

**SIMON CLEAR & ASSOCIATES
PLANNING AND DEVELOPMENT
CONSULTANTS**

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

16th April 2020

AN BORD PLEANÁLA	
LDG-	025711-20
ASP-	
16 APR 2020	
Fee: €	220 Type: Chq
Time:	By:

Re: Section 5 Declaration re Use of 62 Lower Dorset Street, Dublin 1

Dear Secretary,

I have been requested by Michael Maher, Loughfield, Two Mile Borris, Thurles, Co. Tipperary, Post Code E41A665 and owner of 62 Lower Dorset Street, Dublin 1 to Refer to An Bord Pleanála the Declaration made by Dublin City Council (DCC) that a change of use of an off-licence to pharmacy on this street in the centre of Dublin city constitutes a material change of use and is not exempted development. The Planning Authority Reference Number is 0079/20, copy of decision enclosed.

I enclose herewith the requisite fee in relation to a Referral in the sum of €220 (cheque).

The planning authority's decision was made on 20th March 2020 and the date for making this referral has been affected by the orders made on 29th March, 2020, by the Minister and the Government, taking account of the considerations under section 251A(5) of the Planning and Development Act, 2000 as amended, which result in an extension of time for a range of specified/appropriate periods and timelines under this Act and associated regulations, meaning that such periods are extended in duration from 29 March 2020 to 20 April 2020 inclusive.



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Background

A detailed case, that there was no material change of use, was made in documentation furnished to DCC by Frank Kenny, Architect. This included that a long established off-licence shop had existed at this location for many decades. Up to the making of amendments to statutory Regulations in 2005, inserted by article 3 of S.I. No. 364/2005 – Planning and Development Regulations 2005, an off-licence was a ‘shop’ for planning purposes prior to 14th July 2005.

Shop was thereafter defined as follows: -

‘shop’ means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public –

(a) for the retail sale of goods,

(b) as a post office,

(c) for the sale of tickets or as a travel agency,

(d) for the sale of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and “wine” is defined as any intoxicating liquor which may be sold under a wine retailer's off-licence (within the meaning of the Finance (1909-1910) Act, 1910), 10 Edw. 7. & 1 Geo. 5, c.8,

(e) for hairdressing,

(f) for the display of goods for sale,

(g) for the hiring out of domestic or personal goods or articles,

(h) as a launderette or dry cleaners,

(i) for the reception of goods to be washed, cleaned or repaired,

but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies;

As can be seen, thereafter shop does not include any use associated with the sale of intoxicating liquor for consumption off the premises. The date is important, as the use as a ‘shop’ was established before the regulation of the use. Therefore, the established use was as ‘shop’.

On 21 September 2004 Ref. 1392/04, permission was granted for redevelopment at this address, including - to demolish the existing ground floor off-licence (then a 'shop') and basement store and the construction of a 4-storey block over basement consisting of an off-licence at ground floor with basement storage and apartments overhead. This permission was put into effect and the premises exists as shown below.



As a result of a judgement in the High Court (Kenny v ABP), subsequently affirmed by the Supreme Court, there is a presumption against retrospective effect in planning matters, in as much as a procedure commenced under prevailing legislation cannot be affected by subsequent legislation or regulation after it is entered into the decision making process and put into effect on foot of that process. Therefore, in the subject case, the permission granted was for a 'shop' albeit described as an off-licence, as both were within the same definition when the final grant of permission was made and was put into effect.

Planning Officer's Report

The planning officer noted the case made within the request letter submitted by Frank Kenny, architect, that a change from off-licence to pharmacy cannot be considered as

“material” as envisaged by the Act as both uses are retail in nature. In summary in this regard the Planning Officer commented as follows: -

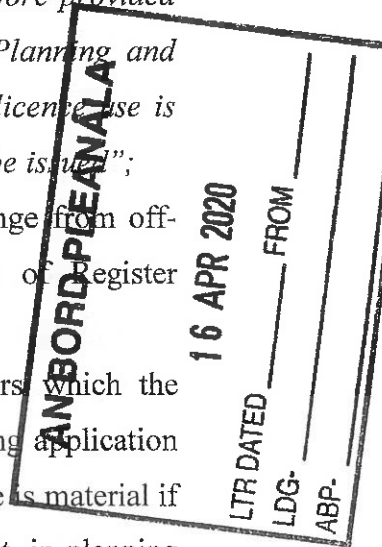
- The use pharmacy would fall within the definition of “shop” as set out within the Planning and Development Regulations;
- “Off-licence” is not included and specifically exempted from the definition of “shop”;
- Given the definition of ‘shop’ and the exclusion of off-licence from this definition it is implied by omission that the change of use of an off-licence to a shop would require permission as this is omitted from Class 14 change of use in which changes from the stated uses to a shop is exempted development;
- The use of the property is specifically identified as “off licence” within the development description under Register Reference 1392/04;
- The planner’s report in 1392/04 indicated - *“The proposed off-licence at ground floor level is acceptable as it is currently an existing use and the proposal involves a significant improvement to the shop front facing onto Dorset Street Lower”*;
- At the time of the grant of permission under Register Reference 1392/04, the use off-licence was included within the definition of shop;
- The final grant of permission was dated the 21st of September 2004 and the off-licence use was implemented under this permission;

Assessing that argument, the Planning Officer noted: -

- The definition of ‘shop’ has been significantly altered by the 2005 Regulations and specifically excludes any use for the sale of intoxicating liquor for consumption off the premises, except where the sale of wine is subsidiary to the main retail use;
- The decision issued under DCC Declaration EXPP0545/18 was considered significant in relation to the current Section 5 particularly the reference to the implementation of the off-licence use within the lifetime of the permission: *“It is considered that, in the case of a retail unit which had permission prior to the issuing of SI No. 364 of 2005, any change of use to off licence or part off licence following this would not be exempted development, and would require permission. Notwithstanding this, and having regard to the High Court order of 28 November 2018, it is considered that, where development comprising construction and occupation of a retail unit, with part off licence, was carried out within the*

lifetime of a permission granted prior to the change in the Regulations, the amendment to the Regulations would not retrospectively affect the definition of a retail unit at the time of granting permission”;

- The following decision was issued by DCC in this regard: “The existing retail unit, including part off licence, commenced trading in 2008 on foot of planning permission granted on 25 February 2004 (Reg. Ref. 4650/03, decision order P2835A). At the time of granting permission, the definition of a retail unit included an off licence or part off licence and the permission therefore provided for this use, notwithstanding the subsequent amendment to the Planning and Development Regulations under SI No. 364 of 2005. The part off licence use is therefore exempted development and a certificate of exemption may be issued”;
- In the instance of the current Section 5 it is evident that the change from off-licence to pharmacy was not implemented within the lifetime of Register Reference 1392/04¹;
- The test of the determination of materiality relate to the matters which the planning authority would take into account in the event of a planning application being made for the use. Case law has determined that a change of use is material if the character of the first use (permitted use) is substantially different, in planning terms, from the second use (proposed use) and also if the change of use impacts on the proper planning and sustainable development of the area (Monaghan County Council -v- Brogan);
- In this instance it is noted that different considerations would relate to a proposed off-licence and pharmacy use in accordance with the policies and objectives of the Dublin City Development Plan 2016-2022. In particular it is noted that the guidance set out within Section 16.28 of the City Development Plan relates to applications for off-licence and part off-licence use. Furthermore in terms of the operation of the existing and previous use it is noted that different opening hours would apply to the off -licence and pharmacy use, (i.e. restrictions on early opening hours for the off-licence);
- Having regard to the above reasons and considerations it is considered that the current use of the property constitutes a change of use from off-licence to pharmacy and such use constitutes a material change of use. The proposed change



¹ This interpretation of the lifetime of a planning permission is disputed later in these grounds.

of use is therefore considered to be development within the meaning of section 3(1) of the Planning and Development Act, 2000 as amended.

The second question addressed by the Planning Officer was whether the proposed development constitutes exempted development? It was assessed that: -

- The use as pharmacy comes within the scope of the definition of shop as defined with the planning and development regulations;
- The use “off licence” does not fall within and is specifically excluded from this definition;
- There are no exemptions within the Planning and Development Regulations governing the change of use from off licence to pharmacy use. Given the definition of ‘shop’ and the exclusion of off-licence from this definition it is implied by omission that the change of use of an off-licence to a shop would require permission as this is omitted from Class 14 change of use in which changes from the stated uses to a shop is exempted development. (underline – our emphasis, issue addressed in the grounds of referral below);
- In this regard the proposed development does not constitute exempted development.

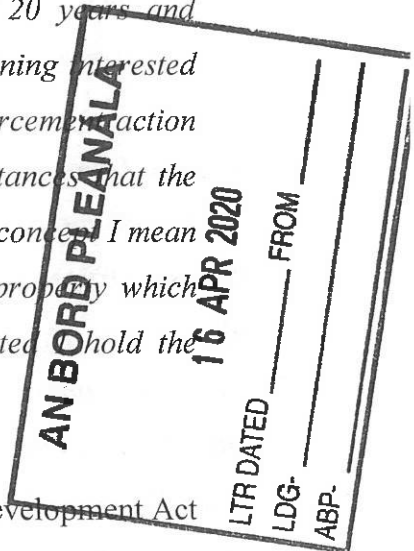
Grounds for Referral

There are several areas of contention in relation to the planning authority’s assessment of the information put before it and particularly, in relation to the duration of a planning permission for development, which includes both works and use. The Planning Officer commented that *in the instance of the current Section 5 it is evident that the change from off-licence to pharmacy was not implemented within the lifetime of Register Reference 1392/04*. This appears to suggest that, even in the context where a planning permission for works and use has been fully put into effect, there is some concept of withering of use even where there is a continuity of benefit from the permission.

This is a false concept, which is not supported by legislation or case law summarised below: -

The Broc House Case (Molloy & Ors – v – The Minister for Justice, 2004) found that in circumstances where a planning permission is capable of being implemented and there has been no material structural alteration to the land or property which would render the planning permission incapable of being implemented, a valid planning permission cannot be lost or abandoned.

In Molloy and Ors v The Minister for Justice, Equality and Law Reform & Ors it was held by Gilligan J. that: *“where there is an existing valid planning permission for specific use of land or property and no subsequent planning permission has been granted for the use of the land or property concerned and where a matured unauthorised change of use has taken place and has been carried on even for a period in excess of 20 years and notwithstanding that there may have been no complaint raised by an adjoining interested party in respect of the material unauthorised change of use and no enforcement action has been taken by the appropriate planning authority where in circumstances that the original planning permission is capable of being implemented and by this consequence I mean where there has been no material structural alteration to the land or property which prevented the original planning permission for use of being implemented, the original planning permission cannot be lost or abandoned.”*



We would also draw your attention to section 39(1) of the Planning and Development Act 2000 (“the 2000 Act”) which provides that –

“(1) Where permission to develop land or for the retention of development is granted under this Part, then, except as may be otherwise provided by the permission, the grant of permission shall enure for the benefit of the land and of all persons for the time being interested therein.”

Section 40(1) of the 2000 Act deals with the limit of duration of a planning permission. Section 40(2)(b) indicates that subsection 1 (limit of duration) *shall not affect the continuance of any use, in accordance with a permission, of land*

In this regard, we refer you to the decision of the High Court in **Molloy v. Minister for Justice [2004] 2 I.R. 493** wherein the High Court found that a valid planning permission for a specific use of land could not be lost or abandoned where the original planning

permission was capable of being implemented. In doing so the High Court approved the decision of the English House of Lords in **Pioneer Aggregates (U.K.) Limited v Secretary of State for the Environment 1 A.C. 132.**

In the subject case permission was granted by the planning authority for a use and there is no limit on the life of permission for such use.

We would consider that the precedent Declaration cited by the Planning Officer, Ref EXPP0545/18, which we have read in full, makes our case on this point. DCC made an incorrect Declaration, which was set aside by the High Court and thereafter a different Declaration was made. In the subject case the planning authority appears to wish to go back to the original error.

Material Change of Use

The second major issue in this Declaration is the materiality of the change of use. The Planning Officer's report deals with the issues by including the following comments - *In this instance it is noted that different considerations would relate to a proposed off-licence and pharmacy use in accordance with the policies and objectives of the Dublin City Development Plan 2016-2022. In particular it is noted that the guidance set out within Section 16.28 of the City Development Plan relates to applications for off-licence and part off-licence use. Furthermore in terms of the operation of the existing and previous use it is noted that different opening hours would apply to the off-licence and pharmacy use, (i.e restrictions on early opening hours for the off-licence).*

It should be noted that the guidance set out in section 16.28 of the DCDP relates to control of the potential deleterious effects of a proliferation of off-licences in any particular areas of the city. The implication is that proliferation of off-licences within 1km radius is assessed as it is potentially injurious to the proper planning and sustainable development of neighbourhoods within the city². There is no equivalent concern expressed in relation to the number of pharmacies in any area.

² There is an off-licence directly opposite on Dorset Street.

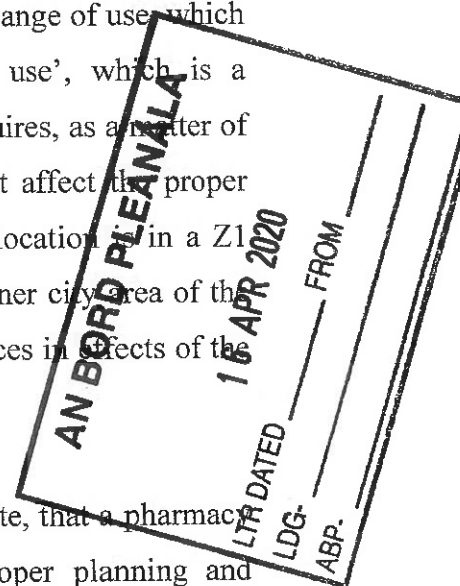
The hours of opening are not material considerations, particularly in the inner-city location in which this issue is to be assessed. Many policies and objectives in the DCDP support the provision of services in the inner city that stay open into the early morning hours, or all of the time. Off-licences close by separate law at 10pm. However, it is not a material planning issue in an inner-city location whether a pharmacy opens late or not, when the reality is that the majority close before 10pm anyway.

Interpretation of materiality in the context of 'material change of use' is a matter of fact as well as a question of law. It is not merely that there may have been a change of use which is denied, but that there must have been a 'material change of use', which is a fundamental distinction. To determine this issue on its own merits requires, as a matter of law, a consideration of the impacts that arise from the new use that affect the proper planning and development of the area. In the subject case, the site location is in a Z1 residential area located on a busy primary route within the defined inner city area of the city. One needs, on a case by case assessment, to identify the differences in the nature of the activity and if there are none, then there is no material change in use.

It is submitted that in the instant case it could be argued in the opposite, that a pharmacy in a residential area is far less likely to adversely affect the proper planning and development of an area compared to an off-licence – an activity that Dublin City Council saw need to control with specific provisions included in the statutory development plan. It is submitted that there is no reasonable argument to be made that a shop pharmacy in a premises permitted as a shop amounts to a change of use let alone a material change of use.

It could be very reasonably posed that this is not an issue about exempted development, more that there has been any development at all? If the new use relative to the previous use does not amount to a material change of use then it does not amount to development and consequently the issue of exempted development does not arise.

It is further noted that the Planning Officer draws erroneous conclusions from the contents of the Class 14 exemption to conclude that permission would be required. The purpose of the exempted development regulations is to confirm that certain specified works or



changes of use are exempted developments. There can be no 'implication by omission' in respect of other scenarios that are not explicitly described. It is clear from the extract below that the Planning Officer placed false reliance on the exempted development regulations to determine that permission would be required, which is in effect a determination of material change of use.

Given the definition of 'shop' and the exclusion of off-licence from this definition it is implied by omission that the change of use of an off-licence to a shop would require permission as this is omitted from Class 14 change of use in which changes from the stated uses to a shop is exempted development.

Planning permission 1392/04 authorises the development of an off-licence in the premises and in 2004 when permitted, this amounted to permission for a shop. The current use is in use as a shop and it is a fact that the use permitted under 1392/04 in 2004 and the existing use both fall within the definition of a shop and as a consequence no issue of a change of use arises in any event.

As noted above the planning officer in 2004 referred, inter alia to 'shop', 'shopfront' and included a condition, No.5 relating to 'shopfront', 'glazing of the shopfront' etc. These references are all consistent with the creation of a retail shop, which use cannot be subsequently extinguished retrospectively by any change in the definition of 'shop'.

The following reference to the Dublin City Development Plan 2016-2022 is taken from the Planner's Report: - *The subject site is zoned objective Z1 "To protect, provide and improve residential amenities". The use shop local is listed as a use which is permitted on lands zoned for Z1 purposes. Off-licence is not listed as a use which is "permissible" or "open for consideration".*

The guidance set out in Section 14.8.1 of the City Development Plan outlines that: - In both new and established residential areas, there will be a range of uses that have the potential to foster the development of new residential communities. These are uses that benefit from a close relationship with the immediate community and have high standards

of amenity, such as convenience shopping, crèches, schools, nursing homes, open space, recreation and amenity uses”.

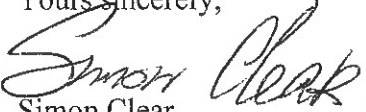
From this it is apparent that off-licence is a non-conforming use under the Z1 zoning land use matrix, whereas pharmacy, as a local shop, is permitted in principle. While development plan context is not a normal reference point in referrals, in the context of assessing the proper planning and development of the area for material effects, it is entirely relevant that the current use is more acceptable in statutory development plan terms than the previous use. Therefore, the change in use, if there is one, is not material.

Conclusion

The Declaration is flawed. There is no development and there is no material change in the permitted use of the premises.

It is requested that the declaration of the planning authority be overturned.

Yours sincerely,


Simon Clear

AN BORD PLEANÁLA	
16 APR 2020	
LTR DATED _____	FROM _____
LDG- _____	
ABP- _____	

AN SOHO BAWALIA

14 APR 2020

LIB DATED FROM

NO

NO



An Roinn Pleanála & Forbairt Maoine, Bloc 4, Urlár 3, Oifigi na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8.

Planning & Property Development Department, Block 4, Floor 3, Dublin City Council, Civic Offices, Wood Quay, Dublin 8.

T: (01) 222 2288

E. planning@dublincity.ie

20-Mar-2020

Kenny Kane Associates
Oak Hollow Studio
Upper Glenageary Road
Glenageary
Co. Dublin

AN BORD PLEANÁLA	
16 APR 2020	
LTR DATED _____	FROM _____
LDG- _____	
ABP- _____	

Application Number	0079/20
Application Type	Section 5
Registration Date	20-Feb-2020
Decision Date	18-Mar-2020
Decision Order Number	P2821
Location	62, Dorset Street Lower, Dublin 1
Proposal	EXPP: Continuation of retail use from off-licence to introduction of retail use as a pharmacy in place of former retail use as an off-licence.

Applicant Details Michael Maher

- If you have any queries regarding this Decision, please contact the number shown above

Note:

Any person issued with a declaration on development and exempted development, may, on payment of the prescribed fee, refer a declaration for review by A Bord Pleanála within four weeks of the date of the issuing of the declaration.

NOTIFICATION OF DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

In pursuance of its functions under the Planning & Development Act 2000 (as amended), Dublin City Council has by order dated 18-Mar-2020 decided to issue a Declaration that the proposed development is NOT EXEMPT from the requirement to obtain planning permission under Section 32 of the Planning & Development Act 2000 (as amended) for the following reason:

It is considered that:
<ul style="list-style-type: none"> • The current use of the property constitutes a change of use from off licence to pharmacy and constitutes a material change of use. The proposed change of use is therefore considered to be development within the meaning of section 3(1) of the Planning and Development Act, 2000 as amended; and; • There are no exemptions in the Planning and Development Act 2000, as amended, or the Planning and Development Regulations 2001, as amended, that would apply to the change of use from off-licence to pharmacy. In this regard the proposed development does not constitute exempted development.



Comhairle Cathair Bhaile Átha Cliath
Dublin City Council

An Roinn Pleanála & Forbairt Maoin, Bloc 4, Urlár 3, Oifigi na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8.

Planning & Property Development Department, Block 4, Floor 3, Dublin City Council, Civic Offices, Wood Quay, Dublin 8.

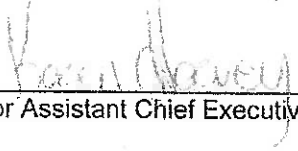
T: (01) 222 2288

E. planning@dublincity.ie

20-Mar-2020

The applicant should be advised accordingly.

Signed on behalf of Dublin City Council


For Assistant Chief Executive

Note: Any person issued with a declaration on development and exempted development, may on payment of the prescribed fee, refer a declaration for review by An Bord Pleanála within four weeks of the date of the issuing of the declaration.

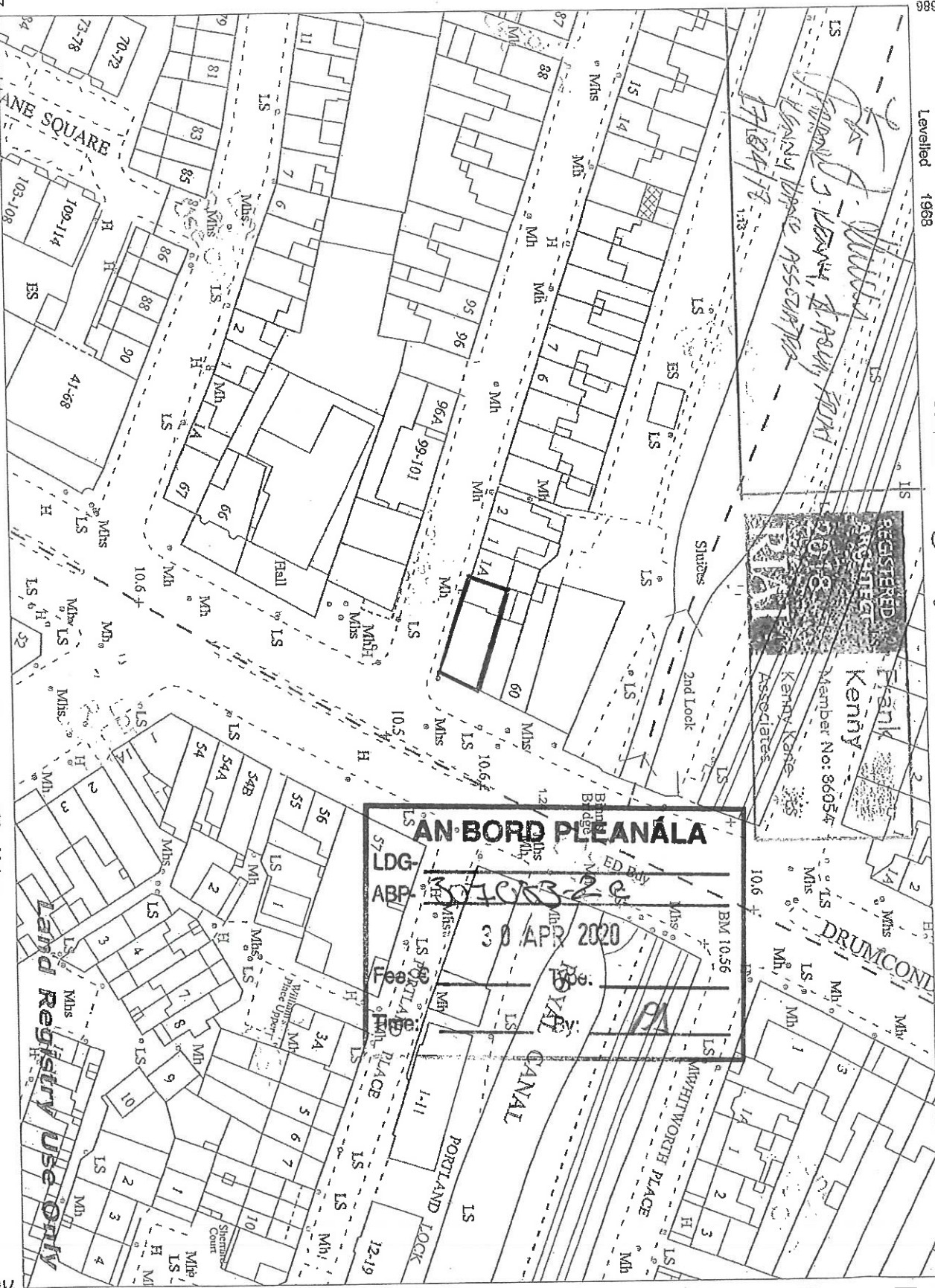
715888
 1971 Surveyed
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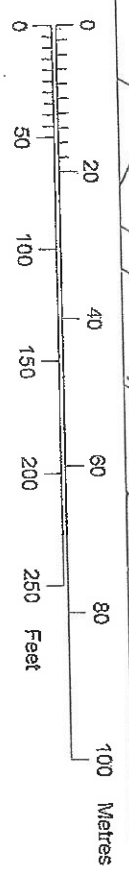


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Handwritten: **WILLIAM J. KENNY, ARCHITECT**
 KENNY KANE ASSOCIATES
 Member No: 86054



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Plot Ref No. 25324689_1.1
 Plot Date 04-APR-2018

Land Registry Use Only

DESCRIPTION
MAP SHEETS
1:1000 3187-20



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 Richard, Corkinagh, Dublin 14.
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