

Farry Town Planning Ltd.

Suite 180
28 South Frederick Street
Dublin 2

| | | |
|--------|--------|------------------------|
| LDG- | Phone | (01) 677 8180 |
| ABP- | Mobile | 087 288 7311 |
| | | vincentfarry@gmail.com |
| | | 03516421 |
| | | 08 FEB 2021 |
| Fee: € | 22000 | Type: _____ |
| Time: | 16.40. | By: hand |

1 February 2021

The Secretary
An Bord Pleanala
64 Marlborough Street
Dublin 1

DEVELOPMENT AT 16 BEECH PARK AVENUE FOXROCK DUBLIN 18 S5 OF THE PLANNING AND DEVELOPMENT ACT, 2000 AS AMENDED

Dear Sir

We refer to the above and we act for Thomas Clarke of [REDACTED], Dublin 18.

We hereby refer a declaration by Dun Laoghaire – Rathdown County Council under ref. 12320 for review by An Bord Pleanala under s.5(3)(a) of the Planning and Development Act, 2000 (as amended), the details of which are set out below. The relevant documents have been appended to this request.

To summarise the matter our client, through MHP Solicitors, lodged a referral with the Planning Authority under s. 5(1) of the Act of 2000 on the question of whether certain works which had taken place at 16 Beech Park Avenue Foxrock require planning permission and Dun Laoghaire – Rathdown County Council, on 15 January 2021, deemed that these works comprised exempted development.

We disagree with this decision, on the basis that none of the statutory or regulatory provisions governing exempted development allow for works of this nature to be undertaken without consent and we respectfully invite the Board to overturn the Council's decision and to affirm that the alterations which have been carried out at 16 Beech Park Avenue Foxrock Dublin 18 require planning permission.

1. Background to Review Request

(i) Original Referral

On 16 December 2020, Dun Laoghaire-Rathdown County Council received our client's original referral request (from agent, MHP Solicitors) which sought a formal declaration on whether certain works which were then being undertaken at 16 Beech Park Avenue, Foxrock required permission. This originating correspondence invited the Planning Authority to concur with the following opinion:

'As the development and the intended finish would materially alter the appearance of the property to an extent that is inconsistent with our client's premises and all of the neighbouring premises, our client objects to the said works'.

(ii) Council Decision

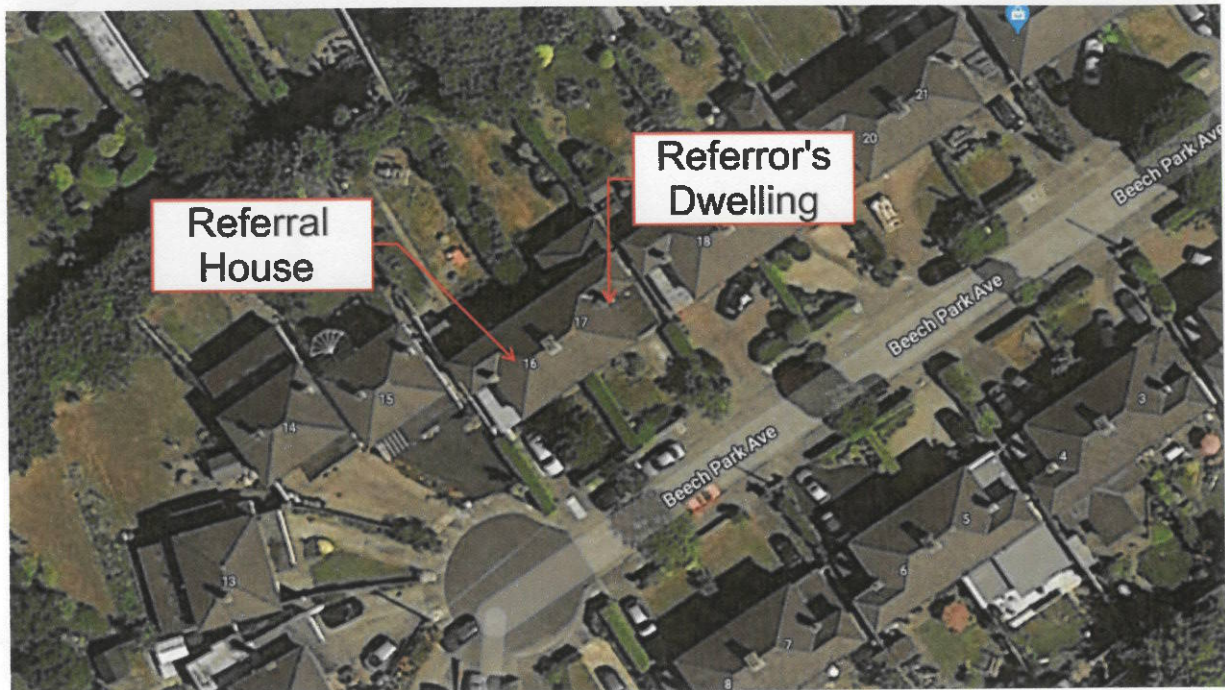
The Council, under reg. 12320, issued a formal determination which, dated 15 January 2021 stated:

'Having regard to Section 4(1) of the Planning and Development Act, 2000 (as amended), it is considered that the following development works at No. 16 Beech Park Avenue Foxrock Dublin 18 constitutes exempted development:

- *The application of cladding / insulation to the exterior of an existing dwelling'.*

2. The Character of Beech Park Avenue

The property to which this referral relates comprises a two-storey semi-detached, dwelling which is located within a mature housing estate within the suburban residential area of Foxrock, Dublin 18. This structure was constructed at the same time as most of the other buildings on Beech Park Avenue and, prior to the subject works being undertaken, formerly exhibited a high degree of homogeneity with other pairs of semi-detached houses in this immediate area. In essence, this is an homogenous area, in terms of the appearance of built development and is of a type which is found in many other suburban areas which were developed during the nineteen-sixties decade (eg. Glasnevin and Coolock).



Aerial Image 1: The Referral Property and the Referrer's Dwelling, on Beech Park Avenue, Foxrock, Dublin 18.

The semi-detached dwellings which characterise this residential street exhibit a strong degree of commonality through their overall mass, height and number of floors, roof profile and shared building line. However, these houses are also closely coordinated in terms of their architectural design detailing, including the use of the same colour pebbledash on the first floor of the facade, the use of an identical red-brick at ground level and the separation of these external finishes by means of a concrete band which gives these buildings a horizontal emphasis which would not otherwise exist.

Unusually, in the context that these houses are of a type found in other suburban locations, a feature brick surround has been added to their ground level (principal) habitable window opening and this, in our view, distinguishes the dwellings along Beech Park Avenue from similar houses in other locations.



Photographs 1 & 2: Typical semi-detached houses on Beech Park Avenue, Foxrock, include a concrete band which separates the ground and first floors and a feature material around the main ground floor window.



Beech Park Avenue also accommodates a cluster of detached houses (to the west of the referral site), which were erected after the remaining dwellings on this road were completed and which differ from the referral property, in terms of their appearance and architecture. These later structures, which are shown in image 3 overleaf, are of no real relevance to this case, given their different design detailing.



Photograph 3: Housing at the end of this no-through-road, which dates from the nineteen-eighties, differs from the predominant house type on Beech Park Avenue.

3. The Subject Property

Based on Google Streetview imagery (2009), the referral building at 16 Beech Park Avenue was virtually identical to other houses along Beech Park Avenue prior to the subject works taking place and we ask the Board to accept that this is the case, based on photograph nos. 4 – 6 below and overleaf.



Photograph 4: The subject property is of a type which was strikingly similar to other housing in this immediate area, prior to being changed.



Photographs 5 & 6: The façade of 16 Beech Park Avenue, Foxrock, prior to being altered.



4. Grounds of Review

It is our opinion that the works which have been undertaken at 16 Beech Park Avenue Foxrock require planning permission and we base our opinion on two considerations comprising firstly, the fact that the size of the house has increased (without any corresponding provision in planning law by which such a result can be classed as exempted development) and secondly the fact that the alterations which have been carried out at this dwelling 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.

(i) Increase in Size of House

(a) Statutory Interpretation

It is our opinion that a building cannot be increased in size under s.4(1)(h) of the Planning and Development Act, 2000 (as amended) and we submit that this has been the traditional interpretation of this provision since 1964 (with s.4(1)(g) of the Local Government Planning and Development Act, 1963 being the predecessor of this clause). This orthodox view was temporarily suspended in the light of the High Court decision in *Michael Cronin (Readymix) Limited -v- An Bord Pleanála* which, although concerning an extension to a yard area, held, in relation to a domestic addition, as follows:

'Suppose the householder builds a modest extension to his house. If it is consistent with the neighbouring structures that will constitute exempted development, generally speaking. If he uses that as a kitchen or a garage or an extra bedroom that is consistent with the whole structure as extended. ...Applying this thinking to the present situation, it seems to me that the Inspector should have looked at the concreted area and asked the question whether the use of that area of land for storing or resting or drying blocks in connection with block making operations constituted a material change of use in all the circumstances. She did not do that. She addressed herself to the question whether the concreted surface itself amounted to a material change of use and that is where, in my view, she fell into error and did indeed conflate works and use...'

However, An Bord Pleanála appealed against this ruling to the Supreme Court, which held as follows:

'It is true that, in principle, an extension could be considered to be an improvement. However, that is a concept that requires further examination. Almost by definition, any proposed development will be an improvement from the point of view of the developer. In my view the trial judge fell into error in ascribing such significance to the word "for" in the phrase "works for the maintenance etc" as to make the purpose for which the works were carried out of paramount importance. In the context of the overall framework, policies and purposes of the Act, that is to ascribe a weight which I do not believe the word can bear. I do not consider that it was the intention of the legislature to make the necessity to apply for planning permission dependent on the motive and purpose of the developer. It seems to me that an "improvement", for the purposes of an exemption, must be something that relates to the internal use and function of the structure, resulting in either no externally noticeable difference or an insignificant difference. In my view the interpretation placed on s.4(1)(h) of the Act by the High Court was incorrect. I accept the arguments of the Board as to its true meaning, and consider that an extension is a development that does not come within the exemption...'

(b) Measurement Methodology

The manner in which the size of a building must be measured is set out in art. 3(1) of the Planning and Development Regulations, 2001 (as amended), which defines 'gross floor space' as follows:

'means the area ascertained by the internal measurement of the floor space on each floor of a building (including internal walls and partitions), disregarding any floor space provided for the parking of vehicles by persons occupying or using the building or buildings where such floor space is incidental to the primary purpose of the building'



Photograph 7: The front projection to the façade of the referral house.

(c) Increase in Size of Building

Prior to the subject works being undertaken, the size of 16 Beech Park Avenue was gauged by measuring the space between the inner face of its outer walls and by including the area occupied by its internal walls. We do not know the actual floorspace of this house, in its original and unaltered form, but for the purpose of this present assessment, the actual figure per se is wholly unimportant.

Any measurement exercise which is undertaken after these works were carried out would differ from the above calculation to the degree that the material which has been affixed to the outer wall of the referral building has since become the key reference point, so that the size of the dwelling is now based on the inner leaf, not of the original wall, but of the new cladding. The area occupied by the original outer wall would then comprise an internal wall and would be included as 'gross floor space'.

The Supreme Court judgment in *Michael Cronin (Readymix) Limited -v- An Bord Pleanála* did not overrule the High Court decision on the basis of size or quantity, but on the basis of overall principle.

As illustrated in photograph no. 7 opposite, the works which have already been undertaken at no. 16 Beech Park Avenue Foxrock comprise the addition of an outer feature, which is located in the façade of this building and which has been affixed to the original external wall of this house (although we are unaware as to the degree to which this front wall was, in itself, altered, as part of this construction activity).

As a result of this work having been undertaken, the external wall in the façade of 16 Beech Park House now projects further forward, relative to the building line exhibited by the referrer's dwelling, at no. [REDACTED]. None of the provisions in the Planning and Development Regulations, 2001 (as amended) which confer exempted development rights on householders apply to cases of this nature and the sole remaining issue comprises whether this alteration reasonably falls within section 4(1)(h) of the Planning and Development Act, 2000 (as amended).

It is our opinion that this statutory provision covers works to existing structures, or features located thereon, but does not extend to include works which result in any increase in the size / floorspace or the three-dimensional volume of such original buildings, a matter to which we now turn.

The effect of this decision has been to revert to the previous approach to s.4(1)(h) of the Act of 2000 viz. that this provision only enables works which do not entail a change in the size of the structure in question. Indeed, should An Bord Pleanála conclude differently in the current case, such an approach would raise profound questions as to whether the Supreme Court determination is not to be shunned.

(ii) External Appearance

(a) Introduction

It is our opinion that the works which have been undertaken at 16 Beech Park Avenue materially affect the external appearance of this structure and have the effect of rendering its appearance inconsistent with the character of the structure or of neighbouring structures. The subject alterations are wholly inconsistent with the pattern of built development on Beech Park Avenue, as a matter of generality and disrupt the design relationship between the referral house and the referrer's dwelling, to which it is attached. We take this opportunity to discuss these issues under the following select subheadings.



Photograph 8: The alterations to the referral property are immediately apparent from the street (compare with its previous appearance in image no. 4 above).

(b) Design Changes

It is a clear and incontrovertible fact that the alterations which have been undertaken at no. 16 Beech Park Avenue result in a different form of façade being presented to the streetscene, relative to other housing in this area and that such changes result in the omission of certain architectural features which are characteristic of this immediate locale. This viewpoint accords with the Council's assessment:

'Beech Park Avenue is typically characterised by double storey semi-detached dwellings of similar architectural style. The palette of materials and finishes of dwellings to the south and east of the site are generally consistent and comprise a combination of dash render and brick for the principal facades...'

The first question to be applied, in line with planning law, comprises whether these works materially affect the external appearance of this house and it is our opinion that the cladding which has been added to its façade and the removal of other features on this original external wall change the appearance of this building to a significant degree. Indeed, whilst the Report of the Planning Officer notes that the detached houses which are shown in photograph 3 above differ from the remaining dwellings in this street (*'there are a number of dwellings to the west and south-west... which display a variety of finishes'*), the referral property is not located within this enclave of slightly newer houses and we consider that the County Council may thus have asked itself the wrong question in this case.

Indeed, aside from the fact that the pebble-dash which has been added to the subject property is clearly off-white in colour and fairly uniform in texture, the pebble-dash on the remainder of housing in this area is notably darker and provides a grey-brown appearance. Moreover, the cladding to the subject structure extends the full height of the house, unlike other dwellings nearby and in doing so, obscures other features and finishes which are characteristic of built development locally (eg. the use of red-brick at ground level and provision of a concrete band which separates the ground and first floors).



Photograph 9: The façade of the referral property differs materially from its neighbours

These design changes, which are material in our opinion, affect the relationship between the referral dwelling and the referrer's home to a significant degree, based on the reasoning set out hereunder.

(c) Character of Neighbouring Structures

It is our opinion that the referral house, as altered is out of character with the Beech Park Avenue streetscene as a matter of generality, but we equally opine that this inconsistency is especially apparent in relation to the dwelling to which it is attached, viz. the referrer's home, for reasons of proximity.



Photographs 10 & 11: The façade of the referral property as it exists at present (above, left) differs notably from its appearance before any works begun.



(iii) Precedent Effect

The prevailing architectural treatment of housing on Beech Park Avenue Foxrock is of a type which is relatively commonplace in those suburban areas which developed in the nineteen-sixties decade, including Rathfarnham, Glasnevin, Malahide and Coolock. Any Board decision to the effect that the works which have been undertaken on the referral property in this case comprise exempted development will plainly be of universal application on similar houses elsewhere within the country.



Photograph 12 & 13:

Housing at St. Brendan's Drive Coolock (above) and at Glengohar Avenue Rathfarnham exhibits a similar style to dwellings along Beech Park Avenue, Foxrock. The Board's decision in this instance would clearly serve as a precedent case in many other suburban estates of this type, age and character throughout the country.



5. **Concluding Comment**

Planning law plainly allows householders to undertake internal works to their homes, even where statutorily protected and in Planning and Development Law 2nd Edition, Garrett Simons SC, citing *Cairnduff-v-O'Connell*, advises that *'The character of a structure relates to its shape, colour, design, ornamental features and layout and not to its particular use'*. We are of the opinion that the alterations which have been undertaken at 16 Beech Park Avenue are inconsistent with its character and with its relationship with the dwelling to which it is attached, viz. [REDACTED] and we respectfully ask the Board to determine that such alterations do not constitute exempted development.

Yours faithfully



Farry Town Planning Ltd.

Acting for the Referee

John Shaw,
MHP Solicitors
9/11, Bindon Street
Ennis
Co. Clare



Planning Department
Rannóg Pleanála
Registry Section
Ciarán Carolan
Asst. Staff Officer
Direct Tel: 01 2054863

Reference No: Ref12320
Application Type: Declaration on Development and Exempted Development Act
– Section 5, Planning & Development Act (as amended)
Registration Date: 16-Dec-2020
Decision Date: 15-Jan-2021
Location: 17 Beech Park Avenue, Foxrock, Dublin 18, D18 K2F9
Development Works: Cladding applied to the front of the house
materially altering the appearance and leaving it jutting out of the adjoining
semi-detached premises.

NOTIFICATION OF DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

In pursuance of its functions under the Planning & Development Act, 2000 (as amended), Dún Laoghaire-Rathdown County Council has, by Order No. REF04/21 Dated 15-Jan-2021 decided to issue a Declaration pursuant to Section 5 of the Planning & Development Act 2000 (as amended), to, John Shaw, MHP Solicitors 9/11, Bindon Street, Ennis, Co. Clare that:

Having regard to Section 4(1)(h) of the Planning and Development Act 2000 (as amended), it is considered that the following development works at No. 16 Beech Park Avenue, Foxrock, Dublin 18 constitutes exempted development:

- The application of cladding/insulation to the exterior of an existing dwelling.

Dated: 15-Jan-2021

Signed: Ciarán Carolan
For Senior Executive Officer.

NOTE: Where a Declaration is issued under Section 5, any Person issued with such a Declaration, may, on payment to An Bord Pleanála, 64, Marlborough Street, Dublin 1, of a fee of €220, refer the Declaration for review, **within 4 weeks** of the date of issue of the Declaration.

Dun Laoghaire Rathdown County Council
Planning Department
Marine Road
Dun Laoghaire
Co. Dublin
A96 K6C9

Our Reference
JS/MM/S172/28

Your Reference

Date
December 2020

Re: Declaration pursuant to Section 5 of the Planning Development Act 2000 as amended

Our client: Mr. Thomas [REDACTED]

Dear Sirs

We act on behalf the above named client, who is the owner of [REDACTED]
Co. Dublin.

Our client's house is one of several in a development which we understand was constructed in or around 1964. The house is semi-detached and we enclose photographs showing the house and works which have already commenced on the adjoining property. The work on the adjacent house consists of the addition of cladding and a finish which will significantly alter the appearance of the front of the house.

We understand from our client that the main purpose of the cladding is to better insulate the house. However, it appears that the proposed development is not exempted development and on examination of the Planning & Development Regulations 2001-2020, we can find no provision which would exempt this development. As the development and the intended finish would materially alter the appearance of the property to an extent that is inconsistent with our client's premises and all of the neighbouring premises, our client objects to the said works.

Our client seeks a declaration pursuant to S50 of the Planning and Development Act 2000, from Rathdown Dun Laoghaire County Council, as the competent Planning Authority, as to whether this development is exempted development or not .

We enclose herewith our cheque in the sum of €80 in discharge of the appropriate fee. We note that your department normally requires a location map, etc. However, the location of the development is readily identifiable and the photographs attached show the nature of the

development clearly. We therefore trust that you will have sufficient information to determine whether the development is exempted or not.

Should you require any further information, please do not hesitate to contact us.

Yours faithfully

Michael Houlihan and Partners

DRAFT