

Aisling Reilly

AsL

From: Bord
Sent: Friday 21 May 2021 15:46
To: Appeals2
Subject: FW: Response to Referral
Attachments: FINAL Second Response to Referral 20.05.21 CB.pdf; 16 Hollybrook Park, Clontarf, Dublin 3_Reference Number Change_ABP_050521.pdf; 16 Hollybrook Park, Clontarf, Dublin 3_Notification of Opportunity to make an Appeal_ABP_110521(1).pdf; Appendix A.pdf; Appendix B - Frances Campbell Statutory Declaration.pdf; Appendix B - Affidavit Robin Campbell 16 Hollybrook Park.pdf

From: Christopher Browne <christopher.browne@hpdc.ie>
Sent: Friday 21 May 2021 15:34
To: Bord <bord@pleanala.ie>
Subject: Response to Referral

Good afternoon,

I would like to submit the following response to a referral under ABP Ref 309873-21. Please see attached items for further details.

Kind regards,

Christopher Browne
Consultant Town Planner

Hughes Planning & Development Consultants
No. 70 Pearse Street
Dublin 2

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

20th May 2021

Re: Response to Referral of an Application for a Declaration under Section 5 of the Planning and Development Act 2000 (as amended) regarding the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to Dublin City Council/ Dublin Regional Homeless Executive to accommodate homeless people at No. 16 Hollybrook Park, Clontarf, Dublin 3

Reference No.: EXPP 0049/21
ABP. Reference No.: 309873-21

Dear Sir or Madam,

We, Hughes Planning and Development Consultants, 70 Pearse Street, Dublin 2, have been instructed by our client, Copperwhistle Ltd., Castleshane, Clontibret, Co. Monaghan, to prepare this response to a referral of an application for a declaration made to Dublin City Council (Reg. Ref. 0049/21) under section 5 of the Planning and Development Act 2000 (as amended) in respect of the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to Dublin City Council/ Dublin Regional Homeless Executive to accommodate homeless people at No. 16 Hollybrook Park, Clontarf, Dublin 3.

1.0 Response to Referral

There are currently two section 5 declarations being sought at No. 16 Hollybrook Park; one by the Applicant for the referral, and one by the his office on behalf of our client (Reg. Ref. 0025/21). The Planning Authority sought further information on Reg. Ref. 0025/21, which has been submitted, and as a result, the Applicants of Reg. Ref. 0049/21 have decided to refer their section 5 declaration to the Board as Dublin City Council determined that a decision could not be reached without seeking further information regarding the use of the property as a guest house. The Applicant notes that while the further information period does not subscribe to any statutory deadlines, the period for referring section 5 declarations does have a statutory deadline, hence the referral.

However, upon review of their cover letter, it would appear that the Applicants are asking the Board to determine a different question to the one submitted. Page 2 of the cover letter states that *the primary substantive issue is whether the present use is as a guest house or use as a residential building*. This is completely different to the question which is being referred which read as follows:

“Whether the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to Dublin City Council/ Dublin Regional Homeless Executive to accommodate homeless people, is or is not development and whether development constitutes exempted development or does not constitute exempted development?”

As noted, the Planning Authority has requested information proving that the property was used as a guesthouse in the period after planning permission was granted under Reg. Ref. 1586/96, as amended by Reg. Ref. 2161/96. As part the further information response, statutory declarations have been acquired from a previous owner and their family member stating that the property was indeed used as guesthouse. Please refer to our further information response and statutory declarations in Appendix A and B.

The Applicants alleged that the guesthouse use ceased in 2007 and provide evidence in the form of correspondence from the AA and valuation records. To respond to the allegation that the guesthouse use ceased in 2007, it is noted that the building's current and authorised use, pursuant to permission granted under Reg. Ref. 1586/96, as amended by Reg. Ref. 2161/96, is that of a guesthouse. The building's use in the future will remain that of a guesthouse and therefore no change of use will occur. The claim that the approved use as a guesthouse ceased in 2007 is not valid. The subject matter of the Applicant's Section 5 Application does not consist of the resumption of a use that has been abandoned. The Supreme Court defined the concept of "abandonment of use" in the decision of *Kildare County Council v. Goode* [1999] 2 I.R. 495, where Barron J. held (at p.506) that:

"Abandonment is the objective sign of a decision not continue further with the development."

The High Court in the case of *Dublin County Council v. Tallaght Block Company* [1982] 1 I.L.R.M. 1 set out the following test, which it adopted, for whether the established use of land had been abandoned:

"Where a previous use of land had been not merely suspended for a temporary and determined period but had ceased for a considerable time with no evinced intention of resuming it at any particular time, the Tribunal of fact was entitled to find that the previous use had been abandoned, so that when it was resumed the resumption constituted a material change of use."

Again, in the case of *Lord Mayor of Dublin v. Lowe* [2000] IEHC 161, the High Court recognised that a definitive decision to cease a use indefinitely was required in order for an established use to be abandoned. Morris J. held that:

"The removal of the original hoarding by David Allen Holdings Limited without the intention of replacing it must be regarded as an abandonment of any rights which they may have acquired up to that time." (Emphasis added)

Of absolute key importance, however, is the fact that the law distinguishes between a use which is unauthorised or which pre-existed the modern planning legislation introduced in 1963, and a use which has been specifically the subject of a grant of planning permission. The High Court in *Mason and McCarthy v. KTK Sand and Gravel Ltd.* [2004] IEHC 183 definitively held that a use has been expressly granted by planning permission cannot be abandoned:

"I accept the Respondent's submission that a planning permission enures for the benefit of the land - such proposition was not disputed by the Applicants, but this means no more or no less than that the planning permission, with all its terms and conditions advantages and disadvantages and limitations, is available to the land and is not personal grant, and unlike a pre-1963 Act user cannot be abandoned. It, in a colloquial sense, becomes "part of the title" hence the necessity of its objective construction." (Emphasis added)

That principle was repeated and applied in the same manner by Gilligan J. in the case of *Molloy v. Minister for Justice* [2004] 2 I.R. 493. The court clearly held that:

*"It accordingly appears to follow that where a use of land is permitted under a valid planning permission, the use of the land cannot be abandoned as the permission enures for the benefit of the land and can presumably only be extinguished if abandoned as per Lord Scarman's exceptions in *Pioneer Aggregates (U.K.) Ltd. v. Secretary of State for the Environment* [1985] 1 A.C. 132, where applicable. A use permitted under a planning permission is more securely protected under the law and this will be reflected in the planning register."* (Emphasis added)

This proposition is obviously inherently logical when one considers that planning permission exists to provide an objectively verifiable legal record for what is and is not permitted, in terms of buildings, works, and use, on land. If a brief hiatus in activity on land could essentially obviate a provision of planning permission, the status of that legal record as an accurate, definitive, reflection of what is permitted on a parcel of land would be fatally undermined.

It is submitted, therefore, that based on the decisions of the High Court in *Mason and McCarthy v. KTK Sand and Gravel Ltd.* and *Molloy v. Minister for Justice* that it would be legally impossible for the

Applicant to have abandoned the use of 16 Hollybrook Park as a guesthouse, as this use is the subject of a grant of planning permission bearing Reg. Ref. 1586/96. This is the case notwithstanding the fact that the premises were not used as a guesthouse between the sale of the property in 2004 until today.

Even were it not the case that the abandonment of a use granted by planning permission were legally impossible, it is clear from the Applicant's action in respect of the property that there was never any objective sign of a decision to not continue further with the use of the property as a guesthouse, such as would be required to establish abandonment of use. The property was physically maintained as a guesthouse, no works or alterations ever took place which were inconsistent with that use, or that would have evidenced an intention to cease that use. There was never any planning application for an alternative use, nor any other sign that the Applicant did not intend to recommence the commercial operation of the property as a guesthouse in due course. Please refer to Appendix C which contains a series of photographs taken inside the property showing a layout and design that is consistent with a guesthouse including the use of similar furniture, carpeting, numbering on bedroom doors, provision of en suite bathrooms, a guest payphone and a sign issued by the AA accrediting the guesthouse as a 4-star facility.

The Applicants have submitted evidence that the guesthouse use has ceased at the property in the form of correspondence with The AA and Rateable Valuations. It is not contested that the property did not operate as a guesthouse temporarily. However, when the property was put on the market, it was sold as a guesthouse and our client purchased the property as a guesthouse.

In an email from Declan Connors, The AA, he confirms that Hollybrook was accredited by The AA at some stage in the past but could not confirm the dates as the system does not record properties that are no longer participating in the accreditation scheme in the last 10 years. He also notes that the AA plaque displayed at the entrance to the house was discontinued in 2007 and a new design was introduced. Neither of these facts confirms that the guesthouse use has ceased at the property. As confirmed above the approved use has not been abandoned and the use of outdated plaques can be seen at guesthouses and hotels across the city. Furthermore, we note that membership of The AA is not mandatory, with the organisation only accrediting only 27 premises out of the thousands operating in Dublin.

In correspondence from Frank O'Connor, Rate Valuations, Mr O'Connor notes that the property does not have a rateable valuation and further notes that there is no link between the rate process and planning, stating:

A business can be operating without planning permission and still be rated and paying rates. Or a business can be operating with planning permission and not be rated and not paying rates, due to escaping assessment mainly because of errors.

It is submitted that the evidence submitted by the Applicants does not confirm nor deny that the guesthouse use has continued at the property.

2.0 Basis of Exemption

As noted, the Applicant appears to be asking a new question which was not included in the application for a declaration under section 5 of the Planning Act 2000 (as amended). That question included in Reg. Ref. 0049/21 and to which the referral relates reads as follows:

"Whether the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to Dublin City Council/ Dublin Regional Homeless Executive to accommodate homeless people, is or is not development and whether development constitutes exempted development or does not constitute exempted development?"

Under Section 2(1) of the Planning and Development Act 2000 (as amended), 'development' is assigned the meaning set out under Section 3 (1) as follows:-

"In this Act, 'development' means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or other land."

This declaration seeks clarification on the use of No. 16 Hollybrook Park as a guest house. It is noted that legislation does not define the phrase 'material change of use' as used in Section 2(1) of the Act. In order to determine the materiality of the change, the practical impacts and effects of the proposed change of use and whether it would have led to materially different planning considerations by the Planning Authority are considered in this determination.

This is supported by findings in recent court cases which examined the practical and real-life effects caused by the change of use. In *Esat Digifone v South Dublin County Council* [2002] 3 IR 585, the court quoted the following:

"The consideration to be taken into account in determining materiality must at least be relevant to "proper planning and development and the preservation of amenities" which are the twin objectives of the preamble to the legislation. The question is whether there were sufficient planning considerations raised by the change in activity to justify its submission to development control."

In a similar vein the court quoted Barron J. in *Galway County Council v. Lackagh Rock* [1985] I.R. 120 at 127:

"To test whether or not the uses are materially different, it seems to me, that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use."

A further decision in support of that view is that of Budd J. in *Westmeath County Council v. Quirke & Sons* [Unreported, High Court, 23rd May 1996] where the court noted that:

"Many alterations in the activities carried out on the land constitute a change of use, however, not all alterations will be material. Whether such changes amount to a material change in use is a question of fact as is explained in Monaghan County Council v Brogan [1987] IR 339. Consideration of the materiality of a change in use means assessing not only the use itself but also its effects."

No. 16 Hollybrook Park is approved to operate as a guest house as per Reg. Ref. 1586/96. It is proposed to continue the established use as a guest house whilst providing temporary accommodation to the DRHE. It is submitted that there will be no discernible change to the use of the building other than the socio-economic class associated with the inhabitants occupying those rooms which should not be taken into consideration when having regard to whether a material change of use has occurred as evidenced by the Supreme Court *Dublin Corporation v Moore* [1984] ILRM 339 in which the judge stated:

"I can well understand the objection voiced by Mr. Heneghan in his affidavit, to which I have referred - the residents of a quiet suburb naturally resent the presence of what may well be out of keeping with what they conceive to be the standards appropriate to the neighbourhood. There cannot, however, be one law for Cabra and another for Clondalkin - yet others for Finglas and Foxrock. Considerations of this kind are not appropriate to planning law - if they were, they might well offend against rights of equality."

It is considered that if this were a planning application for a guest house, the planning authority would not include conditions prohibiting accommodation to people of particular socioeconomic background. Nor would they preclude the guest house from accepting block bookings of rooms. It is, therefore, submitted that the guest house will operate like any other guest house in the city and offer rooms to members of the public for a rate. The rooms will be advertised on the guest house's website where bookings can be made by members of the public. As with any guest house or hotel, a block booking can be made by an individual or group for a specific event or occasion.

The following conditions were attached to the grant of permission for the guest house under Reg. Ref. 1586/96:

Insofar as the Local Government (Planning & Development) Acts 1963/93 and the Regulations made thereunder are concerned the development shall be carried out in accordance with the plans, particulars and specifications lodged with the application, save as may be required by the conditions attached hereto.

REASON: To comply with permission regulations.

This permission shall apply only to the use of the existing residence for overnight guest accommodation purposes and provision of additional parking facilities as indicated in the submitted plans.

REASON: In the interests of clarity and development control.

The proposed development shall be constructed and so operated that there will be no emission of odours, or noise such as would give rise to reasonable cause for complaint by occupants of adjoining or nearby properties.

REASON: In the interests of residential amenities.

No signs or nameplates shall be erected without the prior approval of the planning authority, whether or not such development would constitute exempted development.

REASON: In the interests of visual amenities.

The existing entrance shall be widened to a width not less than 4.0 metres and shall be relocated so as to align the entrance gates parallel to the centreline of the public road. Full details to be submitted and agreed in writing with the planning authority prior to the commencement of development.

REASON: In the interests of traffic safety.

Before this development commences a financial contribution in the sum of #6,135.00 shall be paid by the applicant to Dublin Corporation, in accordance with Section 26 of the Local Government (Planning & Development) Act 1963.

REASON: Investment by Dublin Corporation in Local Authority works has facilitated and will facilitate the proposed development. It is considered appropriate and reasonable that the developer should contribute to the cost of same.

It is noted that no conditions were included about the length of stay, class of guest nor the ability to block book rooms. Therefore, the continued use as a guest house, which leases rooms to the DRHE for the provision of homeless accommodation, complies with the conditions as set out above. It is submitted that no material change of use will have occurred and the development is therefore exempted development.

It is considered that the continued use as a guest house offering accommodation to the DRHE will have no material effects on the area with regards to the proper planning and sustainable development of the area. It is considered that the use of the building will not negatively impact the amenity of local residents in Hollybrook Park. It is therefore apparent that no material change of use will have occurred and that change of use is considered exempted development.

It should be noted that precedence for a guest house being used to accommodate homeless people exists at No. 14 Hollybrook Park, which adjoins the subject site. In this case, a warning letter was issued to the owners of the property regarding the use of the guest house to accommodate homeless people under Reg. Ref. E0931/10. In their investigation, the Planning Authority concluded that planning permission for a guest house had been granted on the 20th January 1997 under Reg. Ref. 1957/96 subject to a number of conditions including the reduction of bedrooms. It was noted by the Enforcement Inspector that the number of rooms was never reduced, but enforcement proceedings were statute-barred as 10 years had passed since the grant of permission was issued.

Regarding the use for the provision of homeless accommodation, the Inspector confirmed that the building and its use did not materially change and were, therefore, the enforcement file was closed.

The case at No. 14 Hollybrook Park is pertinent to No. 16 Hollybrook Park as the approved use of guest house will continue at the property, as it did at No 14 where no material change of use was found to have occurred.

3.0 Conclusion

This is a response to a referral of an application for a declaration made to Dublin City Council (Reg. Ref. 0049/21) under section 5 of the Planning and Development Act 2000 (as amended) in respect of the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to Dublin City Council/ Dublin Regional Homeless Executive to accommodate homeless people at No. 16 Hollybrook Park, Clontarf, Dublin 3.

First, we note that No. 16 Hollybrook Park was granted permission to operate as a guest house. It is proposed to continue the operation of the property as a guesthouse which will lease rooms to the DRHE. These rooms will be leased on a nightly basis and a full Bed and Breakfast service will be provided to occupants. Our client will maintain the management of the guest house whilst providing staff 24/7 for regular guest house duties. It is submitted that the principal use of the property has not changed and therefore will have no adverse effects on the proper planning and sustainable development of the area.

Furthermore, it is submitted that the use of guesthouse has not been abandoned. As previously noted, planning permission exists to provide an objectively verifiable legal record for what is and is not permitted, in terms of buildings, works, and use, on land. If a brief hiatus in activity on land could essentially obviate a provision of planning permission, the status of that legal record as an accurate, definitive, reflection of what is permitted on a parcel of land would be fatally undermined.

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

A copy of the response to the further information request under reg. Ref. 0025/21.

Appendix B

Copy of the statutory declaration by Frances Campbell and Robin Campbell, a previous owner and their relative, confirming that the property was used as a guesthouse.

Appendix C

A series of photographs taken inside the property showing a layout and design that is consistent with a guesthouse.



Figure 1.0 Photograph taken of the front of the property. Note the AA sign to the right of the entrance

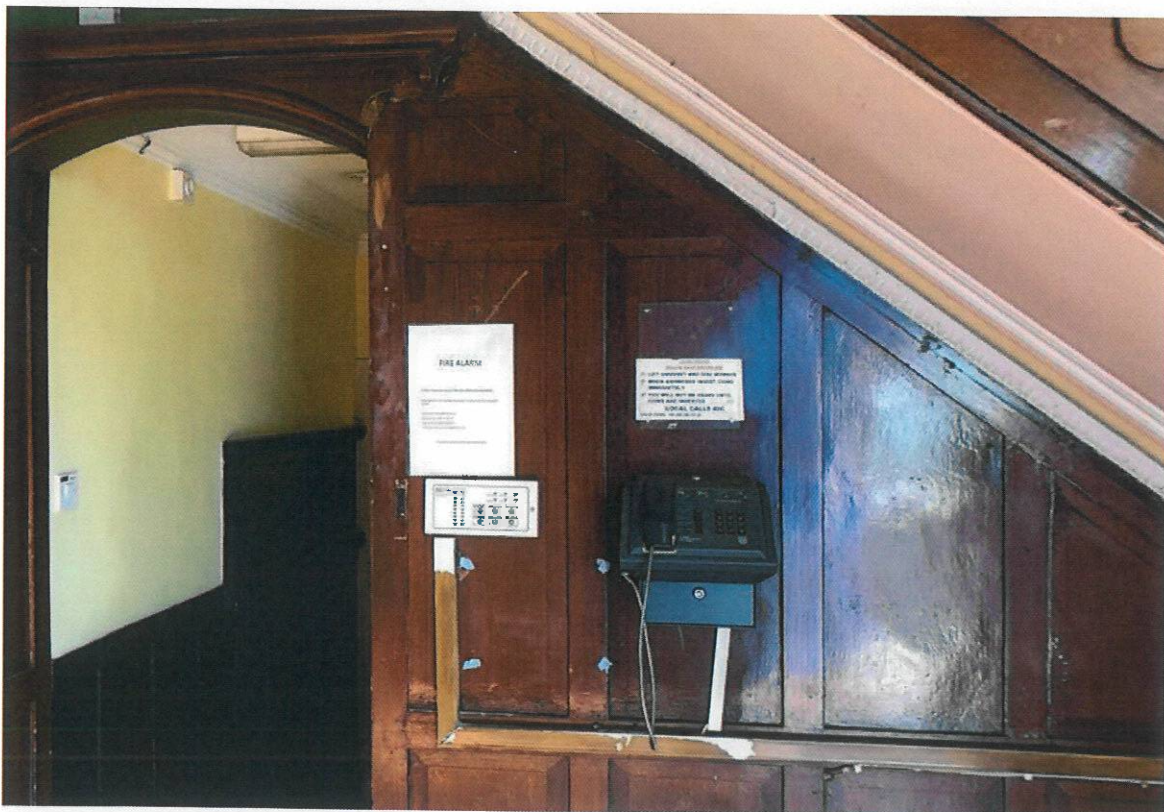


Figure 2.0 Coin operated phone in the lobby of the guesthouse would have been used by guests prior to the wide spread use of mobile phones



Figure 3.0 Photograph of a guest room with bathroom



Figure 4.0 Photograph of a guest room with bathroom



Figure 5.0 Photograph of a wardrobe and guest safe which is a standard feature in most guest accommodation



Figure 6.0 Photograph of a guest room door which is numbered



Figure 7.0 Photograph of a wardrobe and guest safe both of which are similar in design to those found in the other rooms

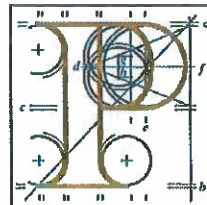


Figure 8.0 Photograph of guest bedroom with own bathroom

Our Case Number: ABP-309873-21

Planning Authority Reference Number: 0049/21

Our Reference: Copperwhistle Ltd



**An
Bord
Pleanála**

Hughes Planning & Development Consultants
70 Pearse Street
Dublin 2

Date: 11 May 2021

Re: Whether the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people, is or is not development or is or is not exempted development.
16 Hollybrook Park, Clontarf, Dublin 3.

Dear Sir / Madam,

I have been asked by An Bord Pleanála to refer further to our letters to you dated 7th April, 2021 and 5th May, 2021 regarding the above mentioned referral under the Planning and Development Act, 2000, (as amended).

In accordance with section 129 of the Planning and Development Act, 2000, (as amended), you may make submissions or observations in writing to the Board in relation to the referral which issued to you on the 7th April, 2021 within a period of 4 weeks beginning on the date of this letter.

Any submissions or observations received by the Board outside of that period shall not be considered and where none have been validly received, the Board may determine the referral without further notice to you.

Please quote the above referral number in any further correspondence.

Yours faithfully,

Stephen Sutton
Administrative Assistant
Direct Line: 01-8737165

BPRL05

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STATUTORY DECLARATION

I, Frances Campbell, wish to declare under the Statutory Declarations Act, 1938 and in the presence of Vanessa Campbell ACA (Solicitor/Commissioner of Oaths), that the information provided herein is correct and accurate as required in respect of history of No. 16 Hollybrook Park, Clontarf, Dublin 3.

- a. The declaration relates to the property known as No. 16 Hollybrook Park, Clontarf, Dublin 3 (hereinafter called "The Property"). The property is owned by Copperwhistle Limited.
- b. I say that I owned the property from 1998 until 2004 when it was sold to Mr Gerry Gannon. From 1998 until 2004 I operated the property as a commercial guesthouse, trading as "Copperbeach Court Guest House", through City Accommodation Bureau (a company owned by me). The property was registered with Bord Fáilte during this time.
- c. From approximately the year 2000 until the sale of the property in 2004, Dublin City Council leased rooms in Copperbeach Court Guest House on a nightly basis to provide accommodation for homeless persons in the city. The property also continued to operate as a commercial guesthouse during this time.

SIGNATURE

Frances Campbell
Frances Campbell

In the presence of Vanessa Campbell ACA

(Solicitor/Commissioner of Oaths)

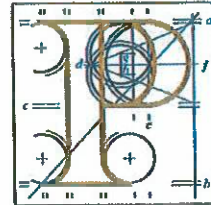
On date:

12/4/21

Our Case Number: ABP-309873-21

Planning Authority Reference Number: 0049/21

Your Reference: Copperwhistle Ltd



**An
Bord
Pleanála**

Hughes Planning & Development Consultants
70 Pearse Street
Dublin 2

Date: 05 May 2021

Re: Whether the use of the property as a guest house which provides rooms on a nightly basis offering Bed and Breakfast to Dublin City Council/Dublin Regional Homeless Executive to accommodate homeless people, is or is not development or is or is not exempted development.
16 Hollybrook Park, Clontarf, Dublin 3.

Dear Sir / Madam,

I have been asked by An Bord Pleanála to refer further to our letter to you dated 7th April, 2021 regarding the above mentioned referral under the Planning and Development Act, 2000, (as amended).

Please be advised that the Planning Authority Reference Number is **0049/21** and not 0025/21 as was previously stated.

Processing of the case is continuing.

Yours faithfully,


Stephen Sutton
Administrative Assistant
Direct Line: 01-8737165

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Senior Executive Officer,
Planning and Development,
Dublin City Council,
Civic Office,
Wood Quay,
Dublin 8.

19th April 2021

Re: Section 5 Application 0025/21 – 16 Hollybrook Park, Clontarf, Dublin 3

Dear Sir or Madam,

We refer to the above reference to Dublin City Council pursuant to section 5 of the Planning and Development Act, 2000, as amended, submitted by this office on behalf of Copperwhistle Ltd. in respect of the property situate at 16 Hollybrook Park, Clontarf, Dublin 3, on 25 January 2021. Specifically, we refer to the Request for Additional Information in respect of that application, dated 23 February 2021, where Dublin City Council sought the following information:

“In relation to the existing and proposed/continued use of the building as per Class 6, Part 4, Schedule 2 of the Planning & Development Regulations 2001 (as amended) the applicant is requested to provide evidence that the currently vacant building at No.16 Hollybrook Park was previously used as a guesthouse as per permission granted under Reg. Ref. 1586/96 as amended by Reg. Ref. 2161/96, and if so when was it was last used as a guesthouse prior to its current vacancy.”

Please be advised that the property was purchased by Ms Frances Campbell in 1998 before being sold in 2004 to Mr. Gerry Gannon. From 1998 until 2004 the property was operated as a commercial guesthouse, trading as “Copperbeach Court Guest House”, through City Accommodation Bureau (a company owned by Frances Campbell). The property was registered with Bord Fáilte during this time. An affidavit from Ms Frances Campbell and Mr Robin Campbell, a relative of Ms Campbell, accompanies this response and confirms that the property served as a guesthouse. Please see Appendices A and B for further details.

We note from the Report of Diarmuid Murphy, Senior Executive Planner, dated 19 February 2021, that additional information has been sought by Dublin City Council in the context of the question of whether the limitation to change of use pursuant to Article 10(1)(d) of the Planning Regulations has any application to the within Section 5 application. Article 10(1)(d) of the Planning Regulations provides as follows:

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

(d) be a development where the existing use is an unauthorised use, save where such a change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.”

As noted by Mr. Murphy in his Report, it is the Applicant’s position that the provisions of Article 10(1) do not apply in this instance as there is no proposed change of use, and therefore no development. The building’s current and authorised use, pursuant to permission granted under Reg. Ref. 1586/96, as amended by Reg. Ref. 2161/96, is that of a guesthouse. The building’s use in the future will remain that of a guesthouse and therefore no change of use will occur.

The subject matter of the Applicant’s Section 5 Application does not consist of the resumption of a use that has been abandoned. The Supreme Court defined the concept of “abandonment of use” in the decision of *Kildare County Council v. Goode* [1999] 2 I.R. 495, where Barron J. held (at p.506) that:

Abandonment is the objective sign of a decision not continue further with the development."

The High Court in the case of *Dublin County Council v. Tallaght Block Company* [1982] 1 I.L.R.M. 1 set out the following test, which it adopted, for whether the established use of land had been abandoned:

"Where a previous use of land had been not merely suspended for a temporary and determined period but had ceased for a considerable time with no evinced intention of resuming it at any particular time, the Tribunal of fact was entitled to find that the previous use had been abandoned, so that when it was resumed the resumption constituted a material change of use."

Again, in the case of *Lord Mayor of Dublin v. Lowe* [2000] IEHC 161, the High Court recognised that a definitive decision to cease a use indefinitely was required in order for an established use to be abandoned. Morris J. held that:

"The removal of the original hoarding by David Allen Holdings Limited without the intention of replacing it must be regarded as an abandonment of any rights which they may have acquired up to that time." (Emphasis added)

Of absolute key importance, however, is the fact that the law distinguishes between a use which is unauthorised or which pre-existed the modern planning legislation introduced in 1963, and a use which has been specifically the subject of a grant of planning permission. The High Court in *Mason and McCarthy v. KTK Sand and Gravel Ltd.* [2004] IEHC 183 definitively held that a use has been expressly granted by planning permission cannot be abandoned:

"I accept the Respondent's submission that a planning permission enures for the benefit of the land - such proposition was not disputed by the Applicants, but this means no more or no less than that the planning permission, with all its terms and conditions advantages and disadvantages and limitations, is available to the land and is not personal grant, and unlike a pre-1963 Act user cannot be abandoned. It, in a colloquial sense, becomes "part of the title" hence the necessity of its objective construction." (Emphasis added)

That principle was repeated and applied in the same manner by Gilligan J. in the case of *Molloy v. Minister for Justice* [2004] 2 I.R. 493. The court clearly held that:

*"It accordingly appears to follow that where a use of land is permitted under a valid planning permission, the use of the land cannot be abandoned as the permission enures for the benefit of the land and can presumably only be extinguished if abandoned as per Lord Scarman's exceptions in *Pioneer Aggregates (U.K.) Ltd. v. Secretary of State for the Environment* [1985] 1 A.C. 132, where applicable. A use permitted under a planning permission is more securely protected under the law and this will be reflected in the planning register."* (Emphasis added)

This proposition is obviously inherently logical when one considers that planning permission exists to provide an objectively verifiable legal record for what is and is not permitted, in terms of buildings, works, and use, on land. If a brief hiatus in activity on land could essentially obviate a provision of planning permission, the status of that legal record as an accurate, definitive, reflection of what is permitted on a parcel of land would be fatally undermined.

It is submitted, therefore, that based on the decisions of the High Court in *Mason and McCarthy v. KTK Sand and Gravel Ltd.* and *Molloy v. Minister for Justice* that it would be legally impossible for the Applicant to have abandoned the use of 16 Hollybrook Park as a guesthouse, as this use is the subject of a grant of planning permission bearing Reg. Ref. 1586/96. This is the case notwithstanding the fact that the premises were not used as a guesthouse between the sale of the property in 2004 until today.

Even were it not the case that the abandonment of a use granted by planning permission were legally impossible, it is clear from the Applicant's action in respect of the property that there was never any objective sign of a decision to not continue further with the use of the property as a guesthouse, such as would be required to establish abandonment of use. The property was physically maintained as a guesthouse, no works or alterations ever took place which were inconsistent with that use, or that would have evidenced an intention to cease that use. There was never any planning application for an alternative use, nor any other

sign that the Applicant did not intend to recommence the commercial operation of the property as a guesthouse in due course. Please refer to Appendix C which contains a series of photographs taken inside the property showing a layout and design that is consistent with a guesthouse including the use of similar furniture, numbering on bedroom doors, provision of en suite bathrooms, a guest pay phone and a sign issued by the AA identifying the guesthouse as a 4 star facility.

The Applicant submits that based on the information set out in this response that 16 Hollybrook Park operated as a guesthouse in line with planning permission granted under Reg. Ref. 1586/96 and that it is legally impossible for this duly authorised use to be abandoned for the purposes of Article 10(1)(d) of the Planning Regulations.

Yours Sincerely,



Kevin Hughes MIPI MRTPI
Director For HPDC

Appendix A

Copy of the statutory declaration by Frances Campbell, a previous owner of the property, confirming that the property was used as a guesthouse.

App **ix B**

Copy of the statutory declaration by Robin Campbell, a close relative of a previous owner of the property, confirming that the property was used as a guesthouse.

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Appendix C

A series of photographs taken inside the property showing a layout and design that is consistent with a guesthouse.



Figure 1.0 Photograph taken of the front of the property. Note the AA sign to the right of the entrance



Figure 2.0 Coin operated phone in the lobby of the guesthouse would have been used by guests prior to the wide spread use of mobile phones



Figure 3.0 Photograph of a guest room with bathroom



Figure 4.0 Photograph of a guest room with bathroom

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Figure 5.0 Photograph of a wardrobe and guest safe which is a standard feature in most guest accommodation



Figure 7.0 Photograph of a wardrobe and guest safe both of which are similar in design to those found in the other rooms



Figure 8.0 Photograph of guest bedroom with own bathroom

STATUTORY DECLARATION

I, Robin Campbell, wish to declare under the Statutory Declarations Act, 1938 and in the presence of PAUL MOLLOY (Solicitor/Commissioner of Oaths), that the information provided herein is correct and accurate as required in respect of history of No. 16 Hollybrook Park, Clontarf, Dublin 3.

- a. The declaration relates to the property known as No. 16 Hollybrook Park, Clontarf, Dublin 3 (hereinafter called "The Property"). The property is owned by Copperwhistle Limited.
- b. I say that my family owned the property from 1998 until 2004 when it was sold to Mr Gerry Gannon. From 1998 until 2004 we operated the property as a commercial guesthouse, trading as "Copperbeach Court Guest House", through City Accommodation Bureau (a company owned by my family). The property was registered with Bord Fáilte during this time.
- c. From approximately the year 2000 until the sale of the property in 2004, Dublin City Council leased rooms in Copperbeach Court Guest House on a nightly basis to provide accommodation for homeless persons in the city. The property also continued to operate as a commercial guesthouse during this time.

SIGNATURE

Robin Campbell

Robin Campbell

In the presence of

Paul Molloy

(Solicitor/Commissioner of Oaths)

On date:

13 April 2021

Molloy & Evans Solicitors
Chamber Buildings, North Street
Swords, County Dublin, K67 A3H7
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