Our Case Number: ABP-308540-20

Planning Authority Reference Number: 0313/20

Your Reference: Brimwood Limited

An Bord Pleanála

Hughes Planning & Development Consultants
70 Pearse Street
Dublin 2

Date: 01 December 2020

Re: Whether the change of use from residential to hostel, is or is not development or is or is not exempted development.
15/17, Lower Drumcondra Road, Dublin, 9

Dear Sir / Madam,

An Bord Pleanála has received your letter in which you intended to make a submission or observation under the Planning and Development Act, 2000, (as amended).

Section 130(3)(c) of the 2000 Act, (as amended), provides that the appropriate period for the making of a submission or observation means the period of 4 weeks beginning on the day of receipt of the appeal by the Board or, where there is more than one appeal against the decision of the planning authority on the day on which the last appeal was received by the Board.

In this case the appeal was received on the 27th October 2020, and the last day for receipt of a submission or observation was the 23rd November 2020. However, your submission or observation was received by the Board on the 30th November 2020 and it is regretted that it must, therefore, be regarded as invalid in accordance with section 130(2) of the Act.

The documents lodged by you are enclosed and a refund will be issued under separate cover.

Yours faithfully,

Mark Kielty
Executive Officer
Direct Line: 01-8737154

BP46

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

30th November 2020

Re: Observation on Appeal Regarding a Declaration under Section 5 of the Planning and Development Act 2000 (as amended) Regarding a Change of Use from Residential (Class 1) to Hostel (Class where care is provided) (Or accommodation for homeless persons) at 15/17 Drumcondra Road Lower, Dublin 9

Reference No.: EXPP 0313/20
ABP. Reference No.: 308540-20

Dear Sir or Madam,

We, Hughes Planning and Development Consultants, 70 Pearse Street, Dublin 2, have been instructed by our client, Brimwood Limited, Farney Business Centre, 14 Farney Street, Carrickmacross, Co. Monaghan, to prepare this observation on a first-party appeal which seeks a declaration under Section 5 of the Planning and Development Act 2000 (as amended) in respect of change of use from residential (Class 1) to hostel (Class where care is provided((Or accommodation for homeless persons)of 15/17 Drumcondra Road Lower, Dublin 9.

Dublin City Council declared under Reg. Ref. EXPP 0313/20 that the works undertaken to the property are exempted development in accordance with Section 4(1)(h) of the Planning and Development Act 2000 (as amended); and, based on Section 4(1)(f) of the Planning and Development Act 2000 (as amended), the chance of use is exempted development.

The applicants are seeking to overturn the decision of Dublin City Council and have alleged that No. 15/17 Drumcondra Road Lower has seen a change of use from residential use to a Hostel for Homeless Accommodation. The question before the Planning Authority is whether or not a change of use from residential to hostel constitutes development and whether or not this development is exempted.

The observation is accompanied by the associated fee of €50.

1.0 Site History

The subject site was used as a multiple unit residential building before being converted to a 21no. bedroom house with kitchen, dining room and bathroom facilities as shown in drawings prepared by GPS Fire Limited, snippets of which are included in Figures 2.0 to 6.0.

2.0 Planning Context

The Dublin City Development Plan 2016-2022 is the relevant statutory development plan for the subject site.

2.1 Zoning

The subject property is zoned Objective 'Z2' which seeks to *'protect and/or improve the amenities of residential conservation areas'*.

The zoning matrix included in the Dublin City Council Development Plan 2016-2022 indicates permissible and open for consideration uses for each zoning objective. 'Permitted in Principle' uses are generally acceptable subject to the normal planning process and compliance with the relevant policies and objectives, standards and requirements set out in the Plan. 'Open for Consideration' uses may be permitted where the Planning Authority is satisfied that the proposed development is compatible with the policies and objectives for the respective zone and would not be in conflict with the permitted, existing or adjoining land uses whilst conforming with the proper planning and sustainable development of the area.

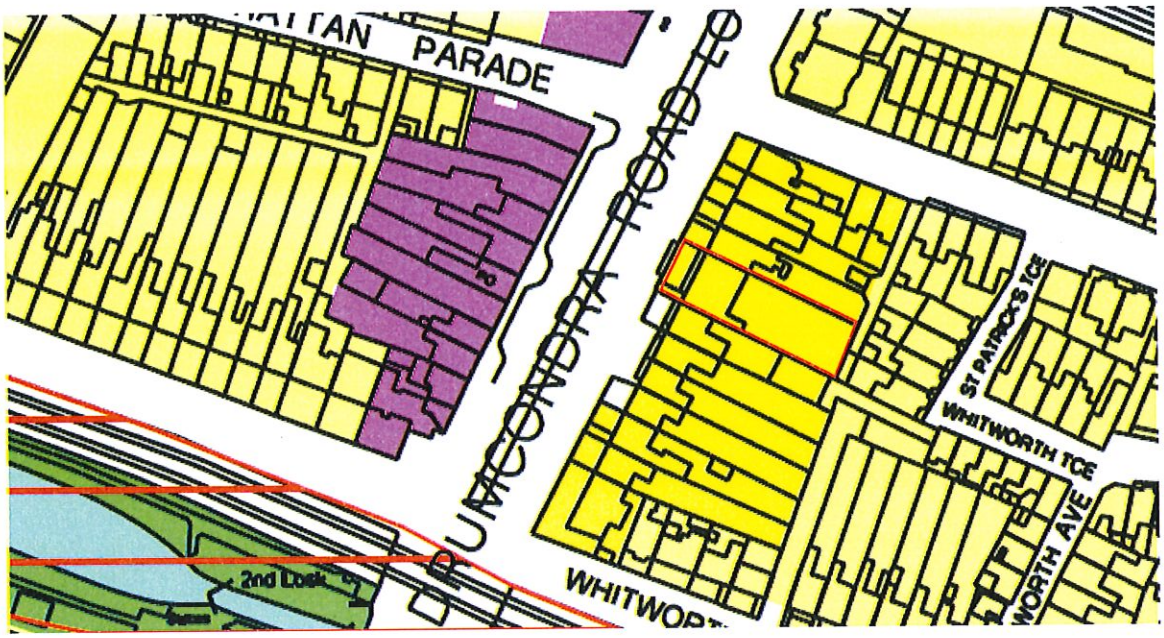

Figure 1.0 Extract from Zoning Map E in the Dublin City Development Plan 2016-2022 showing the site (outlined in yellow) zoned 'Z2'

Permissible Uses:

Buildings for the health, safety and welfare of the public, childcare facility, embassy residential, home-based economic activity, medical and related consultants, open space, public service installation, ***residential.***

It is submitted that the change of use from a multi-unit residential building to a 21 bedroom house with kitchen, dining room and bathroom facilities falls within the permissible uses outlined above as a residential use. It is therefore submitted that the current use of the building is within parameters of the 'Z2' zoned lands.

4.0 Exempted Development/Requirement for Planning Permission

It is submitted that all works carried out to date and the use of the building as a single residential unit are considered exempted development pursuant to Section 4(1) of the Planning and Development Act 2000 (as amended). This will be considered in further detail below.

4.1 Internal Works

The subject site comprises a part three, part four storey over basement dwelling which has been changed from a multi-unit residential building to a house comprising 21 no. bedrooms, a kitchen, dining room, bathrooms, linen storage room, office and utility room. Works have been carried out at the property in order to improve living and safety standards. It is submitted that these works are classified as exempted development pursuant to Section 4(1)(h) of the Planning and Development Act 2000 (as amended) which states:

> *'(h) 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.'*

We are satisfied that the works carried out within the building, as listed above, were carried out for the maintenance and improvement of the building. I am also satisfied that all works were internal only and do not affect the external appearance of the building in any way. Accordingly, the provisions of Section 4(1)(h) apply and planning permission is not required for these works.

4.2 Use of Building

It is noted that until recently, the building has been used as a long-term multi-unit residential building. As noted in Appendix A, a contract between our client and the Dublin Region Homeless Executive (DRHE) has been agreed and under this agreement, the building continues to be used as a long-term residential building. The DRHE is located at Block 1, Floor 2, Dublin City Council Civic Office, Fishamble Street, Dublin 8 and is a subsidiary of Dublin City Council who serves as the housing authority for the city. It is submitted that the use of the building has not changed and therefore planning permission for change of use is not required in this instance. Furthermore, we note that Section 4(1) of the Planning and Development Act 2000 (as amended), sets out the provisions of exempted development. Section 4(1)(f) – Exempted Development states that the following shall be exempted development for the purpose of the Act:

> *(f) development carried out on behalf of, or jointly in partnership with a local authority, pursuant to a contract entered unto by the local authority concerned, whether in its capacity as a planning authority or in any other capacity.*

In considering the above, we refer to a recent declaration issued by South Dublin County Council under Reg. Ref. ED18/0040, which related to an application requesting a Section 5 Declaration on whether *'the use of a monastery as a hub/hostel for homeless families at the Carmelite Monastery, Firhouse Road, Dublin 24 is or is not development and is or is not exempted development'.*

In this instance, a contract was entered into with South Dublin County Council, for the purpose of the provision of a hub/hostel for homeless families at the subject site. It was therefore considered that the proposal to use the Monastery for the provision of accommodation for homeless families was exempted development having regard to Section 4(1)(f) of the Planning and Development Act 2000 (as amended). The Inspector's Report, dated 4th December 2018, noted the following:

> *'It is the understanding of the Planning Authority that a contract has been entered into with South Dublin County Council, for the purpose of the provision of a hub/hostel for homeless families at the subject application site.'*

The planning authority issued the following order, stating the applicant be informed that the proposed development of:

> *'Use of monastery as a hub/hostel for homeless families at The Carmelite Monastery, Firhouse Road, Dublin 24, is considered to be exempted development under the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended) and therefore does not require planning permission.'*

The decision of South Dublin County Council was subsequently appealed to An Bord Pleanála who upheld the decision of the Planning Authority under ABP. Ref. 303392-19. The Inspector's Report states:

> *The referrer argues that the provisions of Section 4(1)(f) of the Act cannot be relied on in the current instance as the proposed 'hostel' use would materially contravene the zoning objective for the site (high amenity/open space) as set out in the South Dublin County Council Development Plan 2016-2022. The referrer argues that Section 4(1)(f) is limited by the operation of Section 178 of the Act which stipulates that the council of a county shall not effect any development in its functional area which contravenes materially the Development Plan).*

The Inspector disagreed with this interpretation of Section 4(1)(f) of the Act, stating:

> *'I do not share the referrers conclusion that the development (change of use) that has taken place constitutes a material contravention of the Development Plan. 8.3.6. On balance, on a strict reading and interpretation of the wording contained in Section 4(1)(f), I agree with the planning authority that the development that has taken place comes within the scope of the section and, therefore, constitutes development which is exempted development by virtue of the operation of this section of the Act.'*

The Inspector also notes that the only restrictions on the exemption provided under Section 4(1)(f) of the Act are as follows:

> *'Section 4(4) provides that certain developments requiring Environmental Impact Assessment and Appropriate Assessment cannot avail of certain exemptions otherwise provided for under the Act. The nature of the development in this instance would not require Environmental Impact Assessment or Appropriate Assessment.'*

'Section 57(1) of the Act places restrictions on works (otherwise deemed to be exempted under that Act and Regulations) in the case of a Protected Structure.'

It is noted that the development does not require an Environmental Impact Assessment and Appropriate Assessment nor is the building listed on the Record of Protected Structures.

With regard to the use of the building, An Bord Pleanála concluded that:

(b) The development that has taken place in changing the former Monastery to a Family Hub was carried out on behalf of South Dublin Co. Council (a local authority) pursuant to a contract entered into by the local authority (and a service provider) acting its capacity as a housing authority.

(c)Thus, the development that has taken place constitutes exempted development by virtue of the operation of Section 4(1)(f) of the Planning and Development Act,2000, as amended.

The above precedent demonstrates that there are certain circumstances whereby development is considered exempted development when a contract has been entered into by the Local Authority and the Applicant.

Referring to Appendix A, we note that correspondence has taken place between Brimwood Limited, and Ms Eileen Gleeson, Director at the DHRE, and Mr Brendan Kenny, Deputy Chief Executive at Dublin City Council, dated 19th April 2020. This letter notes that a contract has been entered into by Brimwood Limited and the DHRE/ Dublin City Council, on 1st May 2020, for the provision of long-term residential accommodation at 15/ 17 Drumcondra Road Lower. As part of this contract, our client was required to carry out works to the building to improve the standard of accommodation being offered.

The Appellant notes that the DHRE has taken out a lease on the property and claims that Section 4(1)(f) does not apply in this instance as the local authority did not engage directly or indirectly in the development. They further claim that *if the local authority is not willing to be the developer and take on the associated costs and risks with that, they do not avail of exemptions which are designed to protect communities from certain types of development.*

In response to these claims, first of all, the works were carried out were a prerequisite for the contract agreed between Brimwood Limited and the DHRE. It is clearly in line with Section 4(1)(f) which states:

(f) development carried out ***on behalf of, or jointly in partnership with a local authority, pursuant to a contract entered unto by the local authority concerned****, whether in its capacity as a planning authority or in any other capacity.*

Secondly, the Act does not state that a local authority cannot avail of the exemption unless they act as the developer.

It is submitted that Section 4(1)(f) of the Planning and Development Act 2000(as amended) applies in this instance as an agreement was in place between Brimwood Limited and the DHRE.

The Appellant also argues that the development cannot avail of Article 80(1)(k) of the Planning and Development Regulations 2001-2020 which states:

(k) any development other than those specified at paragraphs (a) to (j), the estimated cost of which exceeds €126,000 not being development consisting of the laying of underground sewers, mains, pipes or other apparatus.'

The Appellant claims that this Article cannot be relied upon where the lease of the property exceeds €126,000. It is submitted that this argument is irrelevant to the Section 5 Declaration as the Planning and Development Regulations cannot restrain the Planning and Development Act 2000 (as amended). In a legal opinion prepared by Kevin Bell B.L., it was noted that the Regulations are secondary legislation and are therefore limited in their powers over the Act:

The first point to note in analysing the interaction between these pieces of legislation is the difference in status of primary legislation (i.e. Acts of the Oireachtas duly passed by both Houses and signed into law by Uachtarán na hÉireann) and secondary legislation (i.e. statutory instruments, orders, and regulations introduced by a Minister pursuant to his statutory powers).

The categories of exempted development created by section 4(1) of the Act, being specifically enumerated in primary legislation, are of a higher legal order than those created by the Regulations. The categories set out in section 4(1), can therefore only be limited, or restricted, or circumscribed, by other provisions of primary legislation. For example, section 4(4) of the Act

expressly excludes from the scope of section 4(1) development requiring appropriate assessment or environmental impact statement.

The provisions of section 4(1) of the Act cannot be restricted by secondary legislation unless some other provision in primary legislation gives the relevant Minister the power to so restrict those provisions.

Regarding Ministerial intervention, it is noted that the Minister's ability to introduce categories of exempted development by regulations are in addition to the categories created by Section 4(1) of the Act. Kevin Bell BL, in his legal opinion states:

By examination of section 4(2)(a) of the Act it can be seen that the categories of exempted development for which the Minister may provide by regulations are in addition to the categories created by section 4(1). Moreover, the power of the Minister under section 4(2)(b) to make categories "subject to conditions" clearly only applies to those categories for which he has provided under section 4(2)(a). There is no equivalent ministerial power to make the categories of exempted development created by section 4(1) of the Act subject to any conditions or restrictions, whether by way of regulations or otherwise.

In Weston v. An Bord Pleanala [2008] IEHC 7, the hierarchy of planning legislation was examined by the High Court. Mr Bell's legal opinion states:

In that case the Board sought to utilise Article 9 to "condition out" an application that otherwise would have constituted exempted development under the Act. The Applicant in that case made the following argument to the contrary:

"Weston say the Board is impermissibly seeking to re-interpret primary legislation in the light of a provision contained in secondary legislation; that s.4(2) of the Act of 2000 alone provides for the classes of exempted development and that the Board seeks to read into this primary legislation a qualification that development falling into a designated class of exempted development would nonetheless require planning permission where the Board so stipulates in a condition attached to a planning permission in relation to the same land. Henchy J. in Frescati Estates v. Walker [1975] 1 I.R. 177 held that Regulations cannot be employed as a tool in interpreting the primary legislation under which they are made:

"Much of the necessary procedures laid down by Regulations made pursuant to the Act, but these I ignore in determining the scope of the Act. As Lord Diplock said in the context of another Act -" "It is legitimate to use the Act as an aid to the construction of the
Regulations. To do the converse is to put the cart before the horse.' - Lawson v. Fox [1974 AC 803, 809"...

...Counsel for Weston, Mr. Garrett Simons S.C., forcefully submits that article 9, as secondary legislation, must trace its provenance to an identified antecedent power in the parent Act, that is the Act of 2000. It cannot be free standing."

The exempted class in that case was one created by the Regulations, and was not an exemption created by section 4(1). The High Court ultimately held that section 34 of the Act did give the Board a statutory power to impose certain conditions on a permission in that regard. The court accepted, however, that in the absence of a power set out in the Act, the Board would not have had such authority.

The legal opinion concludes as follows:

For the foregoing reasons, and based on the clear analysis of the courts, it is counsel's view that the restrictions of Article 9 of the Regulations apply only to the categories of exempted development created by Article 6 and Schedule 2 of the Regulations and have no application to the classes of exempted development provided for by section 4(1) of the Act.

With regards to Part VIII of the Planning and Development Act 2000 (as amended), a barrister's opinion on this matter was also sought from Kevin Bell BL. When asked to provide an opinion on whether the provisions of Part VIII of the Planning and Development Regulations, 2001-2020, affect the exempted development status of works falling within the provisions of section 4(1) of the Planning and Development Act, 2000, the following was provided:

'Part VIII of the Planning and Development Regulations, 2001-2020, is entitled

"Requirements in respect of specified development carried out by, on behalf of, or in partnership with, local authorities." Part VIII draws its legislative authority from section 179 of the Act. Section 179 provides as follows:

> *"179. — (1) (a) The Minister may prescribe a development or a class of development for the purposes of this section where he or she is of the opinion that by reason of the likely size, nature or effect on the surroundings of such development or class of development there should, in relation to any such development or development belonging to such class of development, be compliance with the provisions of this section and regulations under this section.*
> *(b) Where a local authority that is a planning authority proposes to carry out development, or development belonging to a class of development prescribed under paragraph (a) (hereafter in this section referred to as "proposed development") it shall in relation to the proposed development comply with this section and any regulations under this section.*
> *(d) This section shall also apply to proposed development which is carried out within the functional area of a local authority which is a planning authority, on behalf of, or in partnership with the local authority, pursuant to a contract with the local authority."*

Article 80 of the Regulations sets out a series of specific works that will engage the provisions of Part VIII. This includes Article 80(k) which provides as follows:

> *(k) any development other than those specified at paragraphs (a) to (j), the estimated cost of which exceeds €126,000 not being development consisting of the laying of underground sewers, mains, pipes or other apparatus.'*

The following case was cited in the Barrister's Opinion:

'The interaction between section 4(1) of the Act and Part VIII of the Regulations was examined in Carman's Hall Community Interest Group v. Dublin City Council [2017] IEHC 544. In that case a resident's group objected to the provision by Dublin City Council of homeless services in their area in that the works were a breach of the Development Plan. The Council's defence to the judicial review was as follows:

> *"It is denied that there has been any contravention of either the First Development Plan or the Second Development Plan. It is pleaded that all local authority development is exempted development by reason of s. 4(1)(aa) of the Act of 2000 and it is further pleaded that Part VIII of the Planning and Development Regulations 2001 (as amended) (the 'Regulations') have no application in circumstances where an emergency situation was deemed by the respondent to exist, and s. 179(6)(b) of the Act 2000 therefore applied."*

As can be seen from the quoted passage, the Council acknowledged that (absent an emergency) Part VIII of the Regulations may apply to exempted development as defined by section 4(1) of the Act.

The High Court further confirmed that development to which Part VIII applies is still exempted development, but exempted development to which additional procedures apply. Importantly the court noted in its ruling that even where works constitute exempted development, and even if an emergency situation for the purposes of section 179(6)(b) of the Act exists, that does not entitle a local authority to undertake development in contravention of its own development plan:

> *"The first article of Part VIII of the Regulations is article 80, which sets out developments prescribed for the purposes of s. 179 of the Acts of 2000-2014. Article 80(1)(k) prescribes any development other than those specified in paras. (a) to (j) (which are of no application in this case), the estimated cost of which exceeds €126,000.00, not being a development consisting of the laying underground of sewers, mains, pipes or other apparatus.*
>
> *In an affidavit dated 9th December, 2016 sworn on behalf of the respondent, Mr. Downey states that the total cost of works carried out at the Premises to that date is of the order of €1,184,000. Accordingly, the procedures set out in s. 179 of the Act of 2000 and Part VIII of the Regulations would, in the ordinary course of events, apply to the works undertaken by the respondent at the Premises. The remainder of Part VIII of the Regulations sets out in some detail the procedures to be followed by local authorities in developments to which the Regulations apply. It is not necessary to set out those procedures here. However, it can be seen from s. 179(6)(b) that the requirement imposed upon local authorities to comply with s. 179 of the Act of 2001 and any regulations made thereunder does not apply to development which is necessary for dealing*

urgently with any situation which the manager considers is an emergency situation calling for immediate action, as is the case in relation to the refurbishment of the Premises by the respondent for the purposes of accommodating persons who are homeless. While the combined effect of s.4(1)(aa) and s. 179(6)(b) of the Act of 2001 is to exempt any development of the kind described in s. 179(6)(b) from the requirements to obtain planning permission or to go through the procedure prescribed pursuant to s. 179 and Part VIII of the Regulations, that does not entitle a local authority to undertake development in contravention of its own development plan. It is clear from ss. 15 and 178 of the Act of 2000, that a planning authority has both positive and negative obligations as regards the development plan – the first being to take such steps as are within its powers and as may be necessary to secure the objectives of the development plan, and the second being not to effect any development which contravenes materially the development plan. It is common case that a planning authority remains subject to these obligations, notwithstanding that it may be exempt from any procedures to obtain permission for or secure approval under s. 179 of the Act of 2000,for the proposed development."

Having reviewed both the Act and Regulations and the case study outlined above, the Barrister formed the following legal opinion:

From an analysis of the text of section 179 of the Act, and the case law outlined above, it is counsel's view that the provisions of Part VIII of the Regulations do apply to exempted development (as defined by section 4(1) of the Act) if that development comes within one of the classes of development set out at Article 80 of the Regulations.'

Article 80 of the Regulations sets out that the following classes of development are not exempt:

80.(1)Subject to sub-article (2) and sub-section (6) of section 179 of the Act, the following classes of development, hereafter in this Part referred to as "proposed development", are hereby prescribed for the purposes of section 179 of the Act —

(a) the construction or erection of a house,

(b)the construction of a new road or the widening or realignment of an existing road, where the length of the new road or of the widened or realigned portion of the existing road, as the case may be, would be—(i) in the case of a road in an urban area, 100 metres or more, or 130(ii)in the case of a road in any other area, 1 kilometre or more,

(c)the construction of a bridge or tunnel,

(d)the construction or erection of pumping stations, treatment works, holding tanks or outfall facilities for waste water or storm water,

(e)the construction or erection of water intake or treatment works, overground aqueducts, or dams or other installations designed to hold water or to store it on a long-term basis,

(f)drilling for water supplies,

(g)the construction of a swimming pool,

(h)the use of land, or the construction or erection of any installation or facility, for the disposal of waste, not being—

(i) development which comprises or is for the purposes of an activity in relation to which a waste licence is required or (ii) development consisting of the provision of a bring facility which comprises not more than 5 receptables,(i)the use of land as a burial ground,

(j)the construction or erection of a fire station, a library or a public toilet, and

(k)any development other than those specified in paragraphs (a) to (j), the estimated cost of which exceeds €126,000, not being development consisting of the laying underground of sewers, mains, pipes or other apparatus.

In considering the above, it is submitted that the proposed use of the entirety of No. 15/17 Drumcondra Road Lower in long term residential use is considered to be exempt from the requirement to obtain planning permission as it does not come within one of the classes of development set out at Article 80 of the Regulations, therefore, Section 4(1)(f) of the Planning and Development Act 2000 (as amended) is applicable in this instance. Furthermore, it has

been declared by Dublin City Council and the Dublin Region Homeless Executive that an emergency exists in homeless accommodation due to the need to ensure compliance with Covid-19 guidance.

4.0 Conclusion

This observation has been prepared in response to an appeal against a declaration under Section 5 of the Planning and Development Act 2000 (as amended) in respect of change of use from residential (Class 1) to hostel (Class where care is provided((Or accommodation for homeless persons) at 15/17 Drumcondra Road Lower, Dublin 9.

Upon review of the Planning and Development Act 2000 (as amended), the Planning and Development Regulations 2001 (as amended), and the legal opinion of Kevin Bell BL, we are of the opinion that the current use of the building is exempted development pursuant to Section 4(1)(f) of the Planning and Development Act,2000 (as amended). As noted in the legal opinion, the provisions of the Planning and Development Act 2000 (as amended) supersede the Regulations and the restrictions of Article 9 of the Regulations apply only to the categories of exempted development created by Article 6 and Schedule 2 of the Regulations and have no application to the classes of exempted development provided for by section 4(1) of the Act. Similarly, provisions of Part VIII of the Regulations do apply to exempted development (as defined by section 4(1) of the Act) if that development comes within one of the classes of development set out at Article 80 of the Regulations, which is not the case in this instance.

Should you have any queries or require any further information, please do not hesitate to contact the undersigned.

Yours sincerely,

Kevin Hughes MIPI MRTPI
Director
For HPDC Ltd.

Appendix A

Correspondence from the Dublin Region Homeless Executive and Dublin City Council, dated 10th April 2020, confirming that a contract exists between the Dublin Region Homeless Executive and Brimwood Limited.

Comhairle Cathrach
Bhaile Átha Cliath
Dublin City Council

Re: New residential facility for Homeless persons at 15/17 Lower Drumcondra Road

I refer to previous representations and correspondence in relation to the above property. I also refer to request for report on this issue from Councillors at this week's Central Area Committee.

The Dublin Region Homeless Executive/DCC commenced using a private property at 15/17 Drumcondra Road on the provision of emergency accommodation for single homeless adults on 1st May 2020. Since then there have been many objections and complaints made to various City Council Sections, to DRHE and to public representatives in relation to this use of the property.

On the 31st March 2020 there were 2,798 single adults in emergency accommodation in the Dublin Region along with 1103 families and 2491children. It is a daily challenge for DRHE/DCC to ensure that appropriate accommodation is put in place to accommodate homeless persons. In addition to the normal challenges we have faced over recent years, we are currently responding to Covid-19 and the life threatening risk that it presents, especially for the homeless population who have been identified as a vulnerable group by the National Public Health Team (NPHET) thereby requiring a specific and urgent response to protect them.

We have and are responding to this challenge as we outlined in previous and recent correspondence from this office to City Councillors.

We had been engaging with the owner of the above property since early March 2020 with a view to delivering additional capacity for homeless single persons as part of the Covid-19 response.

We have negotiated a contract of services for a period of 5 years under a commercial arrangement between the DRHE and the property owners- *Brimwood Limited.* It is being managed directly by the owners of the property under a commercial arrangement whereby the property is made available to accommodate 40 single adults requiring accommodation who are experiencing homelessness until alternative longer term housing solutions via social housing or HAP are available for them.

The average length of time an individual will reside there, is envisaged to be between 3 and 6 months. The property is not a hostel and there is no NGO involved in the management of it.

We are outlining below responses to the various questions raised:

Covid 19 and accommodation

The use of this residential accommodation allows the DRHE to continue responding to the need for the provision of accommodation that enables social distancing, and isolation thereby reducing the public health risk to homeless adults at this time. The HSE guidelines along with Environmental Health advice on the use of private rented properties were carefully followed, in settling on the maximum number (40) that could be accommodated in this property and it is not our intention to increase the number post Covid-19.

The Gardai attended the site on a number occasions following concerns raised in relation to social distancing while the renewal and repair works were underway and it was found to be adhering to social distancing guidelines at all times. It is important also to note that while general construction/building work was on lockdown at that time, work to facilitate accommodation for homeless people was deemed essential work under Government guidelines. We oversaw the installation of 40 beds in the property ensuring that public health guidelines were adhered to.

Single adults are allocated rooms on a sharing basis, which is deemed to be compliant with social distancing and private rented standards. There is scope for two metres of a social/physical distance. (See attached for copy of the HSE guidelines)

We have provided and managed essential services for homeless people in the Dublin Region during the Covid-19 crisis and all our resources are being fully applied to that task. We have ensured that all public health guidance issued by the HSE is communicated immediately to all our services in relation to e.g. the precautions necessary throughout Covid-19 and we have been advising and assisting service providers in the management of facilities throughout the Dublin area.

Curfew

In relation to questions as to a curfew at the property, Homeless individuals will reside at this property on a full time basis and we issue a general guideline of 11.30pm to all operators and residents in private emergency accommodation with exceptions where individuals are possibly working late or visiting family and friends.

Contract

The property is owned by *Brimwood Limited* and will continue to be operated by them on behalf of DCC/ DRHE in the provision of suitable residential accommodation for single homeless adults. Staff are on site 24/7. CCTV is in place at the front and rear of the property as an additional assist in the management of the facility ensuring a response immediately if required. There is a negotiated contract in place between the DRHE/DCC and the property owner but we are not in a position to make details of the contract publically available for commercial sensitivity reasons.

However, we can assure you that like all the contracts negotiated by the DRHE/DCC for the provision of accommodation and services, value for money is key to reaching agreement within the context of a heated residential market.

Fire Safety

The District Fire Officer was on site on two occasions to date and the maintenance works to the fire and life safety systems meet the current fire safety standards. There is no specific historical fire certificate on this property however the owner's Fire Consultants risk assessed the property and have overseen a schedule of works to the property consistent with the standards set out in Government guidelines for emergency accommodation.

This exceeds the requirements for a residential property such as this and ensures that the highest standards are met to protect the residents in relation to fire and life safety. The owner's Fire Consultant has sought a regularisation certificate from the Fire Authority (DFB) in relation to the works and this Certificate will be made available to you as soon as we have it.

Health and Safety Authority (HSA)

There was no requirement on the DRHE to report work on this property to the HSA or to ask them to inspect the property. The HSA have responsibility for occupational health and safety in the work place. We are not aware of any complaint to the HSA in relation to this workplace.

Engagement with local residents

DRHE management met with the owner of the neighbouring house today- 14th May and a further meeting with a wider group of residents is being arranged. It is not practical or prudent to initiate local consultation on projects like this one, prior to us acquiring/leasing such properties because without doubt it would quickly become a very controversial and divisive issue and put such projects in jeopardy, that would then result in many more Homeless persons sleeping on the streets of Dublin. We are of course very willing to consult and engage regularly with local communities on how these projects are managed and how problems and complaints can be resolved quickly.

The DRHE in association with the City Council and the other Dublin Local Authorities have taken on a significant number of private properties (usually by lease) over recent years for the purpose of providing much needed emergency accommodation for Homeless Households, in particular single persons. All these facilities regardless of their location have led to major objections and complaints from local communities and business. However we do put strong emphasis on how such facilities are managed both inside and outside.

As a result of this emphasis, the level of complaints and problems after these facilities open and settle in, have been very low and when problems do arise they are addressed and resolved very quickly. Therefore, we believe that we have developed a good track record in relation to these type of necessary facilities.

Contact details

Contact with the management of this property can be made via email to

15/17 drumcondrard@gmail.com or by telephone to 01 865 9827

Contact with DRHE – Tommy Collins – 086 815 0179

All Private Emergency Accommodations in contract with DRHE are subject to regular inspections by the DRHE's standards team, and this team also ensures a quick response to complaints received or problems arising. All service providers are issued with guidelines in relation to the management of facilities, and we attach a copy of those guidelines for your information.

Eileen Gleeson
Director,
Dublin Region Homeless Executive,
10th April 2020

Brendan Kenny
Deputy Chief Executive,
Dublin City Council

Feidhmeannacht um Dhaoine ar Easpa Dídine Réigiún Bhaile Átha Cliath
Dublin Region Homeless Executive

Appendix B

A copy of the barrister's opinion provided by Kevin Bell BL.

Querist: Hughes Planning and Development Consultants

Re: Application of certain provisions of the Planning and Development Regulations 2001-2020 to section 4 of the Planning and Development Act, 2000.

7th July 2020

OPINION OF COUNSEL

A. Background

1. Querist is a firm of Planning and Development Consultants based at Pearse Street, in the city of Dublin. Querist has a number of clients that regularly carry out development works in conjunction with local authorities. Hithertofore, those clients and the local authorities with which they work have relied upon section 4(1)(f) and section 4(1)(h) of the Planning and Development Act, 2000, (hereafter "the Act") to deem the works they carry out as exempted development.

2. In more recent correspondence with local authorities, specifically in respect of discussions regarding potential declarations on exempted development pursuant to section 5 of the Act, Querist instructs counsel that the firm's clients have detected a reticence on the part of some local authorities to rely on section 4(1)(f) and section 4(1)(h) in declaring the relevant works as exempted development. Querist is of the view that this may be due to a concern on the part of the local authorities that the restrictions on exempted development, set out in Article 9 of the Planning and Development Regulations, 2001-2020, ("the Regulations") and Schedule 2 to the Regulations, may circumscribe the scope of the exempted development covered by section 4(1)(f) and section 4(1)(h) of the Act. Counsel has been

asked to provide an Opinion on whether the restrictions in Article 9 of the Regulations apply to the classes of exempted development set out in section 4(1) of the Act.

3. Secondly, Querist has also raised the question of whether the requirements of Part VIII of the Regulations in respect of development carried out by, on behalf of, or in partnership with local authorities may also circumscribe the scope of the exempted development covered by section 4(1) of the Act.

4. In particular, Querist has questioned what implications Article 80(1)(k) of the Regulations has for the legal and planning status of works undertaken by, on behalf of, or in partnership with a local authority which are of a value greater than €126,000.

B. Legal Issues Arising

Quare 1:
Do the restrictions in Article 9 of the Planning and Development Regulations, 2001-2020, apply to the categories of exempted development created by section 4 of the Planning and Development Act, 2000?

5. Section 4(1) of the Planning and Development Act, 2000, as amended, provides for a number of categories of exempted development. For the purposes of this Opinion of Counsel, the following three categories are pertinent:

> *"4-(1) The following shall be exempted developments for the purposes of this Act –*
>
> *(aa) development by a local authority in its functional area…*
>
> *(f) development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local*

authority concerned, whether in its capacity as a planning authority or in any other capacity…

(h) 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;"

6. Section 4(2)(a) goes on to empower the Minister to, by way of regulations, provide for <u>further</u> classes of exempted development where he is of the opinion that:

> *"(i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or*
>
> *(ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described)."*

7. These further classes of exempted development, created not by statute but by Ministerial regulation, *"may be subject to conditions… as may be specified in the regulations"* as per section 4(2)(b) of the Act.

8. Section 4(4) of the Act limits both the statutory categories of exempted development under section 4(1) and the further categories created by Ministerial regulations, in the following terms:

> *"(4) 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."*

9. Querist has asked for counsel's view on whether the restrictions set out at Article 9 of the Planning and Development Regulations 2001-2020 apply to the categories of exempted development created by section 4(1) of the Act. Article 9(1) of the Regulations provides that *"Development to which article 6 relates shall not be exempted development for the purposes of the Act: (a) if carrying out the development would…"* and goes on to list a number of delimiting factors.

10. In turn, Article 6 of the Regulations, to which Article 9 applies, stipulates that development of a class specified in Schedule 2 to the Regulations shall be exempted development for the purposes of the Act, provided that it also complies with the conditions and limitations also included in Schedule 2.

11. The creation of the categories of exempted development set out in Schedule 2 to the Regulations, and to which both Article 6 and Article 9 of the Regulations apply, constitutes an exercise by the Minister of his statutory power under section 4(2)(a) of the Act to provide for any class of development to be exempted development. The restrictions set out in Article 9 and Schedule 2 constitute *"conditions"* on those classes, as provided for by section 4(2)(b).

12. The first point to note in analysing the interaction between these pieces of legislation is the difference in status of primary legislation (i.e. Acts of the Oireachtas duly passed by both Houses and signed into law by Uachtarán na

hÉireann) and secondary legislation (i.e. statutory instruments, orders, and regulations introduced by a Minister pursuant to his statutory powers).

13. The categories of exempted development created by section 4(1) of the Act, being specifically enumerated in primary legislation, are of a higher legal order than those created by the Regulations. The categories set out in section 4(1), can therefore only be limited, or restricted, or circumscribed, by other provisions of primary legislation. For example, section 4(4) of the Act expressly excludes from the scope of section 4(1) development requiring appropriate assessment or environmental impact statement.

14. The provisions of section 4(1) of the Act cannot be restricted by secondary legislation unless some other provision in primary legislation gives the relevant Minister the power to so restrict those provisions.

15. By examination of section 4(2)(a) of the Act it can be seen that the categories of exempted development for which the Minister may provide by regulations are in addition to the categories created by section 4(1). Moreover, the power of the Minister under section 4(2)(b) to make categories *"subject to conditions"* clearly only applies to those categories for which he has provided under section 4(2)(a). There is no equivalent ministerial power to make the categories of exempted development created by section 4(1) of the Act subject to any conditions or restrictions, whether by way of regulations or otherwise.

16. In the case of *Weston v. An Bord Pleanála* [2008] IEHC 71, this hierarchy of legislation and the effect it has on the application of Article 9 of the Planning and Development Regulations in particular, was examined by the High Court. MacMenamin J. summed up the nature of the power to make conditions on categories of exempted development as follows:

> *"Section 4(3) provides that references in the Act to "exempted development" are to include development so classified by the Minister pursuant to s. 4(2).*

It can be seen from these provisions that the Oireachtas envisaged that the Minister might draw up regulations to designate certain classes of development as exempted development and that such classes, by virtue of the terms of the Act itself would not require planning permission. But the Oireachtas clearly also envisaged that by the insertion of s. 4(2)(b), the Minister would have jurisdiction to impose a condition as regards the extent of the exemption."

17. In that case the Board sought to utilise Article 9 to "condition out" an application that otherwise would have constituted exempted development under the Act. The Applicant in that case made the following argument to the contrary:

"Weston say the Board is impermissibly seeking to re-interpret primary legislation in the light of a provision contained in secondary legislation; that s. 4(2) of the Act of 2000 alone provides for the classes of exempted development and that the Board seeks to read into this primary legislation a qualification that development falling into a designated class of exempted development would nonetheless require planning permission where the Board so stipulates in a condition attached to a planning permission in relation to the same land.

Henchy J. in Frescati Estates v. Walker [1975] 1 I.R. 177 held that Regulations cannot be employed as a tool in interpreting the primary legislation under which they are made:

> *"Much of the necessary procedures laid down by Regulations made pursuant to the Act, but these I ignore in determining the scope of the Act. As Lord Diplock said in the context of another Act -"*

> *"It is legitimate to use the Act as an aid to the construction of the Regulations. To do the converse is to put the cart before the horse.*[1] *- Lawson v. Fox [1974 AC 803, 809"...*
>
> *...Counsel for Weston, Mr. Garrett Simons S.C., forcefully submits that article 9, as secondary legislation, must trace its provenance to an identified antecedent power in the parent Act, that is the Act of 2000. It cannot be free standing."*

18. The exempted class in that case was one created by the Regulations, and was not an exemption created by section 4(1). The High Court ultimately held that section 34 of the Act did give the Board a statutory power to impose certain conditions on a permission in that regard. The court accepted, however, that in the absence of a power set out in the Act, the Board would not have had such authority.

19. It is clear from the jurisprudence cited above that the Minister cannot by regulations delimit or circumscribe the scope of the Act absent a clear legislative provision which empowers the Minister to do so. Section 4(2)(b) creates such a power in respect of the categories of exempted development created under section 4(2)(a) by way of regulation. The Act does not contain any equivalent power in respect of the categories stipulated in section 4(1). It is therefore the view of counsel that these categories, including section 4(1)(f) and section 4(1)(h), are not subject to the conditions created by Article 9 of the Regulations. To use Article 9 of the Regulations to restrict section 4(1) of the Act would be, to use the words of Lord Diplock cited above, to put the cart before the horse.

20. The High Court in *Cunningham v. An Bord Pleanála* [2013] IEHC 234, whilst not directly addressing the question of whether Article 9 applied to section 4(1), clearly indicated through its legal analysis that it does not. In that case Hogan J. examined the question of whether the applicant was entitled to an

exemption either under section 4(1)(a) of the Act, or under Article 6 of the Regulations. The court referred to the Article 6 as a "parallel exemption" to that of section 4(1)(a).

21. In its examination of the two exemptions the court applies the restrictions of Article 9 only to the "parallel exemption" created by Article 6. Article 9 is not anywhere considered as applying any sort of restrictions to section 4(1)(a). The absence of this consideration by the court, of itself, is evidence that restrictions created by the Regulations cannot be used to delimit the scope of exemptions created by section 4(1) and Hogan J. considered this so obvious and trite a proposition as to be unnecessary to actually enunciate.

22. Similarly in *Strategic Capital Investment Fund Ltd. v. Naughton* [2017] IEHC 381 the respondents sought to argue that their works were exempted development under section 4(1)(h) of the Act and Article 6(1) of the Regulations. As in *Cunningham,* the court first examined whether the works could be said to be covered by the statutory exemption under section 4(1). The court undertook no examination of the provisions of Article 9 when considering this point. Only when then turning to consider whether the works were within the scope of Article 6 of the Regulations did the court then examine the restrictions of Article 9.

23. For the foregoing reasons, and based on the clear analysis of the courts, it is counsel's view that the restrictions of Article 9 of the Regulations apply only to the categories of exempted development created by Article 6 and Schedule 2 of the Regulations and have no application to the classes of exempted development provided for by section 4(1) of the Act.

Quare 2:

Do the provisions of Part VIII of the Planning and Development Regulations, 2001-2020, affect the exempted development status of works falling within the provisions of section 4(1) of the Planning and Development Act, 2000?

24. Part VIII of the Planning and Development Regulations, 2001-2020, is entitled *"Requirements in respect of specified development carried out by, on behalf of, or in partnership with, local authorities."* Part VIII draws its legislative authority from section 179 of the Act. Section 179 provides as follows:

> *"179. – (1) (a) The Minister may prescribe a development or a class of development for the purposes of this section where he or she is of the opinion that by reason of the likely size, nature or effect on the surroundings of such development or class of development there should, in relation to any such development or development belonging to such class of development, be compliance with the provisions of this section and regulations under this section.*
>
> *(b) Where a local authority that is a planning authority proposes to carry out development, or development belonging to a class of development prescribed under paragraph (a) (hereafter in this section referred to as "proposed development") it shall in relation to the proposed development comply with this section and any regulations under this section.*
>
> *(d) This section shall also apply to proposed development which is carried out within the functional area of a local authority which is a planning authority, on behalf of, or in partnership with the local authority, pursuant to a contract with the local authority."*

25. Article 80 of the Regulations sets out a series of specific works that will engage the provisions of Part VIII. This includes Article 80(k) which provides as follows:

> *"(k) any development other than those specified at paragraphs (a) to (j), the estimated cost of which exceeds €126,000 not being development consisting of the laying of underground sewers, mains, pipes or other apparatus."*

26. Articles 81 to 85 of the Regulations, and the balance of section 179 of the Act, set out a detailed process to be followed by local authorities if proposed development is caught by one of the categories set out in Article 80. This process ultimately culminates in the preparation of a report by the chief executive of the local authority, which is then presented to the members of the local authority. Unless the members by resolution decide to vary or modify the development the proposed development may proceed as described in the chief executive's report.

27. In the first instance, it can clearly be seen that unlike the restrictions in Article 9, the processes set out in Part VIII of the Regulations are grounded in an express legislative provision in section 179. The provisions of section 179 and Part VIII should essentially be read in conjunction with each other. Whilst pursuant to section 4(1)(aa) and 4(1)(f) of the Act works carried out by, on behalf of, or in partnership with a local authority constitute exempted development, section 179 essentially adds a number of procedural requirements for certain works covered by ss. 4(1)(aa) and 4(1)(f) before they are carried out. These requirements clearly are not equivalent to an application for planning permission but bear some similarities to that process, including the erection of site notices, and the receipt of submissions from observers etc.

28. The effect of section 179 of the Act and Part VIII of the Regulations is not to rob works covered by sections 4(1)(aa) and 4(1)(f) of their status as exempted development, but to ensure that the principles of proper planning cannot be circumvented by local authorities without some oversight from councillors, and to facilitate public participation in the planning process, as required by the Aarhus Convention.

29. The interaction between section 4(1) of the Act and Part VIII of the Regulations was examined in *Carman's Hall Community Interest Group v. Dublin City Council* [2017] IEHC 544. In that case a resident's group objected to

the provision by Dublin City Council of homeless services in their area in that the works were a breach of the Development Plan. The Council's defence to the judicial review was as follows:

> *"It is denied that there has been any contravention of either the First Development Plan or the Second Development Plan. It is pleaded that all local authority development is exempted development by reason of s. 4(1)(aa) of the Act of 2000 and it is further pleaded that Part VIII of the Planning and Development Regulations 2001 (as amended) (the 'Regulations') have no application in circumstances where an emergency situation was deemed by the respondent to exist, and s. 179(6)(b) of the Act 2000 therefore applied."*

30. As can be seen from the quoted passage, the Council acknowledged that (absent an emergency) Part VIII of the Regulations may apply to exempted development as defined by section 4(1) of the Act.

31. The High Court further confirmed that development to which Part VIII applies is still exempted development, but exempted development to which additional procedures apply. Importantly the court noted in its ruling that even where works constitute exempted development, and even if an emergency situation for the purposes of section 179(6)(b) of the Act exists, that does not entitle a local authority to undertake development in contravention of its own development plan:

> *"The first article of Part VIII of the Regulations is article 80, which sets out developments prescribed for the purposes of s. 179 of the Acts of 2000-2014. Article 80(1)(k) prescribes any development other than those specified in paras. (a) to (j) (which are of no application in this case), the estimated cost of which exceeds €126,000.00, not being a development consisting of the laying underground of sewers, mains, pipes or other apparatus.*

In an affidavit dated 9th December, 2016 sworn on behalf of the respondent, Mr. Downey states that the total cost of works carried out at the Premises to that date is of the order of €1,184,000. Accordingly, the procedures set out in s. 179 of the Act of 2000 and Part VIII of the Regulations would, in the ordinary course of events, apply to the works undertaken by the respondent at the Premises. The remainder of Part VIII of the Regulations sets out in some detail the procedures to be followed by local authorities in developments to which the Regulations apply. It is not necessary to set out those procedures here. However, it can be seen from s. 179(6)(b) that the requirement imposed upon local authorities to comply with s. 179 of the Act of 2001 and any regulations made thereunder does not apply to development which is necessary for dealing urgently with any situation which the manager considers is an emergency situation calling for immediate action, as is the case in relation to the refurbishment of the Premises by the respondent for the purposes of accommodating persons who are homeless. While the combined effect of s. 4(1)(aa) and s. 179(6)(b) of the Act of 2001 is to exempt any development of the kind described in s. 179(6)(b) from the requirements to obtain planning permission or to go through the procedure prescribed pursuant to s. 179 and Part VIII of the Regulations, that does not entitle a local authority to undertake development in contravention of its own development plan. It is clear from ss. 15 and 178 of the Act of 2000, that a planning authority has both positive and negative obligations as regards the development plan – the first being to take such steps as are within its powers and as may be necessary to secure the objectives of the development plan, and the second being not to effect any development which contravenes materially the development plan. It is common case that a planning authority remains subject to these obligations, notwithstanding that it may be exempt from any procedures to obtain permission for or secure approval under s. 179 of the Act of 2000,for the proposed development."

32. From an analysis of the text of section 179 of the Act, and the case law outlined above, it is counsel's view that the provisions of Part VIII of the

Regulations do apply to exempted development (as defined by section 4(1) of the Act) if that development comes within one of the classes of development set out at Article 80 of the Regulations.

C. Conclusions

33. The restrictions of Article 9 of the Planning and Development Regulations, 2001-2020, being secondary legislation, do not apply to the categories of exempted development created by section 4(1) of the Planning and Development Act, 2000, as amended.

34. The process and procedures set out in section 179 of the Planning and Development Act, 2000, as amended, and Part VIII of the Planning and Development Regulations, 2001-2020, apply to proposed development carried out by, on behalf of, or in partnership with local authorities if the proposed development is caught by one of the categories set out in Article 80 of the Regulations. This is so notwithstanding the fact that such proposed development constitutes exempted development pursuant to sections 4(1)(aa) and 4(1)(f) of the Planning and Development Act, 2000, as amended.

35. Nothing further occurs.

Kevin Bell B.L.

7th July 2020