of the submission the applications which have previously been made to the City Council and I refer to earlier in the submission, are raised without comment but they accept at Paragraph 3 of Section(d) that a decision deeming the extension to be exempted development was given on the 17th April 2018. In such circumstances therefore there are two options within the period prescribed, one which was to seek a review of that decision to An Bord Plenala which must be taken within four weeks as prescribed in Section 5(3) of the Planning and Development Act 2000. Alternatively, the decision can be the subject of a judicial review, pursuant to Section 50 of the Planning and Development Act 2000, which proceedings must be taken within 8 weeks of the decision.

If neither option are availed of, then the provisions of Section 50 applies and in particular Section 50(2) provides that a person shall not question the validity of any decision made or other act done by a planning authority or a local authority in the performance of a function under the Act other than by way of judicial review, which proceedings must be brought having regard to Section 50(6) within a period of 8 weeks beginning on the date of the decision of the Planning Authority.

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It appears that the referral made amounts to an oblique attack on the decision already given in respect of this development by the Planning Authority on the 17th April 2018, amongst an oblique attack on that decision and a collateral attack, which seeks to avoid the limitations provided for in Section 50 of the Planning and Development Act 2000 and therefore is not a matter that the Bord can, having regard to the Statutory Scheme which is in place allow to occur. The Bord has a duty to ensure that one cannot seek to re-open a matter which has already been determined and where the appropriate period within which any such decision can be appealed, reviewed or challenged is not the subject matter of an attack such as the one lodged in this submission and it is submitted that if the Bord were not to address this issue it would be failing to properly have regard to the time limits provided for which are there to ensure that one can with certainty rely on the decisions of a Planning Authority made, once the appropriate time limit has expired. In this case, having obtained the necessary declarations under Section 5 of the Planning Authority, the owners of No.6 proceeded to implement the development in accordance with the terms upon which that decision was given and it would be entirely inappropriate and contrary to the scheme of the Planning Act for that decision now to be the subject matter of a review where the precise time limits in the Act have already long since passed and were long passed at the time upon which this referral was made.

It is not therefore appropriate nor is it intended to engage in the discussions as to how this matter was determined in the previous Section 5 referrals before the City Council and we do not intend to do so.

In so far as there is a reliance on a decision by Cork City Council on a Section 5 referral referred to as Sean and Tracy Cogan, a number of points must be made in respect of this submission:

a) Cork County Council exercises a jurisdiction which is inferior to that of An Bord Pleanala in circumstances where An Bord Pleanala has a review function in respect of the decision of Cork County Council and therefore no element of the decision of Cork County Council could ever be either binding or even persuasive as to how An Bord Pleanala should conduct a review of a referral even in circumstances where that referral was a valid referral.

b) There is what can only be described as an extraordinary finding that 'once part of a structure is demolished, it is no longer a structure and cannot be replaced, rebuilt or otherwise considered to be exempt from development or has planning permission'. This contained at page 12 of the submission quoting from the Cork County Council planning decision. This is absurd and incomprehensible as either a matter of planning practice, planning fact or planning law. Specifically, Section 4(1)(h) provides that in the context of development to which that exemption applies, includes, as per the definition of works, any act of construction, excavation, alteration, demolition, repair or renewal. In such circumstances therefore it is fundamentally wrong

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as a matter of law and as a matter of fact to conclude, as did Cork County Council in the Sean and Tracy Cogan case. If the works of demolition form part of works to replace or rebuild a structure and if that structure is consistent with the character of the structure itself, and the character of adjoining structures, then all of the works referred to are as a matter law exempted development.
Equally, therefore the application of Class 50(b) and the findings made therein in the light of this fundamental mistake cannot safely be relied upon.

In respect of the reference to new window openings, in the main gable wall of the house, these have already been referred to, are exempt under Section 4(1)(h) of the Planning and Development Act. In Ciaran Duffy O'Connell the Supreme Court held in respect of a house on Waterloo Road, in the City of Dublin, that works far more extensive amounted to exempted development in circumstances where reliance was placed in the precise exemption, though at that time contained in Section 4(1)(g) of the Local Government Planning and Development Act. In that case the Supreme Court specifically stated that issues in respect of overlooking and in respect of the matters sought to be relied upon, had no application to whether or not this was or was not an exempted development for the purpose of Section 4(1)(h). Accordingly, there is no basis upon the matter sought to be addressed at paragraph 13 of the submission.

***CONCLUSION***

It is submitted that the review of the decision of the City Council, which was made, is predicated upon a fundamentally misconceived basis. It is no less than an attempt to reopen a referral already made in respect of which, by virtue of the passage of time no review is possible, no appeal is possible and the validity of the decision cannot now be questioned in the absence of any proceedings being brought within either the 4 week or the 8 week specified. Accordingly, the Bord should not exceed to an investigation of what it is accepted amounts to a review of a decision made which was never appealed, was never the subject matter of a Judicial Review and accordingly should not now be entitled to be raised. This is particularly problematic given that the decision obtained from Dublin City Council was obtained in order to allow the development to proceed with absolute safety relative to the provisions of the Planning and Development Act and once the determination was obtained that the development was exempt and in reliance of that determination the development proceeded. It is not now appropriate, even without the time limits provided for that this should now be allowed to be attacked in the oblique way that is sought and the Bord should not allow these kind of considerations as set out in the submission which would fundamentally undermine the entire procedures provided for under Section 5 and it is submitted as a preliminary matter that this referral should no longer be considered.

In the event that the Bord decide to consider the submission, we specifically reserve our position in that regard.

JCK
SOLICITORS

JOHN C KIERAN & SON
16 Castle Street
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Without prejudice to what is set out above, we would submit that there is no basis to review the decision of the Council. The Council decided in respect of the reference of the matter of the review that the proposed development was within the limitations provided for under Class 1 of Schedule 2 of part 1 of the Planning and Development Regulations and clearly fell within the parameters of what is permitted within the curtilage of a dwelling house and is well within the four areas specified. Equally, in respect of the demolition of the structure, this is specifically provided for in the circumstances where it comprises, or is required for the extension of a dwelling house. Equally, the assertion that the garden shed, which is exempted development, and the windows referred to, whether they be in the front or at the side are exempt under Section 4(1)(h) of the Planning and Development Act. Accordingly, we would request An Bord Pleanala to dismiss the referral and if necessary to uphold the decision of Dublin City Council in the event that they decide that it is appropriate to even consider this application.

We would be grateful for the opportunity to comment in respect of any further submission made, if such is to be submitted by the Bord.

Yours sincerely,

**JOHN C KIERAN & SON SOLICITORS**
**JK/GMCC**

AN BORD PLEANÁLA
03 DEC 2019
LTR DATED _____ FROM _____
LDG- _____
ABP- _____