PLANNING REPORT

To: **Celine Breen**

From: **Brian Brooks**
Exe Planner

Declaration: Request for a determination under Section 5 of the Planning and Development Act, 2000 (as amended) as to whether the change of use from a dwelling where dog grooming and boarding is carried on by the occupant of the dwelling where the occupant charges for the same services is or is not exempt from the requirement to obtain planning permission under the exempted development regulations.

Date: **14th November 2019**

Introduction
An determination of exemption has been submitted with a prescribed fee of €80.

Site location and Description
The existing dog grooming and boarding service is carried out at no. 99. Forest Park, Drogheda, Co. Louth. The site comprises of the applicants semidetached dwelling with 2no. sheds in the rear garden area.

Planning History
Ref no; 93/35 and 94/98 – housing development

02/510069 – conservatory extension to dwelling.

Enforcement:

UD Case 19/U118.

Warning letter issued to the applicant regarding the unauthorised dog grooming and board services on site.

Applicants synopsis:

- The applicant has been dog grooming and boarding at her home since 1998 as a hobby
- Currently the applicant grooms 2 dogs per day, four days a week between 10am and 12am.
- The applicant can provide for 4- 6 dogs staying overnight in the house with these dogs generally delivered on foot
- The applicant contends that grooming and boarding of neighbours dogs is not development and is ancillary to the residential use of the family home.

- It is the applicants contention that no material change of use has occurred whether or not payment is received for the services. The charging for the service has no implications for the residential amenities of adjoining properties.
- Letters from dog owners using of the services have been submitted.

Policy Context

(a)The site is governed by the Drogheda Borough Council Development Plan 2011-2017

The site falls within the "Existing Residential" land use zone. The zoning objective for which is '*to protect and/or improve the amenity of developed residential communities*

LEGISLATIVE CONTEXT

Planning and Development Act, 2000

In order to assess whether or not the activity constitutes development that is exempted development, regard must be had to the following items of legislation:

Interpretation

Section 2(1) sets out the interpretation of a "habitable house which -"

(*a*) is used as a dwelling,

(*b*) is not in use but when last used was used, disregarding any unauthorised use,

as a dwelling and is not derelict, or

(*c*) was provided for use as a dwelling but has not been occupied;

"house" means a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building."

Other Interpretations under this Section include the following:

"unauthorised development" means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use;
"use", in relation to land, does not include the use of the land by the carrying out of any works thereon;

"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—
"warning letter" means a notification in writing under *section 152(1)*;

Development

Section 3 (1) states as follows:
"In this Act, 'development' means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land."

Exempted development
Section 4 (1) of the Planning and Development Act 2000, as amended, sets out what is exempted development for the purposes of this Act and includes (j) "development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such".

Section 4(1)(h) exempts "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"

Section 4 (2) provides for the making of Regulations. The main Regulations are the Planning and Development Regulations, 2001 (as amended).

Section 4 (4) states that "notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required."

7.2. **Planning and Development Regulations, 2001**

Article 5 of Part 2, Exempted Development sets out interpretations for this part and includes "excluded premises" which inter alia means (a) "any premises used for purposes of a religious, educational, cultural, recreational or medical character".
Article 6 provides: "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."

Restrictions on Exemption

Article 9(1) provides: "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. This includes the following criteria of note:

(iii) endanger public safety by reason of traffic hazard or obstruction of road users.

(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.

Changes of use

Under Article 10(1), development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out, would not:

(a) involve the carrying out of any works other than works which are exempted development,
(b) contravene a condition attached to a permission under the Act,
(c) be inconsistent with any use specified or included in such a permission, or
(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.
Article 10(2)(a) provides: "A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use."
Article 10(2)(b) Provides list of criteria which does not include reference to Religious Use: " Nothing in any class in Part 4 of the Schedule 2 shall include any use-"
Exempted Development -General – Schedule 2 Part 1

Class 14 has regard to exempted Development consisting of a *Change of Use.* This does not refer specifically to use as a dog grooming and boarding business.

Class 15 has regard to *Temporary structures and uses.* This is as follows: "Occasional use for social or recreational purposes of any school, hall, club, art gallery, museum, library, reading room, gymnasium or any structure normally used for public worship or religious instruction."

Previous Board Pleanala Decisions:

27.RL.2690: Whether (a) the metal recycling facility is development and is exempted development, and (b) the construction of a three metre high security precast wall at Conway Port Industrial Estate, The Murrough, Wicklow Town, Wicklow, is development and is not exempted development. In this case the Board concluded: (a) the land has an established use for industrial purposes, (b) current end-of-life vehicles are being deposited on the land, and (c) the use of the land has therefore materially changed. The Board declared the use is material and is therefore, not exempted development.

• 29S.RL.3490: Whether the use of a residential apartment for short term holiday lettings at Apartment 1A, 5 – 5A Crown Alley, Dublin 2 is or is not development or is or is not exempted development. The Board declared this to be development and not exempted development. Their Conclusions included: "That neither the Planning and Development Act, 2000 – 2015, nor the Planning and Development Regulations, 2001 – 2015, recognise the said material change of use to be exempted development."

• ABP-302542-18: Whether the use of part of a dwelling house as a solicitors' office at Beachside, Braade, Kincasslagh, Co. Donegal is or is not development and is or is not exempted development. The Board's conclusions in this case are of note and included the following:

(a) the use of part of the house as a solicitors' office does not constitute use as a house as defined at Section 2(1) of the Planning and Development Act, 2000, as amended, and therefore such use is a change of use;

(b) the change of use from use as part of a house to use as a solicitors' office, raises issues which are material in relation to the proper planning and sustainable development of the area

and this change of use constitutes a material change of use having regard to the considerations outlined above and is therefore development;

(c) the development does not come within the scope of Section 4(1)(j) of the Planning and Development Act, 2000, as amended, as the use as a solicitors' office in this instance is not considered incidental to the enjoyment of the house,

(d) the development would correspond to use as an office as defined in Class 2(b) of Part 4 of the Second Schedule to the Planning and Development Regulations, 2001, as amended, and

(e) There are no other provisions in the Act or Regulations whereby such development would be exempted in this instance.

In this case the Board decided that the use of part of a dwelling house as a solicitors' office is development and is not exempted development

Regard to Case Law
McMahon -v- Dublin Corporation 1997 1 ILRM 227, (as cited in ABP Ref. 3490) in which the Board's declaration was upheld. Barron J. held that

...in the absence of explicit reference in the planning permission to a permitted use, regard must be had to the use for which the structure was designed, i.e. the use which was objectively intended for the structure having regard to the relevant planning documentation. The purpose for which the plaintiffs' homes had been designed was private residential, whereas the use to which they were currently being put was commercial.

The question as to whether a change of use is a material one was addressed by Keane J. in the case of Monaghan County Council -v- Brogan (as cited in ABP Ref. 3490) He stated that the issues of relevance to this question are:

...the matters which the planning authority would take into account in the event of a planning application being made for the use. If these matters are materially different (from the original use), then the nature of the use must equally be materially different.

Intensification of Use
OSullivan & Shepherd states:
It is not necessary that the change of the use be in the type of use being made of a structure or land. An intensification of use may also amount to development. Whether an intensification of an existing use amounts to a material change in use depends on the degree of intensification.

Tullamaine Castle Stud V Michael Barry and Others and Tipperary County Council. Mr Justice Charleton in granting injunctive relief to restrain the use of a racing track, considered the test for intensification of use to be the "effect on the wider neighbourhood" to the degree that fresh planning permission is required.

Molumby v Kearns
The case involved a nuisance action by residents living adjacent to an industrial estate owned by the defendant. One of the plaintiffs main arguments was that there had been an intensification of use of the estate by large commercial vehicles and such intensification

constituted a material change of use. O Sullivan JJ found that there had been a considerable increase in the number of larger vehicles servicing the estate and that this was consistent with the accountancy analysis of the growth in the defendants business. Furthermore, O Sullivan J accepted that an intensification of use can itself amount to a material change of use, even where there is no change in the use category. One must have regard to assess whether there has been a material change for planning purposes. OSullivan J considered that the impact of an intensification of the heavier commercial vehicles was likely to be more significant in planning terms than the impact of an intensification of smaller private vehicles.

Planning Assessment:

- This case came to light following complaints from neighbouring dwellings of loss of residential amenity due to the grooming and boarding of dogs in the dwelling house and in 5 sheds in the rear garden area.
- Definition of a house as defined at Section 2(1) of the Planning and Development Act, 2000, as amended
- Previous An Bord Pleanala decisions relating to change of use/ intensification of use
- The site falls within the "Existing Residential" land use zone. The zoning objective for which is '*to protect and/or improve the amenity of developed residential communities*
- The applicant has cleared outlined in the submission to the planning authority that this is a commercial activity for which payment is received.
- The enforcement file indicated the presence of 5 sheds to the rear of the dwelling used for the business. It is stated that 2no. sheds remain on site to be used to continue the service
- There is evidence on the enforcement file that the business is publicly advertised.
- The change of use from use as part of a house to use as a dog grooming and boarding service, raises issues which are material in relation to the proper planning and sustainable development of the area and this change of use constitutes a material change of use having regard to the considerations outlined above and is therefore development;
- The development does not come within the scope of Section 4(1)(j) of the Planning and Development Act, 2000, as amended, as the use as a dog grooming and boarding service is not considered incidental to the enjoyment of the house,
- I consider that the use of the dwelling and rear garden area for dog grooming and boarding is a material change in the use of the residential property which impacts on the residential amenities of adjoining properties.

Does the proposal constitute development?

The Planning and Development Act 2000 defines development to means:
-except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

Given this definition and the information available to the planning authority, I consider that there is a material change in the use of dwelling which is not exempted development.

Does the proposal constitute exempted development?
Based on the plans and information submitted to the Planning Authority, I consider that the use does fall under the scope of the Exempted Development- Classes of use, Part 4 of the Planning and Development Regulations 2001-2012 (as amended)

Accordingly, I consider that the use is not exempted development.

Conclusion

WHEREAS a question to whether the change of use from a dwelling where dog grooming and boarding is carried on by the occupant of the dwelling where the occupant charges for the same services is or is not exempt from the requirement to obtain planning permission under the exempted development regulations.

AND WHEREAS the said question was referred to Louth County Council by the applicant

AND WHEREAS Louth County Council, in considering this referral, had regard particularly to –
(a) Section 2(1), 3(1) and 4(1)(j) of the Planning and Development Act, 2000, as amended,
(b) Part 4 of the Second Schedule of the Planning and Development Regulations, 2001, as amended,
(c) the planning history of the site,
(d) the scale, nature and the description of the use carried on therein
(e) the pattern of development in residential area **AND WHEREAS** Louth County Council has concluded that:

- The change of use from use as part of a house to use as a dog grooming and boarding service, raises issues which are material in relation to the proper planning and sustainable development of the area and this change of use constitutes a material change of use having regard to the considerations outlined above and is therefore development
- The development does not come within the scope of Section 4(1)(j) of the Planning and Development Act, 2000, as amended, as the use as a dog grooming and boarding service is not considered incidental to the enjoyment of the house,

NOW THEREFORE Louth County Council in exercise of the powers conferred on it by Section 5 (2) (a) of the Planning and Development Act, 2000, that the use is development and not exempted development.

Brian Brooks
Exe Planner.
Date 14/11/19

Frank Pentony
Director of Service
Date 15/11/19

AN BORD PLEANÁLA
18 DEC 2019
LTR DATED _____ FROM _____
DG- _____