AN BORD PLEANÁLA
30 APR 2021
LTR DATED _____ FROM _____
LDG- _____
ABP- _____

Date: 28/04/2021

The Secretary,

An Bord Pleanála,

64 Marlborough Street,

Dublin 1, D01 V9

RE: Observations on Planning Referrals and Appeals to An Bord Pleanala.

RE: Bord Pleanala Case reference: **RL61.309893**

SITE LOCATION: The Dean Hotel, No 80 Prospect Hill, No 82,84 & 86 Bohermore Galway City.

Galway City Council Ref. No. (P/DC/3/3/21)

LOCAL AUTHORITY: Galway City Council

Description Whether the relocation of ESB Substation is or is not development or is or is not exempted development.

Case type Referral

REFERRER: Advanced Vision Limited (1st party Referrer)
Date Referral Lodged: **07/04/2021**

Current Planning Permission on Site: 17/41

AN BORD PLEANÁLA
LDG- LDG-039185-21
ABP- _____
30 APR 2021
Fee: €50.00 Type: cheque
Time: _____ By: post

Dear Sir/Madam,

It is noted that Advanced Vision Limited have made a Referral to An Bord Pleanala (ref. No. RL.61309893) to overturn a decision of Galway City Council (Ref. No, P/DC/3/3/21) in which the Local Authority decided that the 'Relocation of A ESB Substation is Development and is not Exempted Development at The Dean Hotel, No, 80 Prospect Hill, No. 82, 84 & 86 Bohermore Galway City.

Forster Court (Phase 1) is located immediately to the East of this Development and in this regard the following residents wish to make Observations on this above-mentioned Referral to An Bord Pleanala.

With regards to this Observation to An Bord Pleanala please forward all Correspondence to **Francis O Brien 10 Forster Court Galway** who is acting as Agent for **the Observers**.

Enclosed please find fee of **€50.00** being the statutory fee made Payable to **an Bord Pleanala** to make this Observation.

The Following are the Residents who wish to be Observers on this Referral to An Bord Pleanala:

(ii)Bord Pleanala **RL61.309893**

1. Francis O Brien 10 Forster Court, Galway.
2. Kelley O Brien. 10 Forster Court, Galway.
3. Anne Marie Quinn. 6 Forster Court, Galway.
4. Colm O Fatharta 8 Forster Court, Galway
5. Tom Hayes. 9 Forster Court, Galway
6. Cairbre O Donnell 12 Forster Court, Galway
7. Dermot Ryan. 17 Forster Court, Galway.
8. Rosemarie [redacted] Ryan 17 Forster Court

With regards to this Observation to An Bord Pleanala please forward all Correspondence to Francis O Brien 10 Forster Court Galway who is acting as Agent for the Observers.

The Basis of Our Observation is as Follows:

1. **INTRODUCTION:**

Forster Court is a Housing Estate that was built in the Middle of Galway City in the late 1980's. It is divided into a number of phases with access from a main distributor road to the west of each phase.

A Planning Application was lodged (Planning Reference 17/41) for a Large Hotel and the description of Development specifically referred to a Plant (Substation and associated Switch room). This Site was previously occupied by Shannon Dry Cleaners which burnt down in around 2016. This Dry Cleaners building was located further to the West from Forster Court Phase 1 and the fire nearly travelled to Forster Court which was very traumatic for the residents at the time.

Galway City Council requested various revisions of the original plans submitted and eventually Planning Permission was granted on 19/09/2017. This was subject to conditions. Condition 1 required "*The Development shall be carried out and completed in accordance with the application made on 14/02/2017 as revised and amended by the details submitted on 04/07/2017 but subject to the conditions herein incorporated. REAON: To ensure that the Development is carried out in accordance with the permission and that effective control is maintained.*"

Condition 1 could not be clearer as to what was required by the Development of this site.

Works commenced on the Hotel Development Site on 10/04/2019 in accordance with the Commencement Notice.

(iii)Bord Pleanala RL61.309893

It was noticed in June 2019 that works were also taking place on the erection of a Large Building to the West of House No. 6 Forster Court. This Building was not on any plans for the development. This is in fact the location of the Substation that is the subject matter of this referral.

A Fire Safety Certificate was lodged to Galway City Council for this Development FSC 112/18 and this was decided on 14/03/2019. This was appealed to An Bord Pleanala (Bord Pleanala Reference No. ABP-304155-19) which allowed the appeal and gave its decision on 06/02/2020. Interestingly in this appeal the ESB Substation was shown in approximately the Location where it is now on some drawings and not in the location as shown on the drawings submitted for Planning Application 17/41. These drawings and documents for this Fire Safety Certificate appeal are obviously available in the Offices of AN Bord Pleanala for Inspection.

In the Interim from the Date of Granting Planning Permission for ref. no. 17/41 until recently the Developer's of the site have been engaging with the Local Planning Authority with submissions for agreements for various conditions. In the majority of these submissions the ESB substation is shown in the location for which Planning Permission was granted in ref. no. 17/41 and not in its current position.

On 04/12/2020 THE Developer of the Dean Hotel sought a Declaration from Galway City Council to state that the moving of the Substation was an exempt development (Galway City Council Reference No. P/DC/3/2020) and this was refused by the Local Authority. It is noted in that Section 5 declaration requests that the Applicant argued that the moving of the ESB Substation was 'de minimis' and minor in nature. There was no mention of compliance with the Fire Safety Certificate or conditions therein.

On the 12th of February 2021 the Applicant again applied for A Declaration from Galway City Council (ref. no. P/DC/3/3/21) that the moving of the ESB Substation was required by a condition of a new revised fire safety certificate and that the moving of the ESB substation was moved on fire safety grounds. Galway City Council again decided that the moving of the substation is not exempted Development on the 11/03/2021. The Applicant is appealing this decision to an Bord Pleanala in this appeal.

2. RELEVANT STATUTORY PROVISION:

Planning and Development Act, 2000

Section 2(1) states: "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal....."

Section 3(a) states: "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 of USE of any structures or other land."

(iv)Bord Pleanala **RL61.309893**

Section 4 states:

(1) The following shall be exempted development for the purposes of this Act:

(h) 'development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only he interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

Section 32(1) states that permission will be required under Part III;

"(a) in respect of any development of land, not being exempted development, and (b) in the case of development which is unauthorised, for the retention of that unauthorised development".

Planning and Development Regulations, 2001

Article 6 states:

"(1) Subject to Article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Article 9(1) states: "Development to which Article 6 relates shall not be exempted development for the purposes of the Act

(a) If the carrying out of such development would

(i) Contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act."

The following are classes of development that are considered exempt under Schedule 2 of The Planning and Development Regulations which may be of relevance in this case

Class 29: *The carrying out by any electricity undertaking of development consisting of the construction or erection of a unit substation (excluding a charging point for electric vehicles) or minipillar for the distribution of electricity at a voltage not exceeding a nominal value of 20kV.* With the following condition and limitation
The volume above ground level of any such unit substation or minipillar shall not exceed 11 cubic metres, measured externally

Class 41 (e)
the carrying out of development in compliance with a condition or conditions attached to a fire safety certificate granted in accordance with Part III of the Building Control Regulations, 1997 other than the construction or erection of an external fire escape or water tank
It is noted that this Class of exemption is being relied upon in this referral to an Bord Pleanala.

(v)Bord Pleanala **RL61.309893**

Article 23 (1) (f) *states plans and drawings of floor plans, elevations and sections shall indicate in figures the principal dimensions (including overall height) of any proposed structure and the site, and site or layout plans shall indicate the distances of any such structure from the boundaries of the site.*
This is very important with regards to compliance with Condition 1 of Planning Permission ref. no. 17/41.

3. **CONTRAVENE A CONDITION ATTACHED TO PLANNING PERMISSION:**

Article 9 (1) (a) (i) of the Planning and Development Regulations already mentioned stipulates that development shall not be considered exempt development if the works involve contravention of any condition on the Final Grant of Planning Permission.

The Opinion is that the re-locating of the Substation contravenes many conditions of Planning Permission ref. no. 17/41 and especially Condition 1 of this permission.
Condition 1 States: "*The Development shall be carried out and completed in accordance with the application made on 14/02/2017 as revised and amended by the details submitted on 04/07/2017 but subject to the conditions herein incorporated. REASON: To ensure that the Development is carried out in accordance with the permission and that effective control is maintained.*"

Therefore, the Buildings must be Built in accordance with the Drawings, documents and specifications lodged with the Planning Application and there should be no deviation from these. Figure (i) shows an extract of the Site Layout Map that accompanied the Reply to Further Information for this Planning Application. It can be clearly seen on the Site Layout Plan that the distance from the ESB Substation to the Boundary of the Site beside No. 6 Forster Court is dimensioned at **12317mm** where the actual current distance is **1100mm approximately**. This is a difference of **11217mm approximately**. It can be further seen that the dimension from the ESB Substation to House no. 6 is dimensioned as **18596mm** where the actual current distance is **7440mm approximately**. This is a difference of **11156mm approximately**. This means that the ESB Substation has been moved in excess of 11 metres closer to the Boundary of No. 6 Forster Court and towers over it. This cannot be dismissed as a slight deviation or de minimis. This is a substantial difference.

Article 23 Article 23 (1) (f) states *plans and drawings of floor plans, elevations and sections shall indicate in figures the principal dimensions (including overall height) of any proposed structure and the site, and site or layout plans shall indicate the distances of any such structure from the boundaries of the site.*

The ESB Substation is not located in the position as shown as per the figured dimensions of the Site Layout Plan and therefore this location is not in compliance in our opinion with Condition 1 Of Planning Permission ref. no. 17/41 as can be seen in Figure (i)

(vi)Bord Pleanala **RL61.309893**

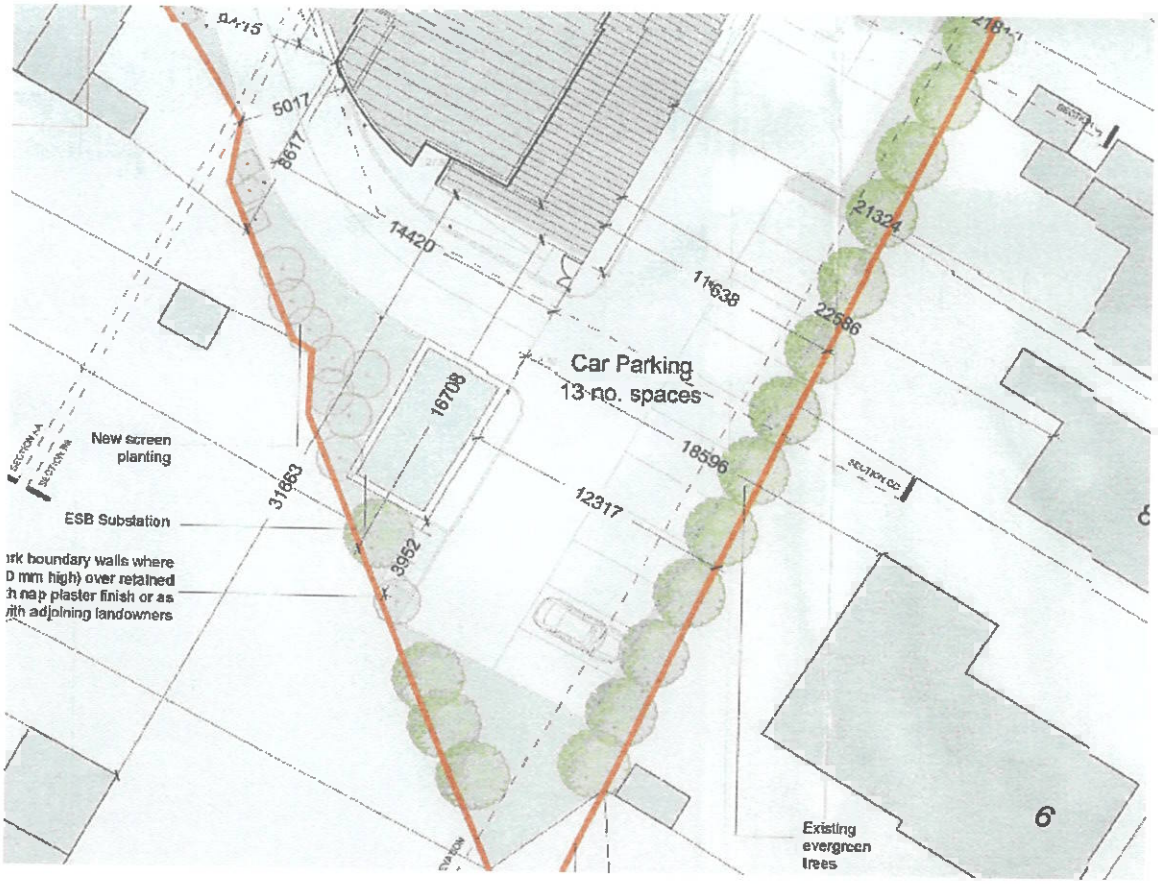


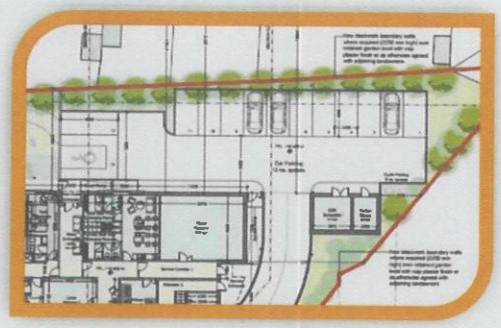
FIGURE (i) Extract from Site Layout Map (Drawing No. W: 16 JOBS P-S-250A lodged with reply to Further Information on 4th of July 2017. It shows the car park 13 spaces required. It shows the dimesions of the ESB Substation from the Boundary wall and the house of No. 6 Forster Court.

There was also a Mobility Management Plan required as part of a Further Information request No. 5 as the Planning Authority were not satisfied with the number of original car parking spaces proposed. The Applicant supplied a Mobility Management Plan advising that 13 car parking spaces would be provided in section 2.2 of this report. It was on the basis of 13 car parking spaces being provided that Planning Permission was granted. The Current Proposal reduces this number of car parking spaces to 8 which is less than what is required by the Planning Permission. Figure (ii) shows an extract from the Mobility Management Plan that was submitted as part of the reply to further information.

(Vii)Bord Pleanala **RL61.309893**

2.2. Proposed Site Layout

The proposed development comprises a 134-bedroom hotel (revised downwards from 139 proposed within the original planning application) on a site at 80 Prospect Hill and 82/ 84/ 86 Bohermore, Galway City. As part of the development proposal, it is now proposed to provide an increased level of on-site car parking, with 13 no. car parking bays proposed (one of which would be designated for disabled use), and cycle



Transport Insights Limited, Ground Floor, 11/ 12 Baggot Court, Dublin 2, Ireland
Email:- info@transportinsights.com | Telephone:- + 353 1 685 2279

6

FIGURE (ii) This is an extract from the Mobility Management Plan submitted as a reply to further Information on the 4/7/2017 showing the provision of 13 car parking spaces. This site layout plan also shows the ESB Substation located some distance from the Boundary. It is apparent that the Current Location of the Substation is located on designated Parking Spaces.

The relocation of the ESB Substation is in a substantially different location than that for which permission was granted. Also, it is located in the place of designated Parking Spaces which reduces the number of car parking spaces required from 13 to 8. This is contrary to the requirements of Condition 1 of Planning Permission ref. no. 17/41 and therefore cannot be declared an exempt development in its current location in our opinion.

Condition 5 Stated: *The Developer shall submit a detailed Landscape Plan for the development prior to any works taking place on site and all landscaping works to be completed prior to occupation of the Building*

FIGURE (iii) This an extract of the Landscape Layout Plan that was submitted on 13/11/2018 for agreement of Condition 5 of Planning Permission 17/41. This Shows the ESB Substation in the location for which Planning Permission was granted and not in its current location.

(xiii)Bord Pleanala **RL61.309893**

Condition 5 requires agreement of Landscaping Proposals for the Development. A Landscape plan was submitted on 13/11/2018. This proposal showed the ESB Substation in the location for which Planning Permission was granted and not in it's current Location. Furthermore, Condition 5 requires agreement of the Landscaping proposals with the Local Authority. The Applicant cannot seek to override this condition by proposing a new Landscaping Plan as is submitted with this referral seeking a Declaration of Exempted Development. This is contrary to the requirements of Condition 5 of the Planning Permission Ref. No. 17/41.

It is noted that other conditions required submissions from the Developer in Planning Permission Ref. No. 17/41 and these were all submitted for agreement on 13/11/2018. They are Condition 9- Watermains Layout, Condition 13-Public Lighting and Condition 15-Details of Plant, Machinery, chimneys and filters etc. It should be noted that all of the layout plans that were submitted on the 13/11/2018 for agreement of Planning Conditions all showed the carparking and landscaping at the rear of No. 6 Forster Court and the Esb Substation in the position for which Planning Permission was originally granted.

Therefore, The Relocation of the ESB Substation cannot in our opinion be deemed an exempted development as it is contrary to Conditions 1, 5, 9, 13 and 15 of Planning Permission Ref. No. 17/41 and therefore cannot benefit from the exemptions sought in this referral.

4. FIRE SAFETY CERTIFCATE AND CLASSES OF EXEMPTION:

It is noted that the applicant in their submission rely on **Class** 41 (e)
the carrying out of development in compliance with a condition or conditions attached to a fire safety certificate granted in accordance with Part III of the Building Control Regulations, 1997 other than the construction or erection of an external fire escape or water tank
in order to put forward the case that the relocation of the ESB Substation is an exempted development.

It is noted that Drawing No. BG/561/01/13 revB and dated 11/02/2019 that was lodged with a Fire Safety Certificate application (Galway City Council REF. FSC 112/18) with Galway City Council actually shows the ESB Substation in it's current Location and not in the location for which Planning Permission was granted.
This Fire Safety Certificate Application Development (Galway City Council REF. FSC 112/18) and this was decided on 14/03/2019. This was appealed to An Bord Pleanala (Bord Pleanala Reference No. (ABP-304155-19) which allowed the appeal and gave its decision on 06/02/2020. These drawings and documents are with An Bord Pleanala and can be checked and cross referenced. It is assumed in this Fire Safety Certificate Application that the Applicant had to prove all matters with regards to access by Fire Tenders at the time of application.
Due to Covid 19 Restrictions the viewing of the current Fire Safety Certificate Application has not been viewed as there was limited time to prepare this observation.

(ix)Bord Pleanala **RL61.309893**

It is a usual condition of Fire Safety Certificates (as similar with Planning Applications) that a condition is put on the grant of permission that all works must be completed in accordance with the drawings, reports, schedules and specifications lodged with the Fire Safety Certificate or similar words to that effect.
It is difficult to imagine that Class 41 (e) was designed to allow for the substantial relocation of the ESB Substation so close to the boundary of a dwelling house. This class 41 (e) does not allow the erection of External Fire Escape Stairs or Water Tanks and in our opinion the relocation of the ESB Substation is equally if not more of a hindrance to the Residential Amenity of Forster Court than those forms of Construction and therefore it cannot be used to justify the re-location.
Furthermore, it is the opinion that whether a Fire Safety Certificate is impending or not that the introduction of new material on a Planning Appeal is usually only at the request of Bord Pleanala and not for any applicant to submit as additional information during an appeal.

With regards to further classes of exemption the opinion is that the relocation of the ESB substation cannot benefit from Class 29: *The carrying out by any electricity undertaking of development consisting of the construction or erection of a unit substation (excluding a charging point for electric vehicles) or minipillar for the distribution of electricity at a voltage not exceeding a nominal value of 20kV.* With the following condition and limitation
The volume above ground level of any such unit substation or minipillar shall not exceed 11 cubic metres, measured externally.

The relocation of the substation cannot in our opinion benefit from this Class 29 exemption as the volume when measured externally is approximately 109m3 which is a lot larger than 11m3 allowed in this class of exemption.

5. **CASE LAW:**

The applicant is relying on Marry V Connaughton (1984 O'Hanlon J) which allowed for some changes of a retention Planning Permission. That was a Specific case and the changes may not have been as great as the substantial relocation of the ESB Substation in excess of 11 metres and close to a private residential house.

Contrary to the Decision in Marry v Connaughton, An Bord Pleanala may also consider "Horne v Freeney (1982)" This is where Internal alterations were undertaken during the course of construction of an amusement arcade. Here it was held that the permission was indivisible and that the planning permission should have been undertaken in its entirety. Mr Justice Murphy considered that it was not possible to undertake alterations during the construction simply because the variation would have been exempted once the building was completed.

This ESB Substation was constructed in tandem with the Dean Hotel main Building and therefore cannot be deemed exempted in accordance with this Judgement.

As Bord Pleanala is aware both Marry v Connaughton and Horne v Freeney were decided in accordance with the Pallning and Development Acts and Regulations 1963-1976.

This Development and Planning Application and referral is decided under the Planning and Development Act 2000 (and all subsequent Amendments) and the Planning and Development Regulations 2001 (and all subsequent Amendments). Already noted in this Observation is Planning and Development Regulations 2001, Article 23 (1) (f) states *plans and drawings of floor plans, elevations and sections shall indicate in figures the principal dimensions (including overall height) of any proposed structure and the site, and site or layout plans shall indicate the distances of any such structure from the boundaries of the site.*
This puts the onus fully on the Development to be compliant with the dimensions shown on the Plans and does not allow deviation from them in our opinion.

In relation to further Precedents that An Bord Pleanala may consider in determining this referral, the following Bord Pleanala decisions and comments should also be considered:

Bord Pleanala Ref No. RL2632

This referral related to a question whether the relocation of a house by approximately 7 – 11 metres from the location as permitted in accordance with condition no. 1 is or is not development and is or is not exempted development. The owner of the property submitted it was necessary to relocate a house due to the discovery of a spring during excavations. The Board decided that the relocation of the house was development and was not exempted development.

Bord Pleanala Ref No. ABP302356-18)

Planning Application for an Extension to a Hotel at Kentfield, Co. Galway (ABP 302356-18 Galway County Council Reference 18/722) that was refused Planning Permission by Bord Pleanala. In this application inter alia the Applicant submitted that the Extension was required to comply with various Building Regulations. In the Planning Inspectors Report from Bord Pleanala It is stated: *A development of the size proposed, if it is unsatisfactory cannot be justified by way of an argument as to ability to satisfy required standards within Part B (fire) and M (access for disabled) of the Building Regulations. Furthermore, it is not accepted that there are no alternative options to ensure consistency with the minimum standards.*

It is our opinion that the above Bord Pleanala decisions are relevant to this Planning Referral as they state that the movement of a building 7-11 metres (similar to this case) is not exempted development. And they also advise that compliance with the Building Regulations is not a justifiable reason for getting permission if the application is not considered acceptable.

(xi)Bord Pleanala **RL61.309893**

6. SUMMARY:

The conclusion of this observation from all of the facts is that this relocation of the ESB Substation is in our opinion is Development and Not Exempted Development.

This relocation has created a large imposing building very close to a residential property that is 6.196 metres above the floor area of that house. Due to the closeness and size of the Substation it will cause severe overshadowing of that property and be ruinous to the residential amenity and enjoyment of same. Exempt development Regulations were never created to impose such structures on neighbouring properties.

We thank An Bord Pleanala for the opportunity to make this Observation and ask you to take all of the points on board when making your decision on this referral.

Please inform us when a Decision is made on this referral.

Signed: (FRANCIS O'BRIEN - AGENT)	10 FORSTER COURT GALWAY
NAME (KELLEY O'BRIEN)	ADDRESS 10 FORSTER COURT, GALWAY
Anne Marie Quinn (Anne Marie Quinn)	6 FORSTER COURT, GALWAY
(Colm O' Fatharta)	8 FORSTER COURT, GALWAY
Tom Hayes (TOM Hayes)	9 FORSTER COURT, GALWAY
(Cairbre O' Donnell)	12 Forster Court Galway
Darnot A Ryan	17 - Forster Court Galway
(Rosmarie A Ryan)	17 FORSTER COURT GALWAY

APPENDIX A

This shows a sketch of current dimensions between the Boundary at 6 Forster Court and the House at 6 Forster Court and the ESB Substation that is currently built.

It can be seen as to how close this is to the boundary and also as to how it dominates the garden of No. 6 and will cause overshadowing of the garden and the west facing Windows of the House

SKETCH PLAN SHOWING LAYOUT AND DIMENSIONS OF 6 FORSTER COURT RELATIVE TO ESB SUB STATION