

Comhairle Contae Fhine Gall
Fingal County Council

An Roinn um Pleanáil agus
Infrastruchtúr Straitéiseach
Planning and Strategic
Infrastructure Department



Peter Rafter
32 Southmede
Ballinteer Road
Dundrum
Dublin 16
D16 CN45

AN BORD PLEANÁLA	
LDG-	<u>041390-21</u>
ABP-	_____
05 JUL 2021	
Fee: €	<u>270</u> Type: <u>cash</u>
Time: <u>14:57</u>	By: <u>hand</u>

NOTIFICATION OF DECLARATION UNDER SECTION 5 OF THE
PLANNING & DEVELOPMENT ACTS 2000, AS AMENDED

Decision Order No. PF/1273/21	Decision Date: 14-Jun-2021
Ref: FS5W/010/21	Registered: 19-May-2021

Area: Castleknock

Applicant: Peter Rafter

Development: Whether the weatherproofing of a structure which fronts the Lower Lucan Road at Strawberry Beds, Castleknock, Dublin 15 is Development and is or is not Exempted Development.

Location: Lower Road, Strawbewrry Beds, Castleknock, Dublin 15

Application Type: Request for Declaration Under Section 5

Dear Sir/ Madam

With reference to your request for a **DECLARATION** under Section 5 (1) received on 19-May-2021 in connection with the above, I wish to inform you that the above proposal **IS NOT Exempted Development** under Section 5(1) of the Planning and Development Act 2000 for the following reason(s):

Áras an Chontae, Sord, Fine Gall, Co. Bhaile Átha Cliath / County Hall, Swords, Fingal, Co. Dublin W67 X8Y2
Swords Office t: Registry (01) 890 5541 Decisions (01) 890 5670 Appeals (01) 890 5724
e: planning@fingal.ie www.fingal.ie

Bóthar an Gharráin, Baile Bhlainséir, Átha Cliath 15 / Grove Road, Blanchardstown, Dublin 15 D15 W638
Blanchardstown Office t: (01) 870 8434 e: blanch.planning@fingal.ie

1. The proposed works would materially alter the external appearance of the structure such that they would render the appearance inconsistent with the character of the structure. The works would not therefore come within the scope of section 4(1)(h) of the Planning and Development Act 2000, as amended, and would constitute development which is not exempted development.

NOTE: Where a declaration is issued under section 5 (1) any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such a fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

Signed on behalf of Fingal County Council.


15-Jun-2021
for Senior Executive Officer

NOTES

(A) REFUND OF FEES SUBMITTED WITH A PLANNING APPLICATION

Provision is made for a partial refund of fees in the case of certain repeat applications submitted within a period of twelve months where the full standard fee was paid in respect of the first application and where both applications relate to developments of the same character or description and to the same site. An application for a refund must be made in writing to the Planning Authority and received by them within a period of eight weeks beginning on the date of Planning Authority's decision on the second application. For full details of fees, refunds and exemptions the Planning & Development Regulations, 2001 should be consulted.

(B) APPEALS

1. An appeal against the decision may be made to An Bord Pleanála by the applicant or ANY OTHER PERSON who made submissions or observations in writing to the Planning Authority in relation to this planning application within four weeks beginning on the date of this decision. (N.B. Not the date on which the decision is sent or received). A person who has an interest in land adjoining land in respect of which permission has been granted may within the appropriate period and on payment of the appropriate fee apply to the Board for Leave to Appeal against that decision.
1. Every appeal must be made in writing and must state the subject matter and full grounds of appeal. It must be fully complete from the start. Appeals should be sent to:
The Secretary, An Bord Pleanála, 64 Malborough Street, Dublin 1.
2. An appeal lodged by an applicant or his agent or by a third party with An Bord Pleanála will be invalid unless accompanied by the prescribed fee. A schedule of fees is at 7 below. In the case of third party appeals, a copy of the acknowledgement of valid submission issued by F.C.C. must be enclosed with the appeal.
3. A party to an appeal making a request to An Bord Pleanála for an oral Hearing of an appeal must, in addition to the prescribed fee, pay to An Bord Pleanála a further fee (see 7 (f) below).
4. Where an appeal has already been made, another person can become an "observer" and make submissions or observations on the appeal. A copy of the appeal can be seen at the Planning Authority's office.
5. If the Council makes a decision to *grant permission/ retention/ outline/ permission consequent on the grant of outline* and there is no appeal to An Bord Pleanála against this decision, a final grant will be made by the Council as soon as may be after the expiration of the period for the taking of such an appeal. If every appeal made in accordance with the Acts has been withdrawn, the Council will issue the final grant as soon as may be after the withdrawal.
6. Fees payable to An Bord Pleanála from 5th September 2011 are as follows:

Case Type

Planning Acts

(a) Appeals against decisions of Planning Authorities

Appeal

(i) 1 st party appeal relating to commercial development where the application included the retention of development	€4,500 or €9,000 if an EIS or NIS involved
(ii) 1 st party appeal relating to commercial development (no retention element in application)	€1,500 or €3,000 in EIS or NIS involved
(iii) 1 st party appeal non-commercial development where the application included the retention of development.	€660
(iv) 1 st party appeal solely against contribution condition(s) – 2000 Act Section 48 or 49	€220
(v) Appeal following grant of leave to appeal (An application for leave to appeal is also €110)	€110
(vi) An appeal other than referred to in (i) to (v) above.	€220
(b) Referral	€220
(c) Reduced fee for appeal or referral (applies to certain specified bodies)	€110
(d) Application for leave to appeal (section 37(6)(a) of 2000 Act)	€110
(e) Making submission or observation (specified bodies exempt).	€50
(f) Request for oral hearing under Section 134 of 2000 Act	€50

NOTE: the above fee levels for planning appeals and referrals remain unchanged from those already in force since 2007 (but note the addition of NIS in (i) and (ii) above).

Fees apply to: All third party appeals at 7(a)(iv) above except where the appeal follows a grant of leave to appeal; First party (section 37 appeals) planning appeals not involving commercial or retention development, an EIS or NIS. All other (non section 37) first party appeals.

These bodies at 7(c) above are specified in the Board's order which determined fees. They include planning authorities and certain other public bodies e.g. National Roads Authority, Irish Aviation Authority.

NB. This guide does not purport to be a legal interpretation of the fees payable to the Board. A copy of the Board's order determining fee under the Planning Act is obtainable from the Board. Further information about fees under other legislation may be found in the appropriate legislation and is also available from the Board.

If in doubt regarding any of the above appeal matters, you should contact An Bord Pleanála for clarification at (01) 8588 100.

Peter Rafter

Appeals,
An Bord Pleanála,
64 Marlborough Street, Dublin 1,
D01 V902

**32 Block C, Southmede,
Ballinteer Road,
Dundrum,
Dublin. D16CN45**

14/07/2021

Appeal of Section 5 Decision [FS5W/010/21] made by Fingal County Council on June 14th 2021

I would like to appeal the Section 5 decision of Fingal County Council made on June 14th 2021 in respect of a question submitted by me on May 19th 2021.

The Planning Authority decision was signed by the Senior Executive Planner and the Senior Planner. The basis for the Planning Authority's declaration was that the proposed works to be undertaken on the subject structure were that an unauthorised use could be facilitated as a result of the works.

The Planning Authority in deciding on a Section 5 declaration are obliged to act judicially and it is my contention that in this instance they have mis-interpreted Irish planning law. The possibility of a future unauthorised use does not provide a basis for de-exemption of works to an authorised structure under Section 4(1)h of the 2000 Planning and Development Act. The Planning Authority is empowered to initiate enforcement action under the enforcement provisions of the 2000 Planning & Development Act [Sections 151 to 164] when and if an unauthorised use is taking face within the Planning Authority's functional area. It was, I believe, inappropriate on the part of the Planning Authority to speculate that an unauthorised use, which has not commenced will commence at some point in the future and to justify the de-exemption applied for on the basis of pure speculation.

It was not contested by the Planning Authority that the structure in question is authorised under current planning legislation by virtue of the fact that it was in existence prior to the introduction prior to the introduction of the 1963 Planning Act. However, it has been established in numerous Section 5 Declarations by An Bord Pleanála since it came into being in 1977 that works under Section 4(1)g of the 1963 Planning Act and Section 4(1)h of the 2000 Planning and Development Act may be carried out to any structure, regardless of its planning status. Two of these Declarations are included with this submission.

The Section Executive Planner in her report and recommendation has referred to enforcement action by the Planning Authority on land owned by me which adjoins the curtilage of the subject structure. No enforcement action has ever been initiated by Fingal County Council in respect of the subject structure and I would submit that the attempted disapplication by the Planning Authority of my statutory right to weatherproof the subject structure under Section 4(1)h of the 2000 Planning and Development Act is a mis-interpretation of Planning Law.

The Senior Executive Planner has also suggested that a material change of use would be a consequence of allowing the proposed works as exempted development under Section 4(1)h

As stated previously no basis exists for such a conclusion by the Planning Authority and enforcement powers are available to Fingal County Council to deal with such an eventuality.

It is difficult to fathom the rationale used by the Planning Authority in reaching their conclusion in this Section 5 declaration.

The previous permitted use of this structure was as a dwelling. However, former uses are not a relevant consideration when a decision on whether proposed works are exempted development under Section 4(1)h of the 2000 Planning and Development Act. This Act based exemption can apply to **any** structure, regardless of its planning status.

It is difficult to understand how the Planning Authority could possibly conclude that by returning the front elevation [street elevation] to its original appearance by the installation of windows and doors and a roof which matched that of the original dwelling would materially affect the external character of the structure, such that they would render the appearance inconsistent with the character of the structure as set out in Section 4(1)h of the Planning and Development Act 2000 as amended

It appears that the Planning Authority would prefer to have the structure in its current state forming the Lower Lucan Road streetscape rather than an improved structure identical to that which has been in place since the 1800's and which closely resembles other dwellings of similar age in the Strawberry Beds area.

Furthermore, the original doors and windows remain in situ and in good condition on the ground floor. I propose to renew the windows on the first floor in identical character and style to those on the ground floor. The original roof slates and ridge caps, which I had to remove in order to make structural repairs remain on site and will be reinstated. Any slates and ridge caps not in satisfactory condition will be replaced by identical materials of identical character and form. Also, the enclosed pictures show a number of buildings in the near locality that have had their roofs refurbished in their original style, just as I wish to do.

Under RL2592, the Board of An Bord Pleanala on June 22nd 2009, decided that the total renewal of a structure could be carried out under Section 4(1)h of the 2000 Planning and Development Act.

Nothing as extensive as that is proposed in this Section 5 application. It is submitted that the insertion of doors and windows into their existing opes and the re-construction of the roof, identical in style and character to that which was removed by myself shortly after I purchased the property would indeed be exempted development under Section 4(1)h of the 2000 Planning and Development Act.

In the High Court case [McCabe v Coras Iompar Eireann & Anor] {2006 IEHC 356} it was decided that the total renewal of a railway bridge could be carried out as exempted development under Section 4(1)h of the 2000 Planning and Development Act. This case was submitted by the applicant in RL2592 as a basis for the total renewal of the structure in question, Rose Cottage, in County Wicklow.

It stands to reason, therefore, that the renewal of elements of a structure, such as doors, windows and roof for the purpose of waterproofing it would definitely fall within the scope of Section 4(1)h of the 2000 Planning & Development Act.

The justification for dis-applying the Section 4(1)h exemption by the Planning Authority has, I would submit, no credibility by reference to other decisions of An Bord Pleanala and other Local Authorities in this country over the years. The subject structure as it currently is, has no character, for preservation, such as a medieval ruin, for instance, might have and the Lower Lucan Road streetscape can only be enhanced by the works proposed in this Section 5 Application.

It is clear from the Planning Authority's decision that conflicting agendas were at play in the Planning Officer's report and recommendation which were subsequently signed by the Senior Planner.

The Section 5 process is a straightforward one and the only questions which were to be addressed by the Planning Authority were those submitted on the Section 5 Application Form.

Attached are copies of Decision Orders, Directions and Inspectors Reports for RL2748, RL2996 and RL2592. Section 5 Declaration RL2592 was referred to earlier in this submission and Section 5 Declarations RL2748 and RL2996 illustrate clearly that developments falling within the scope of Section 4(1)h of the 2000 Planning are not restricted by issues such as planning enforcement proceedings on adjoining lands or possible unauthorised future uses. These matters were used by the Planning Authority as a basis for de-exempting the proposed works.

Please see attached photographs, which clearly verify the facts laid out above.

Yours faithfully,



Peter Rafter.

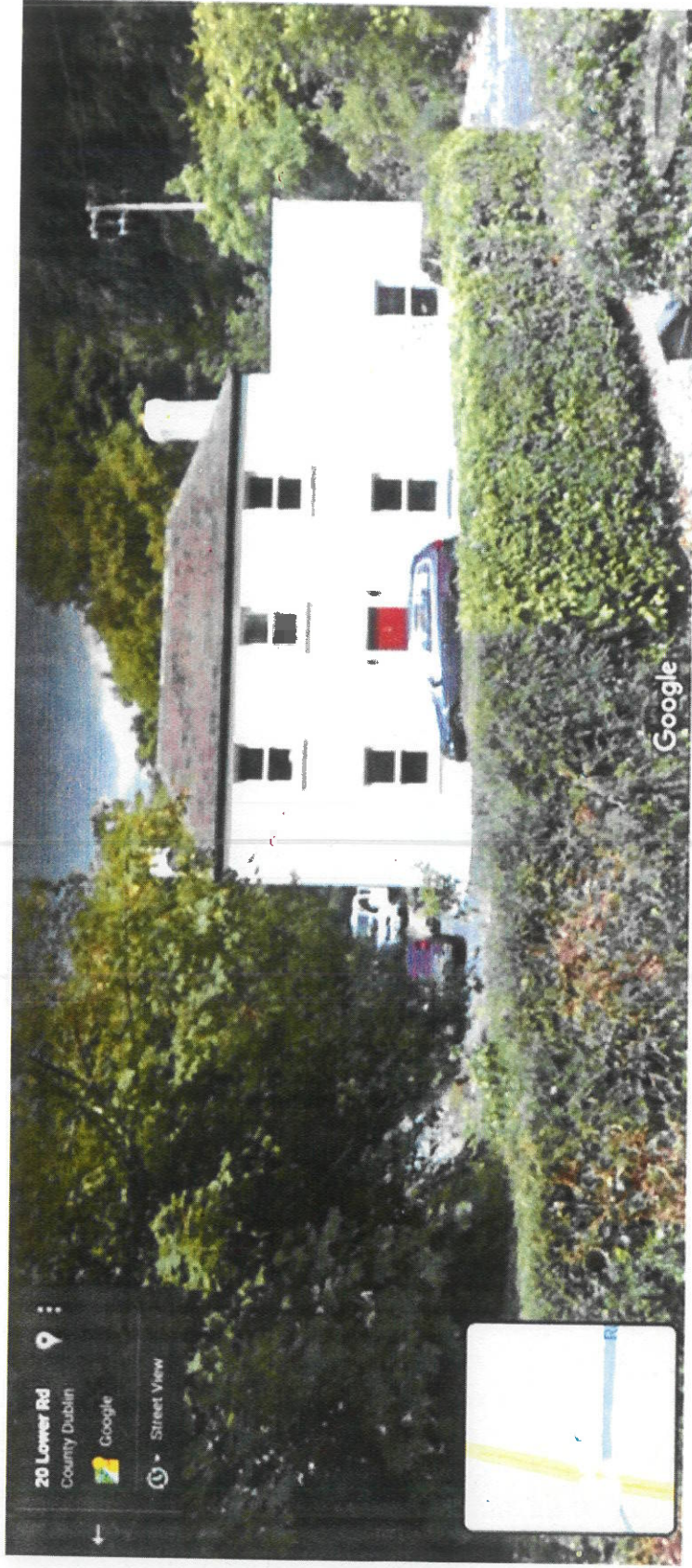
Strawberry Hall. ONLY REMAINING ORIGINAL ROOF WITH
SAME STYLE AND PITCH AS STRUCTURE NOW UNDER
CONSIDERATION.



Glen House

Origin of Roof and Windows





Glen House : 20 Lower Road

After new Roof



Original slates hidden on site.





Original foul sewer connection still operational at structure under consideration.



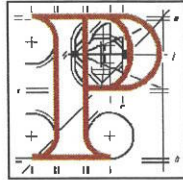
Existing windows still in place in structure under consideration.
-To be refurbished and copied on first floor



Existing entrance to property on Lower Road



An Bord Pleanála



Inspector's Report

Reference No.: 27.RL2592

Details of Reference: Whether (a) a domestic extension and (b) works of repair and renewal to a cottage, known as 'Rose Cottage', at Brockagh, Glendalough, Co. Wicklow, is or is not development, or is or is not exempted development.

Referred by: Mr Fredrick O'Brien, 6 Borleigh Court, Welling Road, Orsett, Grays, Essex RM 1635E, England.

Agent for owner: Michael Halligan Planning Consultants Ltd.

Planning Authority: Wicklow County Council

Location: Rose Cottage, Brockagh, Glendalough, Co. Wicklow.

Site Inspection: 17th April 2009

Inspector: Tom Rabbette

INTRODUCTION

The referrer carried out works to an existing cottage, known as 'Rose Cottage', at Brockagh, Glendalough in Co. Wicklow. The works were subject of a Warning Letter pursuant to s. 152 of the Planning & Development Act. The works at the cottage ceased and the referrer sought, from the planning authority, a Declaration under s.5 of the Act that the works, described as a domestic extension and works of repair and renewal, were exempted development. The planning authority issued an Order that the works were not exempt under the Planning & Development Regulations 2001-2006. The referrer is now seeking a review of that decision pursuant to s.5(3)(a) of the Act.

SITE LOCATION & DESCRIPTION & THE DEVELOPMENT PLAN

The subject structure is located in the Glendansan River Valley in Glendalough in Co. Wicklow. There is a small, detached, single storey cottage on the site known as 'Rose Cottage', extensive works have been recently carried out to the cottage.

The area where the structure is located is of high scenic value and also of historical significance. The designations applicable to the area reflect its national importance i.e. Wicklow Mountains National Park - '*Area of Outstanding Natural Beauty*', SPA, pSAC, pNHA, as per Maps Nos. 3D, 5 & 6 and Schedules 10.2, 10.3 & 10.4 of the Wicklow County Development Plan 2004-2010. The site is also located in an '*Area of Archaeological Potential or Significance*' as per Map No. 13 of the Development Plan. A report from the Development Applications Unit of the DoEHLG on one of the history files attached to the current reference case, makes reference to the site being within the zone of archaeological potential established around Recorded Monument 'WI023-001 - St. Kevin's Road', also referred to as the pilgrims' path (ref: DoEHLG letter dated 20/10/03 on Planning History Ref: 03/9318).

The site is accessed off a regional road the R756, which is a major tourist route leading to the Wicklow Gap. There are impressive views across the valley from several locations along this road, the route is designated a '*Prospect of Special Amenity*' as per Map No. 9A and Schedule 10.7 of the Development Plan. There is a 'corkscrew' type drive, of substandard width & alignment, off the public road that provides access to two structures, one is a two-storey detached dwelling located at a higher level than Rose Cottage. Reference is made on file to this two-storey dwelling belonging to the referrer's sister, the lane/drive continues past this dwelling and terminates at Rose Cottage. The cottage is located on lower ground than the public road and is not immediately visible from the regional road. The existing entrance off the public road serving both structures is substandard with restricted sight distances, the public road itself is of substandard width and alignment at several locations in the vicinity of the site.

THE QUESTION

Whether (a) a domestic extension and (b) works of repair and renewal to a dwelling known as 'Rose Cottage', at Brockagh, Glendalough, Co. Wicklow, is or is not development, or is or is not exempted development.

PLANNING AUTHORITY REPORT

Planner's Report dated 23/10/08:

The contents of the planner's report in relation to the section 5 declaration request can be summarised as follows:

- In relation to the first part of the declaration request i.e. the domestic extension the following is noted:
 - Original house on the site no longer exists.
 - Original house has been substantially demolished and replaced without the benefit of planning permission.
 - Therefore the extension can only be taken as an extension to an unauthorised structure.
- In relation to the second part of the declaration request i.e. works of repair and renewal, the following is noted:
 - The replacement of a defective roof would come within the ambit of improvement and alteration as long as it was in the same form and position as the original.
 - The replacement of nearly all the walls/roof of the existing structure leaving only fragments of the original dwelling would be more than improvement and alteration.
 - It is deemed as a replacement dwelling.
 - The walls now in place are essentially new and do not incorporate a significant amount of the original.
- Recommendation: works is development and is not exempted development.

PLANNING AUTHORITY'S DECLARATION

The planning authority refused to issue a certificate of exemption under Section 5 stating the following:

"The question has arising is whether a) Domestic extension b) Works of repair and renewal to house, which include replacement of roof, part of front wall, a gable and rear walls is exempted development.

A- Domestic extension:

- 1) the provisions of the Planning & Development Act 2000 Section 2, 3 & 4(1)(h)
- 2) the demolition and replacement of a substantial part of the original dwelling without the benefit of permission and as such rendering the development as unauthorised.
- 3) The provisions of paragraph (viii) of Article 9(1)a of the Planning & Development Regulations 2001-2008 that works outlined in Schedule 2 pt. 1 Class 1 Planning & Development Regulations 2001-2008 are not exempt

where they would consist of or compromise the extension, alteration repair or renewal of an unauthorised or a structure that is unauthorised.
It is considered that the above works is development and not exempted development.

B- Works of repair and renewal to house, which include replacement of roof, part of front wall, a gable and rear walls.

Having regard to:

- 1) the provisions of Planning & Development Act 2000 Sections 2, 3 & 4(1)(h)
- 2) the works initiated to repair and renew this house had the effect of demolishing a major part of the house which existed on the site apart from part of the front and side walls.
- 3) The structure now existing on the site is for all practical purposes a new house replacing the original house,
- 4) The works carried out on the house do not fall within the range of works set out in Section 4(1)(h) of the Planning & Development Act 2000.

Therefore it is considered that the stated works is development and is not exempted."

The above declaration, under article 5(2)(a) of the P & D Acts 2000-2006, was dated 28/10/08.

PLANNING HISTORY

UD2309: Warning Letter under s.152, dated February 2007 from the p.a., addressed to Mr Fred O'Brien, Brockagh, Glendalough, Co. Wicklow, reads, *inter alia*, as follows: '*Alleged Unauthorised Development consisting of the construction of extensions to the rear and eastern side of an existing cottage respectively that is located in Brockagh, Glendalough, Co. Wicklow, for the purpose of significantly increasing the floor area of the existing building, without the benefit of Planning Permission. The existing cottage was the subject of a planning application submitted to Wicklow County Council under Planning Register Number 06/4606 on the 24/01/06.*' That letter referred to the cumulative gross floor area of the extensions to the rear and side ("c. 72 sq.m.") and the potential increase in rate of vehicular traffic. The letter held that the works were unauthorised. The letter also went on to refer to Article 9(vi) of the Regs with reference to the location of the cottage i.e. 'Area of Outstanding Natural Beauty', 'SAC' and 'Area of Archaeological Zone of Importance'.

06/4606: Fred O'Brien refused permission for 46 sq.m. extension to 37 sq.m. cottage and effluent treatment system for 3 reasons relating to 1) serious traffic hazard 2) impact on the preservation of the scenic and archaeological qualities and character of the area, noting the number of designations applying to the area 3) the removal of hedgerow and trees, impact on the visual amenities of this Area of Outstanding Natural Beauty.

04/1492: Fred O'Brien refused permission for 70 sq.m. extension to 37 sq.m. cottage and effluent treatment system for 4 reasons relating to 1) development in area of outstanding natural beauty and housing need policy 2) traffic hazard at proposed

entrance 3) interference with a prospect of special amenity value and interest and 4) effluent percolation.

03/9318: Fred O'Brien withdrew an application for a 70 sq.m. extension to a 37 sq.m. dwelling.

97/7225: Fred O'Brien was refused permission for dormer dwelling and septic tank on a site to the east of the structure that is subject of this referral.

96/4793: Fred O'Brien dwelling and septic tank on a site to the east of the structure that is subject of this referral (similar application to 97/7225 outlined above).

REFERRER'S SUBMISSION

The contents of the submission on behalf of the referrer can be summarised as follows:

- A Declaration is sought under section 5 of the Act that the works are exempted under the provisions of the Act and the Regulations.
- Drawings and photographs of the works and buildings are submitted.
- Rose Cottage was constructed in 1926 by the current owner's grand uncle who resided there until his death in 1967, following which it was then occupied by his son and family.
- It was damaged by fire in 1985 and was restored.
- The current owner bought the cottage in 1995 with the intention of moving back to the area where he was brought up and educated.
- The current works are to provide the owner with a modern but modest standard of accommodation.
- Rose Cottage benefits from an existing right of way from the road.
- The works which were commenced in the understanding that they were exempt were the subject of a Warning Letter from the p.a. (ref: UD 2309) in March 2007, the works were ceased.
- As an earlier application to the p.a. for a larger extension to Rose Cottage were refused the works were reduced to what was considered exempted.
- The p.a. had earlier contended that Rose Cottage was not a habitable dwelling and had opposed redevelopment on that basis but later accepted that it was a habitable dwelling.
- It was then contended that 'the character i.e. appearance, design and layout' was inconsistent with its pre-development character.
- It was further contended that the house had been made uninhabitable by the works carried out.
- The present unfinished state of the building is entirely the result of the Warning Letter served on the owner, his compliance with this can not be held against him.
- The works the subject of this application comprise two discrete elements: the construction of an extension to the rear (of 40 sq.m.) and works of repair and renewal comprising weatherproofing of existing roof and replacement of corrugated roof with tiles, also replacement of a small section of the front wall and a section of the rear wall.

- This referral does not include the conversion and extension of the small lean-to at the side of the cottage, that development will be the subject of a separate application to the p.a.
- The p.a. contends that the works carried out amount to a demolition of the existing cottage and that the works and extension subject of this referral are thereby effectively to a new unauthorised house.
- The works complained of consist of the replacement of a small section of the front wall which was extremely porous and the replacement of section of the rear wall which had become water damaged, these are within the terms of section 4(1)(h) of the Act.
- The works do not amount to any reasonable interpretation of the phrase to a substantial demolition of the dwelling.
- The internal section of the wall between the rear extension and the cottage is exempted as part of the exempted extension and is specifically exempted under Class 50(b) of the Regs.
- The construction of the domestic extension to the rear of Rose Cottage falls within the exemption provided for under Art. 6 and Class 1 Schedule 2 Part 1 of the Regs.
- The separate small extension/renewal to the side of Rose Cottage will be subject of an application for retention.
- The p.a. have now accepted that Rose Cottage was and is a habitable dwelling.
- With reference to Art. 9(a)(vi), it is evident that the proposed rear extension will not interfere with the landscape or with protected views.
- With reference to Art. 9(1)(a)(iii), the extension does not obstruct visibility or directly impact on road safety.
- It will not materially affect the occupancy of Rose Cottage and will not materially increase traffic levels.
- The works carried out and proposed to be completed are exempted under section 4(1)(h) of the Act.
- The cottage is not a protected structure, the works will not render the appearance of the building inconsistent with the character of the structure or of neighbouring structures.
- The works detailed above are not as extensive as those found to be exempt in McCabe v CIE (2006) IEHC 356 where the renewal and reconstruction of a railway bridge was found to be exempt.
- It should be noted that the restrictions on exemption set out in Art. 9 of the Regs do not apply to the exemptions provided for in the Act under section 4.
- In assessing the referral the Board is requested to review each component of the referral separately and individually and to adjudicate on each component separately.
- The small extension/conversion of attached shed to the side will be subject of a separate application and removed of not permitted.

RESPONSES TO REFERRAL

There is no response on file from the planning authority.

STATUTORY PROVISIONS

Planning & Development Acts 2000 - 2006

Part 1

Section 2.—(1) In this Act, except where the context otherwise requires—

“habitable house” means a house which—

- (a) is used as a dwelling,*
- (b) is not in use but when last used was used, disregarding any unauthorised use, as a dwelling and is not derelict, or*
- (c) was provided for use as a dwelling but has not been occupied;*

“house” means a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building;

“unauthorised structure” means a structure other than—

- (a) a structure which was in existence on 1 October 1964, or*
- (b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34 of this Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act);*

“unauthorised works” means any works on, in, over or under land commenced on or after 1 October 1964, being development other than—

- (a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or*
- (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;*

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

Section 3.—(1) In this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

Section 4.—(1) The following shall be exempted developments 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 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;

Planning & Development Regulations 2001 - 2008

Article 6 Exempted Development.

6. (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 Restrictions on exemption.

9. (1) 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—

(iii) endanger public safety by reason of traffic hazard or obstruction of road users,

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan,

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,

SCHEDULE 2 Part 1

Development within the curtilage of a house

CLASS 1

Column 1 Description of Development:

The extension of a house, by the construction or erection of an extension (including a conservatory) to the rear of the house or by the conversion for use as part of the house of any garage, store, shed or other similar structure attached to the rear or to the side of the house.

Column 2 Conditions and Limitations:

1. (a) Where the house has not been extended previously, the floor area of any such extension shall not exceed 40 square metres.

(b) Subject to paragraph (a), where the house is terraced or semi-detached, the floor area of any extension above ground level shall not exceed 12 square metres.

(c) Subject to paragraph (a), where the house is detached, the floor area of any extension above ground level shall not exceed 20 square metres.

2. (a) Where the house has been extended previously, the floor area of any such extension, taken together with the floor area of any previous extension or extensions constructed or erected after 1 October 1964, including those for which planning permission has been obtained, shall not exceed 40 square metres.

(b) Subject to paragraph (a), where the house is terraced or semi-detached and has been extended previously, the floor area of any extension above ground level taken together with the floor area of any previous extension or extensions above ground level constructed or erected after 1 October 1964, including those for which planning permission has been obtained, shall not exceed 12 square metres.

(c) Subject to paragraph (a), where the house is detached and has been extended previously, the floor area of any extension above ground level, taken together with the floor area of any previous extension or extensions above ground level constructed or erected after 1 October 1964, including those for which planning permission has been obtained, shall not exceed 20 square metres.

3. Any above ground floor extension shall be a distance of not less than 2 metres from any party boundary.

4. (a) Where the rear wall of the house does not include a gable, the height of the walls of any such extension shall not exceed the height of the rear wall of the house.

(b) Where the rear wall of the house includes a gable, the height of the walls of any such extension shall not exceed the height of the side walls of the house.

(c) The height of the highest part of the roof of any such extension shall not exceed, in the case of a flat roofed extension, the height of the eaves or parapet, as may be appropriate, or, in any other case, shall not exceed the height of the highest part of the roof of the dwelling.

5. The construction or erection of any such extension to the rear of the house shall not reduce the area of private open space, reserved exclusively for the use of the occupants of the house, to the rear of the house to less than 25 square metres.

6. (a) Any window proposed at ground level in any such extension shall not be less than 1 metre from the boundary it faces.

(b) Any window proposed above ground level in any such extension shall not be less than 11 metres from the boundary it faces.

(c) Where the house is detached and the floor area of the extension above ground level exceeds 12 square metres, any window proposed at above ground level shall not be less than 11 metres from the boundary it faces.

7. The roof of any extension shall not be used as a balcony or roof garden.

CLASS 50

Column 1 Description of Development:

(a) The demolition of a building or other structure, other than—

(i) a habitable house,

(ii) a building which forms part of a terrace of buildings, or

(iii) a building which abuts on another building in separate ownership.

(b) The demolition of part of a habitable house in connection with the provision of an extension or porch in accordance with class 1 or 7, respectively, of this Part of this Schedule or in accordance with a permission for an extension or porch under the Act.

Column 2 Conditions and Limitations:

None

ASSESSMENT

The referrer has requested that the Board review each component of the referral separately and individually, and to adjudicate on each component separately. The Board is also requested not to be influenced by the extension/conversion of a side shed attached to the eastern end of the structure.

The planning authority effectively determined that given the extent of demolition and replacement of the original cottage, that the new-build created a new dwelling which is unauthorised. The referrer contests this. He holds that the works are replacements of small sections of the walls and that these works are provided for under s.4(1)(h) of the Act (outlined above). The referrer considers the works to the walls and roof to be works of repair and renewal of the cottage. He adds that the works will *'not render the appearance of the building inconsistent with the character of the structure or of neighbouring structures'* and, as such, comply with s.4(1)(h). In the Planner's Report on file (dated 23/10/08) it stated, inter alia, that *"the original house on the site no longer exists as it has been substantially demolished and replaced without the benefit of planning permission"*, the report goes on to state that *"the replacement of all the walls/roof of the existing structure leaving only fragments of the original dwelling would be more than improvement and alteration"* with reference to the wording of s.4(1)(h). That p.a. report concludes that *"it is considered that the house now existing is effectively a new house, built as a replacement house previously existing on the site."*

A site inspection was carried out by the undersigned on the 17/04/09. Based on that inspection I am satisfied that the p.a. Planner's Report (referred to above) is an accurate and reasonable description of the structure that is subject of this referral. A significant and considerable amount of the original cottage has been demolished. Only a limited amount of the original fabric of the cottage remains. The Board is referred to the photographs in the appendix attached to this report, and also to the photographs on file indicating the cottage before the works were carried out, as submitted by the referrer. The entire original roof has been removed. Only c. 60% of the original front façade remains, the rest has been demolished and rebuilt. The eastern gable end wall of the cottage has been completely demolished. The original rear wall of the cottage has been completely demolished. Only the western gable end wall remains unaltered. In the referrer's submission to the Board it is stated that the *"works complained of consist of the replacement of a small section of the front wall which was extremely porous and the replacement of a small section of the rear wall which had become water damaged"*. I do not consider the length of the front façade that has been removed/demolished to constitute 'a small section' (the Board may wish to compare 'View 3' in the attached appendix with the first photograph of the original front façade submitted by the referrer on the 24/11/08). The entire original rear wall has been demolished which can not be considered 'a small section'. It was not possible to gain access to the interior of the structure on the day of the site inspection, however, a view of the interior was possible, 'views 5 & 6' in the attached appendix are of the interior looking towards the rear wall, it is clear that the original rear wall

has been almost entirely demolished, this is also evident from an external inspection around the back of the structure (ref: 'views 1 & 4' in the attached appendix). It is also clear from the site inspection that little, if anything, of the original interior remain.

The referrer claims that the original cottage was a habitable dwelling. This does not appear to be disputed by the p.a. with reference to the p.a. Declaration & Planner's Report on file (although the dwelling was referred to as 'abandoned' in the Planner's Report on history file 04/1492). It is not now possible to determine if the original cottage was habitable at the time the demolition works commenced given the extensive nature of those demolition works, however, there is nothing to indicate that the cottage was 'derelict' (with reference to the definition of a 'habitable house' as contained in the 2000 Act as outlined above). The dwelling on site in its current condition is not a habitable dwelling i.e. new dwelling under construction and incomplete.

The referrer makes reference to *McCabe v CIE (2006) IEHC 356* concerning the 'renewal and reconstruction of a railway bridge', copy of the judgement is in the appendix attached to this report. It is noted that in that judgement Mr Justice Herbert states, *inter alia*, the following, "In my judgement the renewal or reconstruction of a part or of parts of the bridge would be covered by the provisions of s.4(1)(h) of the Act of 2000, provided that the extent of that renewal or reconstruction was not such as to amount to the total or substantial replacement or rebuilding of the original structure. The question is one of fact and degree whether in the instant case the original railway under-bridge has been so changed by the works that one could not reasonably conclude that it remains the same bridge even though with some alterations, improvements or indications of maintenance work." Applying the above criteria of Justice Herbert to the instant referral case, I am of the opinion that the works amount to the substantial replacement and rebuilding of the original cottage and that, as such, one could not reasonably conclude that the cottage remains the same. The referrer has, in effect, demolished the original habitable dwelling and sought to replace it with a new dwelling. The demolition of a habitable dwelling is not an exempted development with reference to CLASS 50(a)(i) of Schedule 2 Part 1 of the Regs and the construction of a new dwelling requires planning permission.

(While the p.a. Declaration held that the works were effectively for a new house, it should be noted that the Warning Letter, ref: UD2309, did not refer to this issue but rather to 'the cumulative gross floor areas of the extensions', traffic concerns and designations to the area.)

The works to the original cottage are not, in my opinion, works of 'maintenance, improvement or alteration', nor of renewal or repair, but can be more accurately described as works for a new replacement dwelling. This is development and it is not exempted development, therefore the new dwelling is unauthorised and the domestic extension to the rear is an extension to an unauthorised development and thus comes under the restriction of article 9(1)(a)(viii) of the Regulations.

The *Warning Letter*, and the previous refusals for extensions to the original cottage (ref: 06/4606 and 04/1492), made reference to, *inter alia*, the site location in an area of outstanding natural beauty and other designations which reflect the special amenity

value of the area. The p.a. Declaration did not make reference to the provisions of article 9(1)(a)(vi), I am of the opinion that this is appropriate and correct as a new dwelling requires permission here irrespective of the designations that may be applicable to the area as outlined in the Development Plan. However, if the Board disagree with this recommendation they may wish to consider further article 9(1)(a)(vi).

CONCLUSION AND RECOMMENDATION

The works to the original cottage are not, in my opinion, works of 'maintenance, improvement or alteration' (as per s.4(1)(h)), nor of renewal or repair, the works constitute the substantial replacement and rebuilding of the dwelling on the site. This is development and it is not exempted development, therefore the new dwelling is unauthorised and the domestic extension to the rear is an extension to an unauthorised development and thus comes under the restriction of article 9(1)(a)(viii) of the Regulations.

RECOMMENDED DECLARATION

WHEREAS a question has arisen as to whether (a) a domestic extension and (b) works of repair and renewal to a dwelling known as 'Rose Cottage', at Brockagh, Glendalough, Co. Wicklow, is or is not development, or is or is not exempted development.

AND WHEREAS Fredrick O'Brien, 6 Borleigh Court, Welling Road, Orsett, Grays, Essex RM 1635E, England, requested a declaration on the said question from Wicklow County Council and the said Council issued a declaration on the 28th day of October, 2008 stating that the domestic extension and works of repair and renewal are development and are not exempted development:

AND WHEREAS the said Fredrick O'Brien referred the declaration for review to An Bord Pleanala on the 24th day of November, 2008:

AND WHEREAS An Bord Pleanala, in considering this referral, had regard particularly to –

- (a) sections 2, 3 and 4(1)(h) of the Planning and Development Act, 2000, and
- (b) articles 6(1) and 9(1)(a)(viii) of the Planning & Development Regulations, 2001, and
- (c) Schedule 2 Part 1, Class 50(a)(i) of the Planning & Development Regulations, 2001:

AND WHEREAS An Bord Pleanala has concluded that –

- (a) the works are not for the purposes of maintenance, improvement or other alteration to a dwelling,
- (b) the works constitute the substantial replacement and rebuilding of a dwelling,

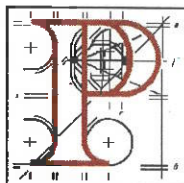
-
- (c) the replacement dwelling is an unauthorised structure, and
(d) the domestic extension is to that unauthorised structure:

NOW WHEREAS An Bord Pleanala, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the (a) domestic extension and (b) works of repair and renewal to a dwelling known as 'Rose Cottage', at Brockagh, Glendalough, Co. Wicklow, is development and is not exempted development.

Tom Rabbette
Senior Planning Inspector
19TH May 2009

An Bord Pleanála Ref.: PL29S.RL2996

An Bord Pleanála



Inspector's Report

An Bord Pleanála Reference No: PL29S.RL2996

Subject of Referral: Whether works to upgrade an existing roof and rooflights over a shed are or are not development or are or are not exempted development.

Location: 1A Ormond Road, Rathmines, Dublin 6.

Planning Authority: Dublin City Council

Planning Authority reference: 0028/12

Planning Authority Decision: Is development and is not exempted development.

Referrer: Patrick and Sandra Garvey

Owner/Occupier: Patrick and Sandra Garvey

Observers: None

Date of Site Visit: 4th July 2012

Inspector: G. Ryan.

1.0 SITE

1.1 The subject site consists of a large shed at the junction of two rear access lanes in a largely residential part of Dublin's south suburbs. The shed forms part of what would have been the rear garden of the end-of-terrace two-storey redbrick house to the south, which is a protected structure. There appear to be four separate exit routes from this network of narrow lanes to the main road network.

1.2 The shed has a shallow A-frame roof with corrugated steel finish interspersed with sections of clear corrugated plastic to let light in. There are no windows. A larger roller-shutter doorway faces the north-south lane, with a smaller pedestrian doorway beside it. Two structures in the adjoining garden (No. 1, to the south), abut the southern wall of the shed.

1.3 The date of the shed's construction is not evident from its outward appearance. The brickwork and render would appear to be around 5-30 years old, by my estimations.

1.4 The shed did not appear to be in active use at the time of my inspection. I was able to look through the letterbox. There were some internal partitions, some materials on the ground, with a kitchenette and another small room in the floorplate's southeastern corner.

2.0 PLANNING HISTORY: -

PA Ref. 0203/11 This was an almost identical 'Section 5' case in relation to the upgrading of the roof. Details are available on the subject file. The planning authority's decision was as per the decision in relation to the subject case. Some points of note from an email submitted by the referrer by way of further information as follows:

2.1.1 The building and its use has never been the subject of a planning permission and that there has always been an outbuilding of some sort on this site since c. 1911-1938, which has been separated from the property on Ormond Road.

2.1.2 The shed appears to have been constructed subsequently to the 1968 revisions to the Ordnance Survey, which shows the area that the footprint currently occupies with a smaller outbuilding taking up around two thirds of the area, with a small yard in it. A ladder workshop was operating in it throughout the 60s, 70s, and 80s and was bought by the applicant in 2002.

2.1.3 The building does not lie within the curtilage of a protected structure.

3.0 REFERRAL

3.1 The referral case is put forward on behalf of the owners of the property by David Slattery Conservation Architects. It is construed as a 'first party appeal in relation to the decision of Dublin City Council' which I take to be a reference to Section 5(3)(a) of the 2000 Planning and Development Act.

- 3.2 The development in question can be summarised as follows:-
- Upgrade of the existing roof. The existing rooflights are to be replaced with the existing structure and openings in the roof maintained.
 - In addition, the existing corrugated metal roof covering is to be replaced with a paralon covering which will match the colour of the existing roof finish and maintain the existing roof profile.
 - The drawings submitted relate to the existing structure and roofing only.
- 3.3 The grounds of the referrer's case can be summarised as follows:-
- 3.3.1 The shed is a basic, single storey shed, which is used as a small industrial unit.
- 3.3.2 It has a corrugated metal roof in need of upgrade and repair.
- 3.3.3 Makes reference to the Dublin City Development Plan and that the adjoining house to the south (1 Ormond Road) is a protected structure.
- 3.3.4 The planning authority have not identified the nature and extent of the unauthorised development.
- 3.3.5 The use is established, and a building has existed at this location since the beginning of the 20th Century (between 1911 and 1938 according to Ordnance Survey Maps).
- 3.3.6 An industrial building of some sort has existed on the site since the 1930s at the latest. It has been extended since then and it may be the extensions and alterations to it which the planning authority see as unauthorised.
- 3.3.7 Refers to previous communication with the planning authority regarding the undesirability of the industrial use and the prospect of introducing a residential use (mews development), which has met with resistance from the planning authority due to access.
- 3.3.8 The planning authority are attempting to resist the continuation of this undesired use by preventing maintenance and upgrading of the existing building on site.
- 3.3.9 The planning authority have advised the referrer to appeal their decision as they are unclear themselves as to what way things can be moved forward.
- 3.3.10 The referrer requests guidance from the board as to the possibility of providing a residential building on this site.

4.0 PLANNING AUTHORITY DECISION

- 4.1 Declares that the proposed development is not exempt from the requirement to obtain planning permission. The planning officer's report refers to the previous decision under 0203/11 (see section 2.0 above). The details are unchanged and therefore the planning authority can only come to the same recommendation.

5.0 LEGISLATION

The following excerpts from current planning legislation are relevant to the assessment of this referral.

5.1 2000 Planning and Development Act: -

Section 2 of the Planning and Development Act, 2000 defines the terms used within the act, with the following definitions of note:

“Works” includes any act or operation of construction, excavation, demolition, extension or alteration, repair or renewal ...

“structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined,

“unauthorised structure” means a structure other than -

- (a) a structure which was in existence on 1 October 1964, or*
- (b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34 of this Act, being a permission which has not been revoked, or which exists as a result of carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act);*

“unauthorised use” means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than –

- (a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or*
- (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;*

Section 3(1) states:

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

Section 4 sets out the types of works that while considered ‘development’, can be considered ‘exempted development’ for the purposes of the Act. Section 4(1)(h) states that

The following shall be exempted developments for the purposes of this Act ... 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;

Section 4(2) makes provision for ministerial regulations to set out further exemptions. The 2001 Planning Regulations as amended derive from this section and designate further works as being exempted development for the purposes of the act.

Section 57 states that

1) Notwithstanding section 4(1)(h), the carrying out of works to a protected structure, or a proposed protected structure, shall be exempted development only if those works would not materially affect the character of—

(a) the structure, or

(b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.

5.2 2001 Planning and Development Regulations: -

Article 6 deems the development set out in Schedule 2 to be exempted development. Column 1 of Part 1 describes the development which can be considered exempted development, while Column 2 describes the conditions and limitations applicable to such exemption.

CLASS 12 The painting of any external part of any building or other structure.

Conditions and limitations:

Such painting may not, except in the case of a hoarding or other temporary structure bounding land on which development consisting of works is being or will be carried out in pursuance of a permission granted under Part III of the Act or as exempted development, be for the purposes of creating a mural.

Article 9 sets out a number of restrictions on exemption including the following

9. (1) 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—

...

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,

Part 4 sets out 'Classes of Use' in relation to changes of use that can be considered exempted development. Class 4 is "Use as a light industrial building." Article 10 states that "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," Class 14 of Schedule 2 Part 1 conveys further exemptions on specific changes of use between use classes, none of which apply to the subject site.

6.0 ASSESSMENT

The main issues to be addressed can be summarised as follows: -

- Whether the proposal consists of 'works', and whether this consists of 'development'
- Whether any exemptions apply
- Whether any restrictions to these exemptions apply

6.1 Whether the proposal consists of 'works', and whether this consists of 'development'

6.1.1 The proposal to replace the roof, albeit with something very similar, does consist of works under the terms of the act, in that it would comprise one or more of 'construction', 'alteration', 'repair', or 'renewal'. As such, the proposal consists of development for the purposes of Section 3(a) of the act.

6.2 Whether any exemptions apply

6.2.1 The legislative provision under which an exemption might be applicable is Section 4(1)(h) of the act, summarised in section 5.1 above. The first part of this provision, that development is 'for the maintenance, improvement or other alteration' is clearly met in this instance. The proposal is to repair/replace a roof with a substantially similar structure. The limitation in relation to exterior works is that the works '*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*'. While it might be argued that the shed is, in itself, inconstant with the character of neighbouring structures, it could not be said that this would be as a result of the works proposed. As such, I do not consider that this limitation is triggered. In my opinion, the exemptions under 4(1)(h) apply in the first instance.

6.2.2 I note that the Section 57 of the 2000 Planning and Development Act place a more restrictive set of requirements on works to protected structures, as set out in section 5.1 above. The house to the front (south) is a protected structure. I do not consider the subject site to be within the curtilage of that protected structure, given the historical separation between the properties. Furthermore, even if the subject site were to be considered as within the curtilage of the protected structure (and the subject building a protected structure by extension), I do not consider that the proposed development would affect the character of the structure or any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest. As such, the exemptions under 4(1)(h) are not affected by the protected structure to the south.

6.3 Whether any restrictions to these exemptions apply

6.3.1 The planning authority issued a decision that the proposed development is not exempted development on the basis that the subject building is unauthorised. Leaving aside for a moment the question of the planning status of the building itself, the specific provisions of Article 9 of the 2001 Planning and Development Regulations need to be considered. Here it states that "*Development to which article 6 relates shall not be exempted development ... if the carrying out of such development would... consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use...*"

6.3.2 Exempted development rights derive from more than one source. Article 9 is a restriction on exemptions where they arise from *Article 6* of the Regulations (the 'Schedule 2' exemptions). It has no bearing or influence on exemptions that derive from the primary legislation, such as 4(1)(h) of the act, which can be availed of

7.0 RECOMMENDATION

I recommend an order as per the following: -

WHEREAS a question has arisen as to whether works to upgrade an existing roof and rooflights over a shed are or are not development or are or are not exempted development.

AND WHEREAS the said question was referred to An Bord Pleanála by Patrick and Sandra Garvey on the 11th day of April, 2012:

AND WHEREAS An Bord Pleanála, in considering this reference, had particular regard to:

- (a) Sections 2, 3, 4, and 57 of the Planning and Development Act 2000.
- (b) Articles 9(1)(a)(viii) of the Planning and Development Regulations 2001.
- (c) The lack of any evidence of a planning permission for the structure or its use.

AND WHEREAS An Bord Pleanála has concluded that-

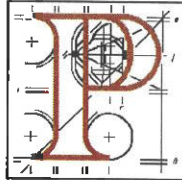
- (a) The proposed works are development.
- (b) The proposed works would be for the maintenance, improvement, and alteration of the structure, would not materially affect the external appearance of the structure so as to render the appearance inconstant with the character of the structure or neighbouring structures, and would not materially affect the character of a projected structure or any element which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest
- (c) The proposed works are consistent with the limitations and restrictions of Sections 4(1)(h) and 57(1) of the Act.
- (d) The 'restrictions on exemption' under Article 9 of the 2001 Planning and Development Regulations, including those relating to works to unauthorised structures or structures the use of which is an unauthorised use, do not apply to exemptions conferred by the primary legislation.

NOW THEREFORE, An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that works to upgrade an existing roof and rooflights over a shed is development which is exempted development.

G. Ryan
Planning Inspector
17th August 2012

An Bord Pleanála Ref.: RL17..RL2748

An Bord Pleanála



Inspector's Report

Details of Reference	Whether the replacement and/or alterations of windows and doors is or is not development or is or is not exempted development at 'The Mews', Ballinlough, Dunsauglin, Co. Meath
Referred By:	Richard Carter
Other Parties to Reference:	None
Planning Authority:	Meath County Council
Planning Authority Ref:	DA/551007
Date of Site Inspection:	August 30 th 2010
Inspector:	Lorraine Dockery

1.0 SITE LOCATION AND DESCRIPTION

The subject site, which has an approximate area of 0.2 hectares is located within the townland of Ballinlough, Co. Meath on the northern side of the N3 roadway, south-east of the village of Dunsauglin. A two-storey residential property is located to the north-west of the subject site. The entrance to the site is such that a shared apron exits for the two properties with the proposed site entrance being accessed off that. The existing site entrance is unpaved and has a sharp slope from the shared apron.

Another residential property is located to the south-east of the subject site. The roadside boundary is comprised of dense planting and the subject site is not unduly visible from the N3.

The existing dwelling on site is a single storey property, with pitched roof and plaster finish. A relatively large garden area surrounds the modest property.

2.0 BACKGROUND TO REFERRAL

The referrer applied to Meath County Council for a declaration under Part 1 Section 5 of the Planning and Development Act 2000 as to whether the following works are development and/or exempted development or not:

- the removal of existing timber framed, single glazing window in front elevation and installation of replacement double-glazed window in the same aperture
- removal of existing full height patio-type sliding door in the southern side elevation, blocking up part of former opening and insertion of double-glazed window in the reduced size aperture
- insertion of new double doors in former blank flank wall to allow greater light penetration
- removal of two existing timber framed, single glazed windows in the southern side elevation of the house and installation of two new replacement double glazed windows
- removal of three existing timber framed, single glazed windows and insertion of new double glazed windows in the opposite flank elevation (facing neighbours house)
- no external works have been undertaken which affect the rear elevation of this dwellinghouse

The Planning Authority decided that the works outlined above was development that required planning permission.

3.0 REFERRAL

The submission refers and seeks a review of the declaration made by Meath County Council.

The Board's determination is sought as to whether the replacement and/or alterations of windows is or is not development, or is exempted development within the meaning of the Planning and Development Regulations 2000-2008 (as amended).

It is submitted by the referrer that the works at this location are exempted development under Schedule 2, Part 1, Class 2(d) of the Planning and Development Regulations 2001 (as amended).

The submission can be summarised as follows:

- Works undertaken at this property do not require planning permission by reason of Section 4(1)(h) of the Planning and Development Act
- While the existing house does not have the benefit of planning permission, its status does not affect the application of Section 4(1)(h) as this provision does not apply exclusively to authorised developments, with the actual text of this provision referring expressly and explicitly to 'any' structure
- Distinguish the statutory entitlement in Section 4(1)(h) of the Act from the separate exempted development provisions in the Planning and Development Regulations 2001 which only pertain to authorised developments
- As statutory provisions cannot be amended by regulation, the provision of Article 9 does not affect Section 4(1)(h) of the Planning and Development Act 2000 so as to otherwise disentitle the referrer from these statutory benefits in this particular case. It is a core principle of statutory interpretation that an Act cannot be amended by secondary legislation and if it had been the intention of the legislature to restrict privileges set out in Section 4(1)(h) to authorised structures only, this would have been explicitly and expressly stated in the Act.
- Cites previous cases from ABP, PL29S.RL2120 and PL06FRL.2162 which recognised that Section 4(1)(h) does not apply exclusively to lawful developments and confirms the relationship between primary and secondary legislation
- Question posed in the referral related exclusively to the works undertaken by the referrer and did not concern the use of the structure. However the planner's report intimates that permission is required for the reason that these changes are inextricably linked with the unlawful use of the property. This approach is fundamentally flawed. Planning law draws a sharp distinction between the two prongs of development, namely 'works' and 'use'. Cites planning law which states that 'the character of a structure relates to its shape, colour, design, ornamental features and layout and not to its particular use...' (Cairnduff v. O'Connell). Secondly, the use of the property as a dwelling has continued for 20 years and it is apparent that the physical changes

undertaken by the referrer are not essential for this property to be used for residential purposes

- Whilst the referrer undertook physical changes to one external wall of the building, such changes are minor in nature and merely comprised the installation of a double door, in an otherwise blank flank wall. Such works slightly altered the external detail of the structure and cannot be considered to be so materially inconsistent with its character or appearance so as to need permission.
- The works undertaken at The Mews comprise development for the maintenance, improvement or other alteration of this structure and based on *Cairnduff v. O'Connell*, as such works do not materially affect its external appearance so as to render such appearance inconsistent with its character or that of neighbouring structures, this project is covered by Section 4 (1)(h) of the Planning and Development Act 2000 and comprised exempted development for which permission is not needed

4.0 RESPONSE TO REFERRAL

A response was received from the planning authority in which no new issues were raised.

5.0 RELEVANT PLANNING HISTORY

DA/900671 (PL17.234282)

Permission REFUSED by ABP for the retention of 'The Mews' as an independent dwelling, retention of existing site access and planning permission for the installation of a proprietary effluent treatment plant, connection to the public water supply and for all ancillary works at The Mews, Ballinlough, Co. Meath. The reasons for refusal were:

1. The subject site is located in a rural area outside any designated settlement and in a 'Rural Area Under Strong Urban Influence' as designated in the Meath County Development Plan 2007-2013. It is the policy of the planning authority as set out in RUR DEV SP1 to ensure that individual house developments in rural areas satisfy the housing requirements of persons who are an intrinsic part of the rural community in which they are proposed, subject to compliance with normal planning criteria. This policy is considered reasonable. It is considered, based on the information submitted with the planning application and the appeal, that the applicant has not established a rural generated housing need for a dwelling at this location. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.
2. Having regard to the location of the proposed development opening onto a section of the N3 National Primary Road, where the maximum speed limit applies, the proposed development would endanger public safety by reason of traffic hazard and the obstruction of road users. In

addition, the traffic turning movements generated by the development would interfere with the safety and free flow of traffic on the public road. The proposed development would also contravene the objectives of the planning authority, which are considered reasonable, to safeguard the carrying capacity of national roads network in the County through restricting further access points onto National primary roads outside of restricted speed limits. Furthermore, the proposed development would, if permitted, set an undesirable precedent for further similar developments in the vicinity and would, therefore, be contrary to the proper planning and sustainable development of the area.

3. The Bord is not satisfied on the basis of the information contained within the appeal that, notwithstanding the use of a proprietary wastewater treatment system, the ground would be suitable for the disposal of effluent. The proposed development would, therefore, be prejudicial to public health and would be contrary to the proper planning and sustainable development of the area.

DA/802984

Permission REFUSED for the retention of 'The Mews' as an independent dwelling, retention of existing site access and planning permission for the installation of a proprietary effluent treatment plant, connection to the public water supply and for all ancillary works on this site (same applicant). The reasons for refusal were that a rural generated housing need was not established; planning authority not satisfied that the ground would be suitable for the disposal of effluent and proposed access would endanger public safety by reason of a traffic hazard

01/271

Permission REFUSED to Ann Carter for retention of dwelling, septic tank, percolation area and entrance on this site

6.0 DEVELOPMENT PLAN PROVISIONS

The operative Development Plan is the Meath County Development Plan 2007-2013

7.0 LEGISLATIVE CONTEXT

In preparing my assessment for this reference, I have had regard to the following:

Planning and Development Act, 2000

Section 2(1)

In this Act, except where the context otherwise requires –

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal

"structure" as any building, structure, excavation or other thing constructed or made on, in or under any land, or part of a structure so defined, and-

(a) where the context so admits, includes the land on, in or under which the structure is situate

"use", in relation to land, does not include the use of the land by the carrying out of any works thereon

Section 3(1)

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

Section 4(1)

The following shall be exempted developments for the purposes of this Act -
(h) development consisting of the use 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;
(j) development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;

Planning and Development Regulations, 2001

Part 2 deals with exempted development

Article 6(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 2.

Article 9/1 of the Planning and Development Regulations 2001 provides for restrictions on exemption and states

9(1) 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:

(viii) Consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use

8.0 ASSESSMENT

The referrer has requested the Board to adjudicate on whether the replacement and/or alterations of windows and doors is or is not development or is or is not exempted development at 'The Mews', Ballinlough, Dunsoughlin, Co. Meath.

I consider that the replacement and/or alterations of windows and doors would involve works within the meaning of Section 3 of the Act. As such it constitutes development.

Therefore the next question in this case is whether or not the subject works represent exempted development. Section 4(1)(h) of the 2000 Act as amended enables certain works to be deemed exempted development where the carrying out of such works is 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'. In this instance, I consider the replacement and alterations specified above to the windows and doors to be relatively minor in nature, modest in scale and are essentially replacing almost 'like with like' in terms of size and design within existing opes. The main changes to most of the windows is the material of the frame, namely from timber framed to PVC and a change from single glazed to double glazed. The proposed works do not in my opinion 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. The remainder of the property is being retained as existing with the only works being proposed to the doors and windows. Therefore, having regard to all of the above it is my opinion that the proposed works would appear to be exempted development by virtue of Section 4(1)(h) of the Planning and Development Act 2000 as amended.

However, the main reasoning for the planning authority's decision is as follows. They state that as the existing dwelling unit does not have the benefit of a grant of planning permission, it is not considered that the proposed works in this application constitute exempted development due to their direct use associated with an unauthorised change of use of a garage to a residential unit. They contend that these works do not therefore come either (i) within the scope of section 4(1)(h) of the Planning and Development Act 2000 or (ii)

within the exempted development provisions of Class 1 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001.

It is recognised that the change of use of a garage to the existing dwelling to which these works pertain is unauthorised. It is stated that this change of use occurred approximately twenty years ago. The Planning Authority in their assessment are essentially stating that by virtue of the unauthorised use of the structure as a dwelling house the proposed works are not exempted development. In response, the referrer cites planning law which state that 'the character of a structure relates to its shape, colour, design, ornamental features and layout and not to its particular use...' (Cairnduff v. O'Connell). They continue by stating that as statutory provisions cannot be amended by regulation, the provision of Article 9 does not affect Section 4(1)(h) of the Planning and Development Act 2000 so as to otherwise disentitle the referrer from these statutory benefits in this particular case. I concur that it is a core principle of statutory interpretation that an Act cannot be amended by secondary legislation and if it had been the intention of the legislature to restrict privileges set out in Section 4(1)(h) to authorised structures only, this would have been explicitly and expressly stated in the Act.

I would concur with the opinion of the referrer and consider that the planning authority misinterpreted the legislation in this instance. While the secondary legislation provides for an expansion of classes of exempted development over and above those described in Section 4(1) (a)-(l) of the Act, it does not provide, as the referrer correctly points out, for any amendment to the exempted development provisions of the Act by way of subsequent regulation. I acknowledge that this point was also made in the Inspectors report of RL2162 in relation to a development in Swords, Co. Dublin. In addition, I concur with the referrer's assertion that it is clear from the text of Article 9(1) of the Regulations that the de-exemption referred to therein relates to development to which Article 6 relates, namely development of a class specified in Column 1 of Part 1 of Schedule 2 and does not apply to exempted development as set out in Section 4(1) of the Act, as amended.

7.0 RECOMMENDATION

Having regard to the above, I would consider that the proposed works are development and are exempted development. Accordingly I recommend an Order on the following terms:

WHEREAS the question has arisen as to whether the replacement and/or alterations of windows and doors is or is not development is or is not exempted development at 'The Mews', Ballinlough, Dunsoughlin, Co. Meath.

AND WHEREAS Richard Carter requested a declaration on the said question from Meath County Council and the said Council issued a declaration on the 30th day of April 2010, stating that the said development was not exempted development requiring planning permission, having regard to the direct use associated with an unauthorised change of use:

AND WHEREAS the said Richard Carter referred the declaration for review to An Bord Pleanála on the 11th day of May 2010:

AND WHEREAS An Bord Pleanála, in considering this reference, had regard particularly to:

- a) Section 3(1) of the Planning and Development Act, 2000,
- b) Section (4)(1)(h) of the Planning and Development Act, 2000,
- c) Articles 6 and 9(1)(a)(viii) of the Planning and Development Regulations, 2001,

AND WHEREAS An Bord Pleanála has concluded that

- a) the proposed replacement and/or alterations to windows and doors at 'The Mews', Ballinlough, Dunsoughlin, Co. Meath does come within the scope of Section (4)(1)(h) of the Planning and Development Act, 2000 as amended and are considered to be exempted development
- b) the restrictions on exemption contained in Article 9 of the Planning and Development Regulations 2001 apply to exemptions allowed under Article 6 of the said Regulations only and do not restrict any exempted development under Section 4(1) of the Planning and Development Act 2000

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the said provision of replacement and/or alterations of windows and doors at 'The Mews', Ballinlough, Dunsoughlin, Co. Meath is development and is exempted development

L. Dockery
Inspectorate

31st August 2010

