

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1

AN BORD PLEANÁLA	
LDG-	<u>043526-21</u>
ABP-	
10 SEP 2021 ^{o.k}	
Fee: €	<u>220</u> Type: <u>cheque</u>
Time:	<u>10.50</u> By: <u>Hanel</u>

10 September 2021

Re: Referral of a Declaration under Section 5 of the Planning and Development Act, 2000, as amended

Site at TRC House, Dundrum Road, Dublin 14

DLRCC Ref.: 10/521

Dear Sir

This Referral of a Declaration under section 5 of the Planning and Development Act, 2000, as amended, is submitted on behalf of Dundrum TRC Ltd., Unit 7 Western Parkway Business Centre, Ballymount, Dublin 12.

A Declaration is sought in respect of the following matter:

'Whether the use of TRC House for residential use, as provided for under article 10(6) of the Planning and Development Regulations, 2001, as amended, is exempt development. This Declaration excludes the lower ground floor area identified on Drawing No. 0213 titled 'Proposed Lower Ground Floor Plan'.

Dun Laoghaire Rathdown County Council issued a Notification of Declaration dated 25 August 2021, stating that the development is not exempt development. A copy of the Notification, and the Planner's Report setting out the reasons, is attached at Appendix 1.

The statutory referral fee of €220 is attached herewith.

In summary, DLRCC determined that the proposed change of use was not exempt on the basis that:

1. Article 10(6)(iii) requires that the property is vacant for 2 years prior to the commencement of the development. DLRCC concluded that works that may facilitate the change of use commenced prior to the property being vacant for 2 years, and that the works cannot be separated from the use for the purpose of determining what is the exempt 'development' for the purpose of the Regulations.
2. Article 10(6)(d) requires that the units comply with the internal standards for co-living contained in the 2018 Apartment Guidelines. On the basis that these standards have been removed from the 2020 Guidelines, DLRCC concluded that the proposed development cannot comply with the Regulations.

Directors:
Declan Brassil &
Sharon Gorman

Reg No.:
329512

As detailed in Section 1, below, the subject development has been the subject of two previous section 5 applications to DLRCC. With particular regard to the most recent Declaration under section 5 Ref. 62/21, DLRCC determined that the proposed use was not exempt on the basis that: (1) Article 10(6)(c)(iii) - works had commenced prior to the building being vacant for 2 years; (2) Article 10(6)(d)(vi) – the Apartment Guidelines (2020) state '*co-living developments should not generally be permitted*'; and, (3) Article 10(6)(d)(vii) – natural daylighting to habitable rooms.

- Reason No. 1 of that (and the previous) Declaration is the same as Reason No. 1 of the subject referral to the Board. As detailed in section 3 below, Counsel Opinion was submitted with the section 5 application setting out the basis on which the Council had erred in law on this matter.
- Reason 2 is also generally consistent with the current decisions, stating that the 'co-living' developments cannot be 'permitted' by reason of the updated Apartment Guidelines 2020 removing references to 'co-living'. [This interpretation of the 2020 amendments to the Apartment Guidelines renders article 10(6) obsolete, and on that basis no proposal for co-living can ever be exempt under article 10(6).]
- Reason No. 3 related to the requirement under article 10(6)(vi) that habitable rooms have adequate natural lighting. 3D Design Bureau was engaged to undertake an assessment of the Average Daylight Factor (ADF) for each room against the relevant BRE Guidelines minimum ADF values. DLRCC has concluded on this application that this requirement of the Regulations is satisfied.

1. Previous Section 5 Declaration Applications

1.1. DLRCC Reg. Ref. 08/21

An Application for Declaration under Section 5 of the PDA 2000 was submitted to Dun Laoghaire-Rathdown County Council (DLRCC) on 22 January 2021, in relation to the intended change of use of TRC House from office to residential after 29 April 2021. A decision was issued by DLRCC on 17 February 2021, which stated the development was not exempt having regard to Article 10(6)(c)(iii) and Article 10(6)(d)(xi) of the PDA 2001.

The primary reasons for considering that the proposed change of use was not exempt were:

- Article 10(6)(c)(iii) states '*the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development*'. It was considered by DLRCC that, given the vacancy period had not elapsed at the time the declaration was sought, that a declaration can only be issued based on the circumstances at the time of writing, and not a future date.
- Article 10(6)(d)(xi) states '*no development shall relate to matters in respect of which any of the restrictions set out in subparagraph (iv), (vii), (viiA), (viiB), (viiC), (viii) or (ix) of article 9(1)(a), or paragraph (c) or (d) of Article (9)(1), would apply*'. The effect of this Article 'de-exempt' works in relation to an unauthorised structure.

The Declaration concluded on the question in relation to the appropriate commencement date being 29 April 2021 that on the basis that the Declaration was being made in advance of that date **that it was not appropriate to make a determination on that matter**. Accordingly, rather than appeal that decision which was not considered to be legally correct or sound, the more appropriate and expeditious remedy was considered to be the submission of a revised Section 5 Application after 29 April 2021.

With regard to the matter of unauthorised development 'de-exempting' otherwise exempt works, it is noted that a basement office space was constructed at the rear of the building on part of the site that permitted as a car parking area. These works were undertaken in 1971 without the benefit of planning permission.

These works could be considered to come within the scope of Section 4(1)(g) of the Local Government (Planning and Development) Act, 1963, (the same provision as 4(1)(h) in the PDA 2000) and as such were exempt and that part of the structure is authorised. Accordingly, Article 9(1)(a) does not de-exempt any change of use of this area. Notwithstanding, this area was omitted from the subsequent section 5 applications, including this application.

1.2 DLRCC Reg. Ref. 61/21

An Application for Declaration under Section 5 of the PDA 2000 was submitted to Dun Laoghaire-Rathdown County Council (DLRCC) on 13 May 2021. Notwithstanding that the stated reasons on Ref. 08/21 addressed to stated reasons on Ref. 08/21, DLRCC issued a Declaration on 9 June 2021, stating the development was not exempt, citing different reasons under article 10(6)(c)(iii) and article 10(6)(d)(vi) and (vii).

The reasons were:

- Article 10(6)(c)(iii) states *'the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development'*. It was considered by DLRCC that given that works had commenced at TRC House on 17 August 2020, prior to the building being vacant for 2 years, the development was not deemed to be exempted development.
- Article 10(6)(d)(vi) states *'dwelling floor areas and storage spaces shall comply with the minimum floor area requirements and minimum storage space requirements of the "Sustainable Urban Housing: Design Standards for New Apartments – Guidelines for Planning Authorities" issued under section 28 of the Act of any subsequent updated or replacement guidelines'*. It was considered by DLRCC that, given the Department of Housing, Local Government and Heritage published an updated version of the Guidelines in December 2020 stating that *'shared accommodation/co-living developments will not generally be permitted'* and remove the internal standards for co-living units. Consequently, it was concluded that was reasonable to assume the exempt development was not in accordance with Article 10(6)(d)(vi) as the revised Guidelines state *'co-living developments should not generally be permitted.'*
- Article 10(6)(d)(vii) states *'rooms for use, or intended for use, as habitable rooms shall have adequate natural lighting.'* It was considered by DLRCC that the proposed kitchen and canteen rooms located at basement level would not have adequate levels of light given the provision of windows for these areas.

2. Grounds of Referral

Counsel Opinion was obtained Conor Quinn BL in respect of Reason Nos. 1 and 2 of Ref. 61/21, and was submitted with the subject application. A copy of the Opinion is attached at Appendix 2. In summary, Counsel Opinion concludes that DLRCC erred in law in respect of Reason Nos. 1 and 2, and that the

development is exempt. DLRCC has not accepted Counsel's Opinion in relation to Reason No. 1, and has changed its position in respect of Reason No. 2 to one that it is submitted cannot be correct as a matter of law.

2.1 Reason No. 1 – 2 Year Vacancy

Article 10(6)(c)(iii) requires that *'the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development'*. DLRCC has determined that given that works had commenced on 17 August 2020, prior to the building being vacant for 2 years (i.e., 29 April 2021), the development was not deemed to be exempted development.

As noted, DLRCC's position on this matter is consistent with its Notification of Declaration under Ref. 61/21. Counsel's Opinion on the matter was submitted the application that is the subject of this Referral, and is relevant to this Referral. The Opinion (Appendix 2), sets out the relevant law and case law, and concludes as follows:

'32. Applying these principles to the facts of this case, the following emerges.

'33. Firstly, given the principle established in Simons and in Roadstone Provinces that a change of use takes place when the new use commences, the change of use has not yet taken place in this case.

'34. Leaving entirely to one side the finding of DLRCC that the works that were carried out in August 2020 were works that facilitated the change of use to residential use, and leaving to one side also the finding by DLRCC that TRC House continues to be advertised for commercial use, my understanding is that it is not disputed that TRC House is not currently resided in by anyone and is not currently used for residential purposes.

'35. Applying the principle per Roadstone Provinces, the new use has not yet commenced. As such, in accordance with the authority, regardless of the question of whether the August 2020 works were works that facilitated the change of use, and regardless of whether TRC House continues to be advertised for commercial use, it cannot be disputed that the change of use has not yet taken place.

'36. Secondly, this means that the "proposed development" for the purposes of Article 10(6)(b) and (c) has not yet taken place. As is outlined above, the "proposed development" for the purposes of Article 10(6)(b) and (c) is the change of use.

'37. Thirdly, as referenced above, the property remained "vacant" for the purposes of Article 10(6) throughout the period from April 2019 to the present day notwithstanding that works were carried out with effect from August 2020.

'38. Fourthly, the question that therefore arises is whether the following condition in Article 10(6)(c)(iii) has been fulfilled:

"(iii) the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development".

'39. The only possible answer is that this condition has been fulfilled. I understand that it is not disputed that TRC House has been vacant since April 2019 and remains vacant. On the basis outlined above, the proposed development, i.e., the change of use, has not yet taken place. Accordingly, on the assumption

that this remains the factual position at the time immediately prior to the taking place of change of use, the condition in Article 10(6)(c)(iii) is clearly fulfilled.

(d) Conclusion in respect of the Section 5 Declaration

'40. Accordingly, on the basis of all the above, in my view DLRCC erred in finding in the Section 5 Declaration as follows (at page 4) (with emphasis added):

"Article 10(c)(iii) requires that the subject property, or the relevant part of it, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development. Accordingly, TRC House would need to have been vacant until 29th April 2021 before the change of use and associated internal works can be carried out".

'41. In my view, on the basis set out above, it is not a correct reading of Article 10(6)(c)(iii) to say that it requires that "TRC House would need to have been vacant until 29th April 2021 before the change of use and associated internal works can be carried out". On the basis set out above, the requirement is that TRC House would need to have been vacant for two years before the change of use can be carried out (in an exempted fashion). For the reasons set out above, the associated internal works are not included within the meaning of "proposed development" for the purposes of Article 10(6)(c)(iii) and accordingly the carrying out of internal works is of no relevance in determining whether "the structure concerned... has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development".

'42. However as is set out above, it is apparent from the statutory provisions that the proposed development which is referred to in Article 10(6)(c)(iii) is the change of use. **The question of when related works were carried out is of no bearing on the question of when the "proposed development" i.e., the change of use took place. As such, in my view, DLRCC erred in law by finding that the development had commenced in August 2020 on the basis that this was when the associated works were carried out.** [Emphasis added]

It is noted that the Planner's Report addressing this matter states:

'Article 10(6) of the of the Regulations clearly states that "...the proposed development for residential use, and any related works, shall be exempt development for the purpose of the Act..." and also that "... the development is commenced and completed during the relevant period".

The Planner's Report has quoted two separate sub-sub-articles in one sentence, as if they appear as one sentence under the Regulations. This is patently wrong as a matter of legal interpretation, and with regard to what the legislation is actually providing for.

The Planning and Development Regulations 2018 amending the PDA 2001 actually state:

*'Article 10 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) is amended by inserting **the following sub-article** after sub-article (5).'* [Emphasis added]

Sub-article (6)(b) states:

*'(b) **This sub-article relates to a proposed development, during the relevant period, that consists of a change of use** to residential use from Class 1, 2, 3 or 6 of Part 4 to Schedule 1.'* [Emphasis added].

Accordingly, 'the development' provided for under Article 10(6), is a 'change of use', and parts (a) to (d) must be interpreted accordingly. In this regard, sub-article (6)(d) must be construed as relating only to the change of use. It is submitted that it is clear from the wording of Article 10(6) that the type of

proposed development that is exempted by Article (b) is the change of use.

This distinction between the works and the change of use for the purposes of article 10(6) is further addressed in the attached Counsel's Opinion, as follows:

'The relevant lesson in this regard that emerges from the case-law is that it is accepted that while there is a distinction in the planning code between works development and change of use development, it is a matter of fact as to whether a particular development is (i) works development, (ii) change of use development, or (iii) a combination of both. In this regard see for example Quinlan v An Bord Pleanála [2009] IEHC 228 (Laffoy J.) at paras. 95, 99; Roadstone Provinces Ltd v An Bord Pleanála [2008] IEHC 210 at para. 17; Bulrush Horticulture Ltd v An Bord Pleanála [2018] IEHC 58; Kildare County Council v Goode [1999] 2 IR 496. In this case however, due to the wording of Articles 10(6)(b) and (c), it is made clear by the wording of the statutory provision that the act of development that is exempted is the change of use and that it is this act of development that must commence at least 2 years after the period of vacancy began.

'A further question, with specific reference to Article 10(6)(c)(iii), is whether the carrying out of works (such as those in August 2020) do anything to disturb or exempt the period of vacancy. As we have seen, the condition in Article 10(6)(c)(iii) that is in question in this Opinion is as follows:

"(iii) the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development".

'Part of the factual background in this case is that the period of vacancy commenced in April 2019 and certain internal works were carried out starting in August 2020 (i.e., prior to the expiry of the 2 year period). Although this issue did not arise in the Section 5 Declaration, for completeness it is proposed to discuss briefly the question of whether the carrying out of works does anything to disturb a period of vacancy.

'The answer in my view is no. The word "vacant" is not defined in either the PDA 2000 or the PDRs. The ordinary meaning of the word "vacant" when used in relation to a property in law is "not occupied". See for example the definition of the word "vacant" in the Concise Oxford English dictionary, see also for example section 17(2) of the Landlord and Tenant Amendment Act 1980, which refers to a landlord requiring vacant possession "for the purpose of carrying out a scheme of development of property". This supports the view that in Irish law, a property remains vacant even where works are being carried out in it.'

It is noted that article 10(6)(d) refers to 'commenced and completed'. This must be interpreted as clumsy drafting and it cannot dislodge the clear legislative words used under parts (b) and (c) that clearly define and circumscribe 'the proposed development' for the purposes of sub-article 6 being the change of use. Furthermore, Circular PL01/2018 referenced in the Planner's Report cannot be relied upon as a legal interpretation, and cannot supplant what the legislation actually provides for.

Accordingly, it is submitted that DLRCC has erred in law in determining that works undertaken that may facilitate a change of use (and that could otherwise be considered to be exempt under section 4(1)(h) of the PDA 2000¹), that were undertaken outside of the relevant period, have the effect of de-exempting the proposed development (i.e., the change of use).

¹ The floor plans of the building at the time of acquisition and prior to any works that are the subject of the referral are indicated on the sales brochure, attached at Appendix 3.

2.2 Reason No. 2 – The Apartment Guidelines

As noted in Section 1.2, DLRCC stated in its notification under ref. 61/21 that Article 10(6)(d)(vi) requires that *'dwelling floor areas and storage spaces shall comply with the minimum floor area requirements and minimum storage space requirements of the "Sustainable Urban Housing: Design Standards for New Apartments – Guidelines for Planning Authorities" issued under section 28 of the Act of any subsequent updated or replacement guidelines'*. It was considered by DLRCC that the updated version of the Guidelines in December 2020 stated that *'co-living developments should not generally be permitted'*, and on that basis the proposed development was not permitted, could not meet the floor area and storage space requirements, was therefore was not exempt.

Counsel's Opinion was also sought on this matter and it concludes that:

'In its ordinary meaning, "planning permission" does not include a declaration under section 5 as to whether a particular development constitutes development.

'In addition, this is in accordance with the relevant definition in the PDA 2000. As has been discussed above, it is established by recent Court of Appeal authority that, in interpreting section 28 Guidelines, it shall be assumed that language used is intended to be consistent with the meanings provided by the PDA 2000. Section 2 of the PDA 2000 provides that the following is the definition of the word "permission":

"'permission' means a permission granted under section 34, 37G or 37N, as appropriate". '...'

'...As such, in my view the correct interpretation of section 5.21 and SPPR 9 is that the provisions contained therein apply to decisions on applications for planning permission under section 34, 37G or 37N of the PDA 2000 or under section 9 of the 2016 Act, but not to applications for a declaration under section 5 of the PDA 2000. In other words, section 5.21 and SPPR 9 are simply not applicable in the context of a decision under section 5 of the PDA 2000.

'As such, in my view, DLRCC erred in law in applying section 5.21 and SPPR 9 in making its decision on the Section 5 Declaration in this case.'

Counsel's Opinion is clear that DLRCC has again erred in law in relying on the removal of the standards provided for under SPPR 9 from the 2020 Apartment Guidelines.

Out of an abundance of caution, the submitted plans and documents clearly demonstrated how the proposed development met the Apartment Guidelines (2018) standards. The standards were removed from the 2020 Guidelines insofar as they related to a determination of an application for planning permission. In those circumstances, the appropriate and reasonable approach to the requirements of article (6)(d)(vi) is to demonstrate compliance with the 2018 Apartment Guidelines, being the Guidelines in place at the time of the making of the coming into effect of article 10(6) and being the only relevant standards available.

It is further submitted that DLRCC's interpretation of the 2020 amendments to the Apartment Guidelines renders article 10(6) obsolete, and on that basis no proposal for co-living can ever be exempt under article 10(6). Article 10(6) has not been revoked, and Action Item No. 20.3 of **Housing for All** states:

'Review and Extend planning regulations that exempt certain vacant commercial premises for requiring planning permission to change of use for residential purposes to 2025.'

Accordingly, DLRCC's interpretation is also considered to be contrary to Government Policy published since it's decision that clearly establishes that the article 10 provisions are still in effect, and will be

extended.

On the basis of the foregoing, it is submitted that DLRCC has erred in law in respect of the stated reasons for issuing a Declaration to the effect that the proposed development is not exempt, and the Board is respectfully requested to overturn that decision and issue a declaration confirming that the proposed use is exempt.

I trust that this application is in order and I look forward to an early and favourable decision.

Yours faithfully,

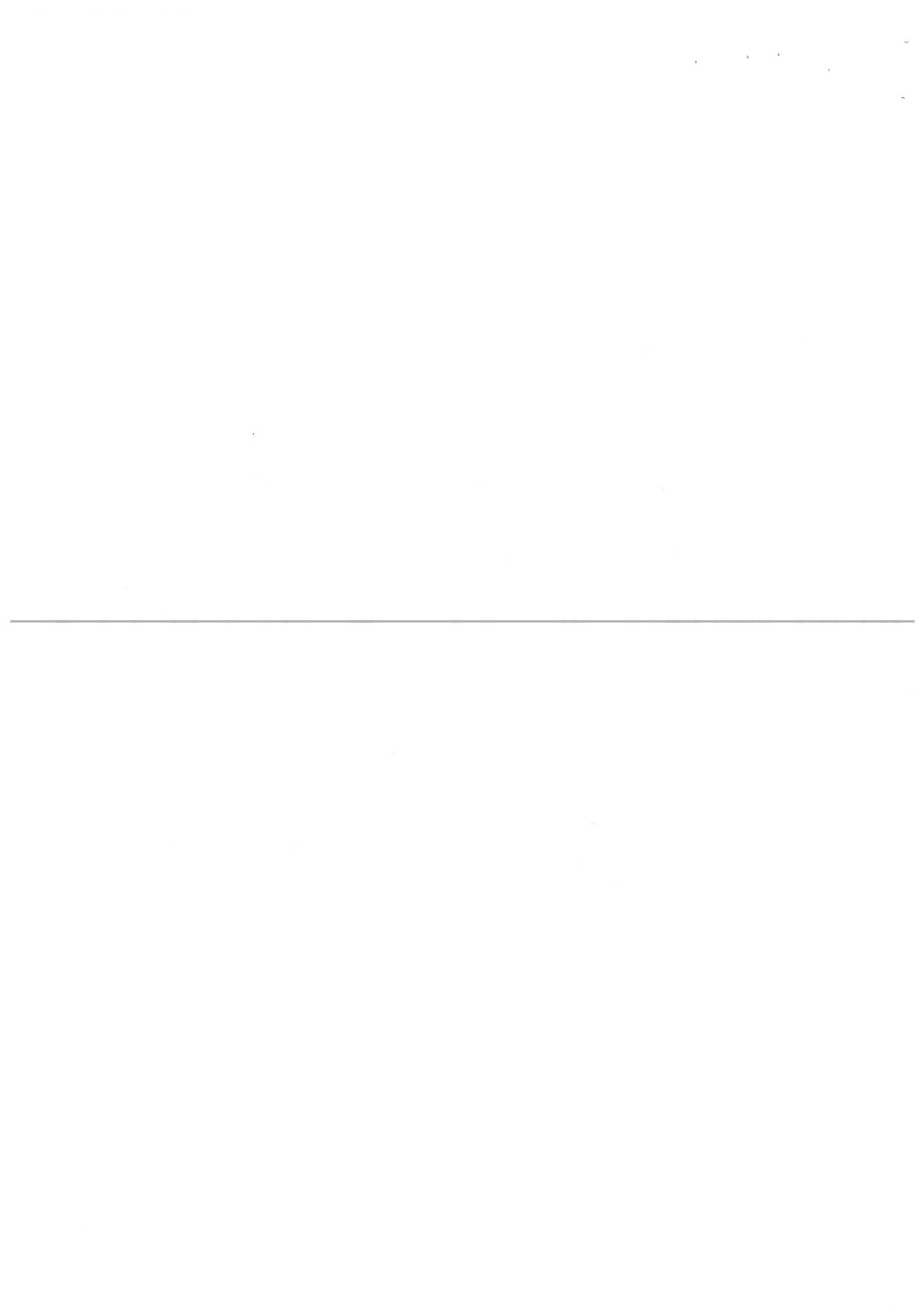


Declan Brassil

Declan Brassil and Co.

Appendix 1

DLRCC's Notification of Declaration (including Planner's Report)



Planning Department
An Rannóg Pleanála
Registry Section
Ciarán Carolan
Asst. Staff Officer
Direct Tel: 01 2054700
Fax: 01 2803122

Aoife O' Connor - Massingham,
Declan Brassil & Co. Ltd.
Lincoln House
Lincoln Lane
Arran Quay
Dublin 7

Reference No: Ref10521

Application Type: Declaration on Development and Exempted Development Act
– Section 5, Planning & Development Act (as amended)

Registration Date: 29-Jul-2021

Decision Date: 25-Aug-2021

Location: Trc House, Dundrum Road, Dublin 14

Development Works: Whether the use of TRC House for residential use, as provided for under article 10(6) of the Planning and Development Regulations, 2001, as amended, is exempt development. This declaration excludes the lower ground floor area identified on Drawing No. 0213 titled 'Proposed Lower Ground Floor Plan'.

NOTIFICATION OF DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

In pursuance of its functions under the planning & Development Act, 2000 (as amended), Dún Laoghaire-Rathdown County Council has, by Order No. Ref.REF124/21 dated 25-Aug-2021 decided to issue a Declaration that:

Having regard to Article 10(6)(c)(iii) and Article 10(6)(d)(vi) of the Planning and Development Regulations, 2001 to 2021 I recommend that pursuant section 5 of the Planning and Development Act 2000, as amended, Dún Laoghaire-Rathdown County Council advise the Applicant that:

- The change of use of TRC House to residential use as provided for under Article 10(6) of the Planning and Development Regulations 2001 as amended,

Is considered development and is not considered to be Exempted Development.

Date of issue: 25-Aug-2021

Signed: Ciarán Carolan
For Senior Executive Officer

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

Dún Laoghaire-Rathdown County Council

LOCAL GOVERNMENT ACTS 1925 - 2014

RECORD OF EXECUTIVE BUSINESS CHIEF EXECUTIVE'S ORDERS

PLANNING & DEVELOPMENT ACT, 2000 (as amended)

SECTION 5 PLANNING & DEVELOPMENT ACT 2000 (as amended)

Reference No: Ref10521

Applicant: Dundrum TRC Ltd. Unit 7, Western Parkway Business Centre, Ballymount Road, Dublin 12

Agent: Aoife O' Connor - Massingham, Declan Brassil & Co. Ltd. Lincoln House, Lincoln Lane, Arran Quay, Dublin 7

Registration Date: 29-Jul-2021

Location: Trc House, Dundrum Road, Dublin 14

Agent: Aoife O' Connor - Massingham, Declan Brassil & Co. Ltd. Lincoln House, Lincoln Lane, Arran Quay, Dublin 7

Description of Works: Whether the use of TRC House for residential use, as provided for under article 10(6) of the Planning and Development Regulations, 2001, as amended, is exempt development. This declaration excludes the lower ground floor area identified on Drawing No. 0213 titled 'Proposed Lower Ground Floor Plan'.

Report:

Miguel Sarabia

PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED
SECTION 5

Ref: 105/21

MATTER FOR DETERMINATION:

Declaration pursuant to Section 5 of the Planning and Development Act, 2000 (as amended), in respect of works at TRC House, Dundrum Road, Windy Arbour, Dublin 14.

SITE:

The subject site, TRC House at Dundrum Road, comprises a two storey over basement office building permitted under Reg. Ref. 3219. The building is set back from the road with access to the front.

ZONING AND OTHER OBJECTIVES

The zoning objective at this site is Objective 'NC' - 'To protect, provide for and/or improve mixed-use neighbourhood centre facilities.'

Dún Laoghaire-Rathdown County Council

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DEPARTMENTAL REPORTS

No reports requested/received.

PLANNING HISTORY

The Applicant states that permission for the existing office building was received under Reg. Ref. 3219, which granted permission for: "two storey office block at Windy Arbour, Dundrum" on 22nd May 1967.

Given the vintage of the Planning History it has not been possible to confirm the above details. No drawings from the original permission have been furnished as part of the subject s.5 application.

ENFORCEMENT HISTORY

ENF 22120.

PREVIOUS SECTION 5 DECLARATIONS

Ref. 8/21 – Development, not exempt

Ref. 62/21 – Development, not exempt

NOTIFICATION OF CHANGE OF USE EXEMPTION

On 30th March 2020, the Applicant lodged with the Planning Authority a Notification (Ref. SA/60013) of intention to avail of exempted development provisions under Article 10(6) of the Planning and Development Regulations 2001 to provide 1 residential unit of 685 sq m with 14 No. bedrooms. The Notification stated that works will commence on 12th April 2020.

PROPOSED DEVELOPMENT

A question has arisen as to:

'Whether the use of TRC House for residential use as provided for under Article 10(6) of the Planning and Development Regulations 2001 as amended, is exempt development. This Declaration excludes the basement area identified on Drawing No. 0203 titled 'Basement Floor Plan' is or is not development or is or is not exempted development within the meaning of the Planning and Development Act 2000, as amended.

It is noted that this application is very similar to that previously determined under Ref. 62/21 but which includes legal opinion, outlining that the Planning Authority had erred in its previous determination.

ASSESSMENT

The first matter for determination is whether the proposal would or would not constitute development.

With regard to the proposal, the Planning Authority refers to Section 3 (1) of the Planning and Development Act, 2000 (as amended), which defines 'development' as follows:

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'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'.

Having regard to the above, it is considered that the proposed actions, namely, the change of use of TRC house from office use (Class 2 as per Part 4 of Schedule 1 of the Planning and Development Regulations 2001-2021) to residential, comprises a material change of use and, therefore comprises development.

Exempted Development or not Exempted Development

The second matter to determine is whether the proposal would constitute exempted development or not. The following legislation is relevant in this regard.

Section 4(2)(a) of the Planning and Development Act, 2000 (as amended) provides that the Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act.

Article 10(6) of the Planning and Development Regulations 2001-2021 relates to a proposed development, during the relevant period, that consists of a change of use to residential use from Class 1, 2, 3 or 6 of Part 4 to Schedule 1, when

- (i) the structure concerned was completed prior to the making of the Planning and Development (Amendment) (No. 2) Regulations 2018,
 - (ii) the structure concerned has at some time been used for the purpose of its current use class, being Class 1, 2, 3 or 6, and
 - (iii) the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development,
- Then the proposed development for residential use, and any related works, shall be exempted development for the purposes of the Act, subject to the conditions and limitations set out in paragraph (d).

Each of the above requirements will be assessed in turn below

Date of completion of the structure.

The Applicant states that permission for the existing two-storey office building was granted on 22nd May 1967 under Reg. Ref. 3219. The Applicant has submitted a letter by Mr David Terry, qualified Engineer dated 8th May 1992 certifying that the office block permitted under Reg. Ref. 3219 was completed in October 1969.

On the basis of the information provided by the Applicant, the Planning Authority is satisfied that the structure concerned was completed prior to the making of the Planning and Development (Amendment) (No. 2) Regulations 2018 on 8th February 2018.

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Use of the structure

The Applicant has submitted an extract of the Kompass Website showing the contact address of the company Total Retail Control Limited to be at TRC House, Dundrum Road. The Planning Authority is satisfied that TRC House has at some time been used for the purpose of its current use class, being Class 2.

Vacancy Period

The Applicant has submitted documentation from the receiver of the subject property and the current owner stating that the property was vacated on 29th April 2019.

Article 10(6)(c)(iii) requires that the subject property, or the relevant part of it, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development. Accordingly, TRC House would need to have been vacant until 29th April 2021 before the change of use and associated internal works can be carried out.

Under SA/60013 the applicant notified the Planning Authority that it was intended to avail of the exempt development provisions under Article 10(6) prior to the commencement of the proposed change of use and any related works. The Notification stated that works would commence on 12th April 2020.

Notwithstanding, the Planning Authority, is aware that development was being carried out for the provision of bedrooms and ensuite bathrooms at basement, ground, and first floor levels and for the construction of kitchen, dining and living areas on the 17th August 2020.

The Applicant appears to acknowledge that works have occurred but states that those comprise refurbishment works, exempt under section 4(1)(h) of the Planning and Development Act 2000 (as amended), given that they are internal only and do not materially affect the external appearance of the structure. The Applicant also states that the structure remains in office use and is being marketed as such.

The applicant has not provided drawings showing floor plans prior to the works. It is noted that such plans were also not provided as part of previous section 5 (Ref 8/21 or Ref 62/21) declaration applications.

Given the nature of the works, which include the provision of ensuite bathrooms in each room and kitchen, dining and living areas; it is considered that these works explicitly relate to the residential use for which a s.5 declaration is sought. Article 10(6) of the Regulations clearly state that '... the proposed development for residential use, and any related works, shall be exempted development for the purposes of the Act...' and also that '... the development is commenced and completed during the relevant period'.

In addition, Circular Letter PL 01/2018 clearly and unambiguously refers to the change of use and any related works. It is the Planning Authority's strong contention that such development relates to both the change of use and the associated works as both are intrinsically linked.

It is clear that the above circular and additions to the Regulations consider the Change of Use and related works as one action rather than two separate acts as being described by the applicants, that is, a) carrying out internal alterations under section 4(1)(h) and b) implementing a change of use at a fixed point in

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time. To view the subject development in such a fashion would negate that inserted by article 2 of S.I. No. 30/2018 – Planning and Development (Amendment) (No. 2) Regulations 2018.

Evidenced by the existing and proposed drawings submitted, the works have already taken place. It is noted that works to adapt the structure from Class 1, 2, 3 or 6 of Part 4 of the Regulations to residential use are provided for under Article 10(6)(d)(ii) and therefore as outlined above Section 4. (1)(h) of the Planning and Development Act is not applicable in this instance.

It is therefore clear that the development had commenced before the property had been vacant for 2 years prior.

Given that the development had already commenced on 17th August 2020 and that the subject structure had not been vacant for 2 years at that point in time (the property was vacated on 29th April 2019) and therefore, having regard to Article 10(6)(c)(iii) of the Regulations, the proposed development is not considered to be exempted development.

Conditions and limitations

The Planning Authority also has had have regard to relevant conditions and limitations. Having regard to the subject Declaration sought by the Applicant in this instance, it is considered that Article 10(6)(d) of the Regulations must be considered in full

(i) The development is commenced and completed during the relevant period. The Planning Authority is satisfied that the development commenced after the making of the Planning and Development (Amendment) (No. 2) Regulations 2018.

(ii) Subject to sub-paragraph (iii), any related works, including works as may be required to comply with sub-paragraph (vii), shall affect only the interior of the structure and shall not materially affect the external appearance of the structure so as to render its appearance inconsistent with the character of the structure or of neighbouring structures.

The Planning Authority is satisfied that the works shown on the submitted plans affect only to the interior of the structure

(iii) Any related works for the alteration of existing ground floor shop fronts shall be consistent with the fenestration details and architectural and streetscape character of the remainder of the structure or of neighbouring structures. There is currently no ground floor shop front at the subject structure.

(iv) No development shall consist of or comprise the carrying out of works to the ground floor area of any structure which conflicts with any objective of the relevant local authority development plan or local area plan, pursuant to the Part 1 of the First Schedule to the Act, for such to remain in retail use, with the exception of any works the purpose of which is to solely provide on street access to the upper floors of the structure concerned.

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There is no objective in the current Development Plan 2016-2022 requiring the ground floor of the subject structure to be used for retail.

(v) No development shall consist of or comprise the carrying out of works which exceeds the provision of more than 9 residential units in any structure. Having regard to the plans submitted, 1 No. co-living unit with 12 No. ensuite bedrooms is proposed.

(vi) Dwelling floor areas and storage spaces shall comply with the minimum floor area requirements and minimum storage space requirements of the "Sustainable Urban Housing: Design Standards for New Apartments — Guidelines for Planning Authorities" issued under section 28 of the Act or any subsequent updated or replacement guidelines.

In December 2020 the Department of Housing Local Government and Heritage published an updated version of the 'Sustainable Urban Housing: Design Standards for New Apartments — Guidelines for Planning Authorities'. Section 5.21 of the updated Guidelines states that 'It is a Specific Planning Policy Requirement (SPPR) of these Guidelines that shared accommodation / co-living developments will not generally be permitted.'

The amendments to the 2018 version of the Guidelines also include the removal of the internal standards for co-living units and therefore the dwelling floor areas and storage spaces within the subject proposal cannot comply with the minimum requirements of the Guidelines and would not be in accordance with Article 10(6)(d)(vi) of the Regulations.

(vii) Rooms for use, or intended for use, as habitable rooms shall have adequate natural lighting.

Having regard to the definition of 'habitable room' set out in Article 10(6)(a) of the regulations and the information submitted by the applicants, the Planning Authority accepts that the proposed kitchen and canteen rooms located at basement level would have adequate levels of light and it is also noted that those areas that do not receive adequate light at basement level are to remain free from habitable use / are excluded from this application.

(viii) No development shall consist of or comprise the carrying out of works to a protected structure, as defined in section 2 of the Act, save where the relevant planning authority has issued a declaration under section 57 of the Act to the effect that the proposed works would not materially affect the character of the structure or any element, referred to in section 57(1)(b) of the Act, of the structure.

The subject structure is not a Protected Structure.

(ix) No development shall contravene a condition attached to a permission under the Act or be inconsistent with any use specified or included in such a permission.

The Planning Authority is satisfied, in principle that no condition would be contravened.

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The Planning Authority is satisfied that the proposal accords with the conditions and limitations set in sub-articles 10(6)(d) (x), (xi) and (xii). An issue was raised in the previous section 5 (Ref. 8/21) in relation to unauthorised development. The Applicant has excluded what appears to be the unauthorised structure from the area subject to this Section 5 Declaration. Thus, no issues arise in this instance.

Therefore, having regard to Article 10(6)(c)(iii) and Article 10(6)(d)(vi) of the Planning and Development Regulations 2001- 2021 the proposed development is not exempted development.

CONCLUSION

In conclusion, the proposed development is not deemed exempted development in accordance with the Planning and Development Act 2000, as amended, and the Planning and Development Regulations, 2001-2021.

RECOMMENDATION

I recommend that the applicants agent, Aoife O' Connor - Massingham, Declan Brassil & Co. Ltd. Lincoln House, Lincoln Lane, Arran Quay, Dublin 7, be informed that:

Having regard to Article 10(6)(c)(iii) and Article 10(6)(d)(vi) of the Planning and Development Regulations, 2001 to 2021 I recommend that pursuant section 5 of the Planning and Development Act 2000, as amended, Dún Laoghaire-Rathdown County Council advise the Applicant that:

- The change of use of TRC House to residential use as provided for under Article 10(6) of the Planning and Development Regulations 2001 as amended, **is considered development and is not considered to be Exempted Development.**


Administrative Officer

Executive Planner

ORDER

The issuing of a Declaration pursuant to Section 5 of the Planning & Development Act 2000, (as amended) to Aoife O' Connor - Massingham, Declan Brassil & Co. Ltd. Lincoln House, Lincoln Lane, Arran Quay, Dublin 7, that

Having regard to Article 10(6)(c)(iii) and Article 10(6)(d)(vi) of the Planning and Development Regulations, 2001 to 2021 I recommend that pursuant section 5 of the Planning and Development Act 2000, as amended, Dún Laoghaire-Rathdown County Council advise the Applicant that:

No. REF 124/21

Dún Laoghaire-Rathdown County Council

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• The change of use of TRC House to residential use as provided for under Article 10(6) of the Planning and Development Regulations 2001 as amended, **is considered development and is not considered to be Exempted Development.**

Is hereby approved.

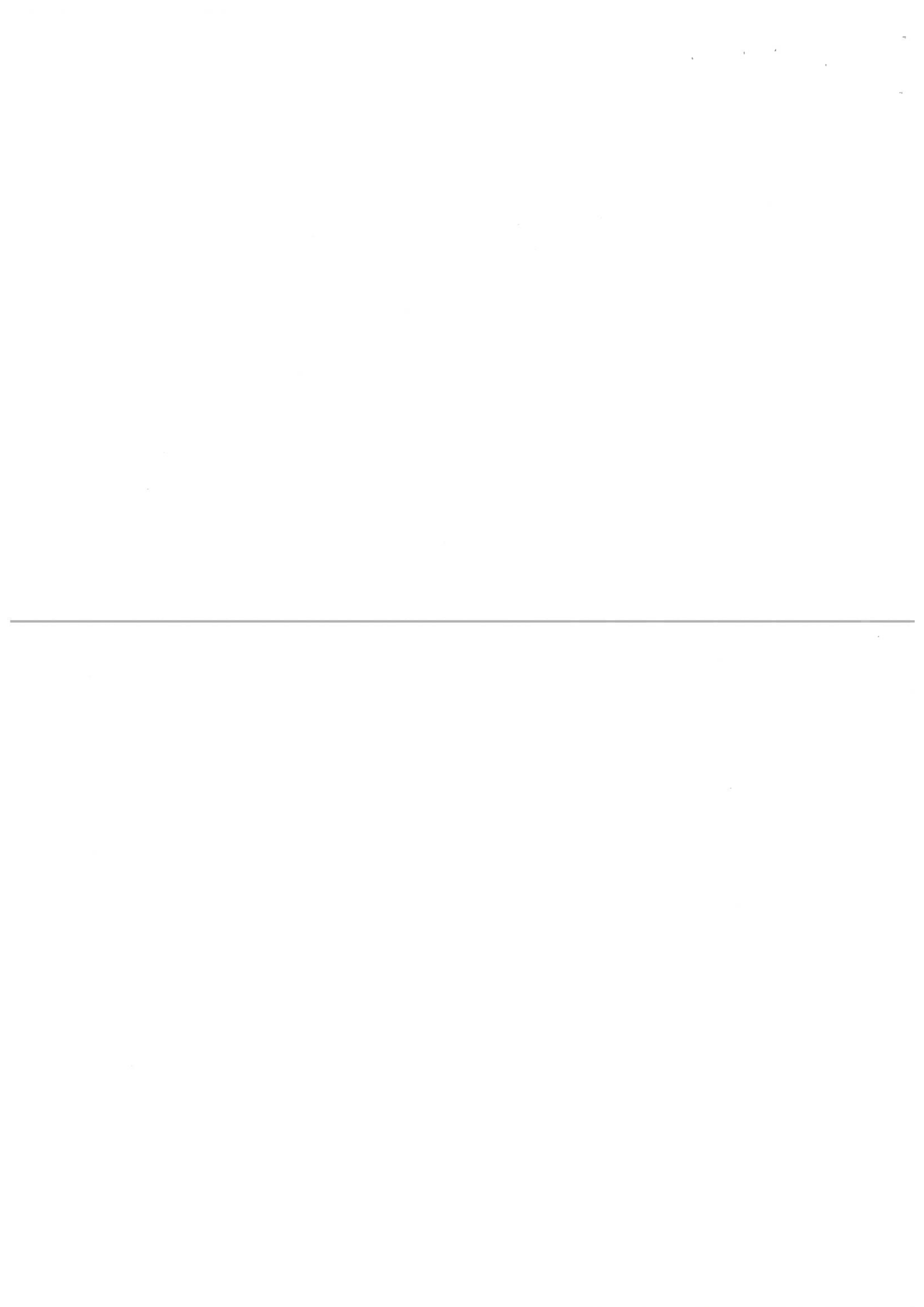
Signed:


Approved Officer

Dated:

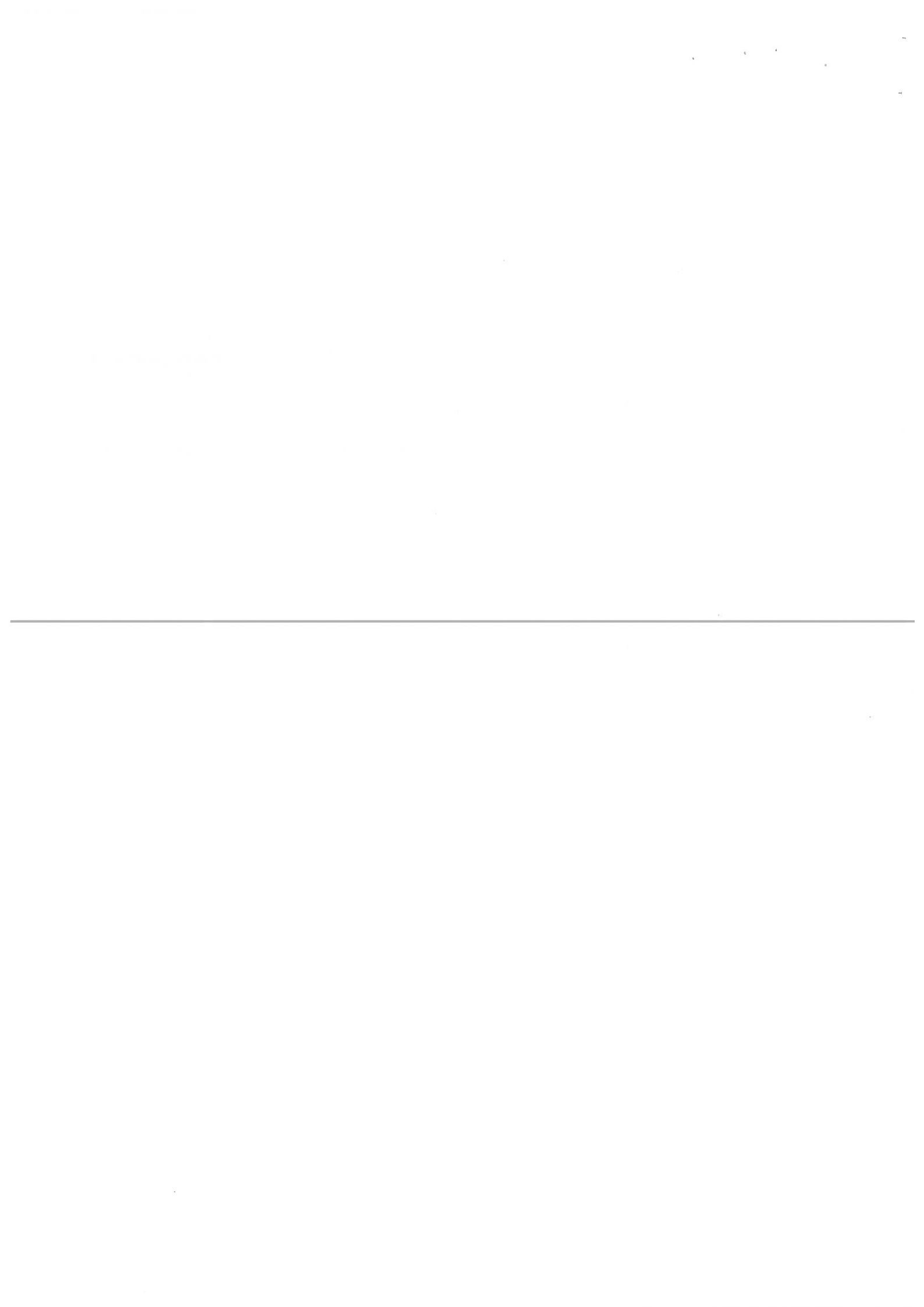
25/08/2021

Thereunto empowered by order of Príomhfheidhmeannach, Comhairle Contae Dhún Laoghaire-Ráth An Dúin, Order No. 2236, dated 26/06/2019, delegating to me all her powers, functions and duties in relation to the County Council of Dún Laoghaire-Rathdown in respect of this matter.



Appendix 2

Counsel Opinion – Conor Quinn, BL



CONOR QUINN
Barrister-at-Law

Law Library
Distillery Building
145-151 Church Street
Dublin 7

Declan Brassil
Declan Brassil & Company
Lincoln House
Phoenix Street
Smithfield
Dublin 7 D07 Y75P

2 July 2021

By email only: declan@dbcl.ie

Re: Opinion re: TRC House Dundrum, application for section 5 declaration

Your client: Dundrum TRC Limited (the "Developer")

Your Ref:

Dear Declan

I refer to the above matter and to your request, by email dated 17 June 2021, for an Opinion in relation to two issues, arising from a Section 5 Declaration by Dun Laoghaire Rathdown County Council ("**DLRCC**") dated 10 June 2021 in relation to a proposed development by the Developer at TRC House, Dundrum, Dublin (the "**Proposed Development**"):

- (1) Whether DLRCC erred in finding that the Proposed Development was not exempt on the basis of non-compliance with Article 10(6)(c)(iii) of the Planning and Development Regulations 2001 as amended (the "**PDRs**"), due to the fact that certain works were carried out in August 2020 prior to the expiry of the 2 year period vacancy;
- (2) Whether DLRCC erred in taking account of section 5.21 and SPPR 9 of the "*Sustainable Urban Housing: Design Standards for New Apartments – Guidelines for Planning Authorities*" as updated in 2020 (the "**2020 Guidelines**") in applying Article 10(6)(d)(vi) of the PDRs to conclude that the Proposed Development was not exempted development.

I set out my Opinion on these matters below.

Summary

1. In summary, my view in relation to issue (1) is that DLRCC erred in law in concluding that the Proposed Development was not exempt on the basis of non-compliance with Article 10(6)(c)(iii) of the PDRs. This provision requires there to be a 2-year period of vacancy immediately prior to the commencement of a proposed development, in order for it to qualify as exempted development.
2. DLRCC concluded that this provision was not complied with on the basis that certain works were carried out commencing in August 2020, which was approximately 1 year and 4 months after the

period of vacancy began. However for the reasons set out below, it is clear that the “*proposed development*” referred to in Article 10(6)(c)(iii) is a change of use and that works are explicitly excluded from the meaning of this phrase as used in this provision. As such, the correct test for the purposes of Article 10(6)(c)(iii) is whether there has been a period of vacancy of two years prior to the change of use. As such, DLRCC erred in law by applying the wrong test, by wrongly considering whether there was a period of vacancy of two years prior to the start of the works in question.

3. Given that, in accordance with the relevant authorities, a change of use occurs when the *change* occurs, i.e. when the new use actually commences, which has not yet occurred in this case, and on the assumption that the factual position remains that the new use has not yet commenced (i.e. that TRC House is not yet being used for residential purposes, i.e. is not yet resided in by any person), then in my view the 2-year vacancy requirement per Article 10(6)(c)(iii) is at this point complied with.
4. In relation to issue (2), my view is in summary that DLRCC erred in law here also. In the Section 5 Declaration, DLRCC applied section 5.21 and SPPR 9 of the 2020 Guidelines to conclude that the Proposed Development was not exempt. However the provisions of section 5.21 and SPPR 9 explicitly apply only to a decision in relation to “*granting planning permission*” and to a decision as to whether specific types of development will be “*permitted*”.
5. It is established by recent case-law that (a) SPPRs are to be carefully interpreted and applied, and (b) it is to be assumed in interpreting and applying section 28 Guidelines that language used in such Guidelines is intended to be consistent with that contained in the Planning and Development Act 2000, as amended (the “*PDA 2000*”). “*Planning permission*” clearly has a specific meaning within the PDA 2000 that does not include a decision on a section 5 declaration. This is also in accordance with the ordinary meaning of this phrase. Where the word “*permitted*” is used in the PDA 2000 with reference to a proposed development, this word is clearly intended to refer to planning permission, which as referenced does not include a section 5 declaration. As such, section 5.21 and SPPR 9 of the 2020 Guidelines are correctly to be applied only in a decision on an application for planning permission and not in a decision on an application for a section 5 Declaration, such as that at issue here.
6. Accordingly DLRCC erred in law in applying section 5.21 and SPPR 9 of the 2020 Guidelines in making its decision on the Section 5 Declaration.

Issue (1): Article 10(6)(c)(iii). Did the Planning Authority err in finding that the Proposed Development was not exempt on the basis of non-compliance with Article 10(6)(c)(iii) of the PDRs, due to the fact that certain works were carried out in August 2020 prior to the expiry of the 2 year period vacancy?

(a) *Introduction*

7. The issue here relates to the correct interpretation of Article 10(6)(b) and (c) of the PDRs. An application for a Section 5 Declaration was made on behalf of the Developer dated 12 May 2021 in respect of a Proposed Development in the form of a change of use from use as an office building to residential use at TRC House, Dundrum). By Section 5 Declaration dated 10 June 2021 (the “**Section 5 Declaration**”), DLRCC found *inter alia* that the Proposed Development did not constitute exempted development pursuant to Article 10(6)(c)(iii) of the PDRs.
8. The relevant finding in the Section 5 Declaration was as follows:

“Article 10(c)(iii) requires that the subject property, or the relevant part of it, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development. Accordingly, TRC House would need to have been vacant until 29th April 2021 before the change of use and associated internal works can be carried out.”

The Planning Authority is aware that development was carried out for the provision of bedrooms and ensuite bathrooms at basement, ground, and first floor levels and for the construction of kitchen, dining and living areas on the 17th August 2020.

The Applicant appears to acknowledge that works have occurred but states that those comprise refurbishment works, exempt under s. 4(1)(h) of the Planning and Development Act 2000 (as amended), given that they are internal only and do not materially affect the external appearance of the structure. The Applicant also states that the structure remains in office use and is being marketed as such. The applicant has not provided drawings showing floor plans prior to the 'refurbishment works'. It is noted that those plans were not provided as part of the previous section 5 (Ref 8/21) either. Notwithstanding, given the nature of the works, which include the provision of ensuite bathrooms in each room and kitchen, dining and living areas, it is considered that those closely relate to the residential use for which a s.5 declaration is sought. This is further evidenced by the existing and proposed drawings submitted were [sic] no physical works appear to be required to facilitate the proposed development. It is noted that works to adapt the structure from Class 1, 2, 3, or 6 of Part 4 of the Regulations to residential use are covered under Article 10(6)(d)(ii) and, thus, s.4(1)(h) of the Planning and Development Act is not deemed of direct relevance in this instance. It is therefore considered that development had commenced before the property had been vacant for 2 years prior.

Given that the development had already commenced on 17th August 2020 and that the subject structure had not been vacant for 2 years at that point in time (the property was vacated on 29th April 2019) and therefore having regard to Article 10(6)(c)(iii) of the Regulations, the proposed development is not deemed to be exempted development”.

9. Accordingly, the Section 5 Declaration found that the requirement in Article 10(6)(c)(iii), for the structure to have been vacant for a period of at least two years prior to the commencement of the proposed development, was not fulfilled. This was due to the finding by DLRCC that specific works which DLRCC found were carried out commencing in August 2020 “*closely relate to the residential use for which a s.5 declaration was sought*”. DLRCC went on to find that the proposed development therefore commenced in August 2020, and accordingly the structure had not been vacant for 2 years, and accordingly the test in Article 10(6)(c)(iii) is not fulfilled.
10. The central question that arises in determining whether this is valid legal finding is that of what constitutes the development in this case.

(b) Relevant legal provisions

11. “Development” is defined by section 3(1) of the PDA 2000 as follows:

“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”.

12. As such, development is defined as either works, or material change in use.

13. “Works” are defined in section 2 of the PDA 2000 as follows:

“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’.

14. "Use" is defined in section 2 of the PDA 2000 as follows:

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

15. Article 10(6)(b) and (c) of the PDRs provide as follows:

"(b) This sub-article relates to a proposed development, during the relevant period, that consists of a change of use to residential use from Class 1, 2, 3 or 6 of Part 4 to Schedule 1".

"(c) Notwithstanding sub-article (1), where in respect of a proposed development referred to in paragraph (b)—

(i) the structure concerned was completed prior to the making of the Planning and Development (Amendment) (No. 2) Regulations 2018,

(ii) the structure concerned has at some time been used for the purpose of its current use class, being Class 1, 2, 3 or 6, and

(iii) the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development,

then the proposed development for residential use, and any related works, shall be exempted development for the purposes of the Act, subject to the conditions and limitations set out in paragraph (d)".

16. It is clear from the ordinary wording of this Article, and in particular the underlined portions, that the type of proposed development that is exempted by Article 10(6)(b) is change of use.

17. This is made clear in the first instance by the wording of Article 10(6)(b): *"this sub-article relates to a proposed development.... that consists of a change of use..."*.

18. Crucially, this does not say *"a proposed development... that includes a material change of use"* or similar. The word used is *"consists"*. *"Consist"* is defined by the Concise Oxford English Dictionary (revised 11th ed., 2009) as *"be composed of"*. This means that the entirety of the proposed development that is exempted by Article 10(6)(b), and the development referred to in the phrase *"the proposed development"* as used in this provision, is the change of use.

19. This is confirmed by the wording of the last paragraph of Article 10(6)(c): *"... then the proposed development for residential use, and any related works, shall be exempted development..."*.

20. Crucially, this does not say *"a proposed development for any residential development, and any works included in the said development"* or similar. The phrase used is *"any related works"*. This makes clear that any works are considered to be related and in addition to, not part of, the *"proposed development"* that is exempted by Article 10(6)(b). This is of course consistent with the fact that as per Article 10(6)(b), the proposed development in question is made up of the change of use.

21. As such, the wording of the last paragraph of Article 10(6)(c) confirms that what is exempted is the proposed development referred to in Article 10(6)(b), which is the change of use, as well as any related works.

22. The reason this is all so important is that the phrase “*the proposed development*” is also used in Article 10(6)(c)(iii) which is the provision that was the basis for the part of the finding in the Section 5 Declaration that is under discussion here. Article 10(6)(c)(iii) provides that one of the conditions that must be fulfilled in order for a proposed development to be exempted under this Article is

“(iii) the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development”.

23. As has been made clear by the discussion above, the phrase “*the proposed development*”, as used in Article 10(6)(b) and (c), refers only to the change of use and not to any related works. As such, the effect of Article 10(6)(c)(iii) is that in order for this condition to be fulfilled, the structure in question must have been vacant for a period of 2 years or more immediately prior to the change of use.

24. The next question that arises is when a development which consists of a change of use is deemed to occur or commence. This question is answered by *Simons on Planning Law*, 3rd ed. at para 2-37: a change of use occurs when the change actually takes place (with emphasis added).

“As is apparent from the definition, in order for there to be a material change in use two conditions must be satisfied: first, there must be an actual change in use; the act of development is the change, not the use itself. Secondly, the change must be material, that is material for planning purposes”.

25. Support for the above proposition is provided by the judgment of the High Court (Finlay Geoghegan J.) in *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210 at para. 51 (which was a judgment that related to quarrying operations) (with emphasis added):

“As stated earlier in this judgment, the potential act of development which is the subject matter of the referral, is a potential material change in use of the lands by the applicant by the planned southward expansion of the quarried area. If it is determined that such operation will constitute a change in use of the lands, then the change in use will take place once those planned operations commence. The potential act of development is one which takes place at a current time. It therefore appears to me that the materiality for planning purposes of any change in use identified must be determined at the time it takes place which is a current time. Its materiality for planning purposes must therefore be considered in accordance with current planning considerations for the relevant area”.

26. What the underlined portion of this judgment means is that the change in use occurs when the new use commences.

27. The next question that arises is whether there anything in relevant case-law to dislodge the above conclusions. The answer is that there is not.

28. The relevant lesson in this regard that emerges from the case-law is that it is accepted that while there is a distinction in the planning code between works development and change of use development, it is a matter of fact as to whether a particular development is (i) works development, (ii) change of use development, or (iii) a combination of both. In this regard see for example *Quinlan v An Bord Pleanála* [2009] IEHC 228 (Laffoy J.) at paras. 95, 99; *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210 at para. 17; *Bulrush Horticulture Ltd v An Bord Pleanála* [2018] IEHC 58; *Kildare County Council v Goode* [1999] 2 IR 496. In this case however, due to the wording of Articles 10(6)(b) and (c), it is made clear by the wording of the statutory provision that the act of development that is exempted is the change of use and that it is this act of development that must commence at least 2 years after the period of vacancy began.

29. A further question, with specific reference to Article 10(6)(c)(iii), is whether the carrying out of works (such as those in August 2020) do anything to disturb or exempt the period of vacancy. As we have seen, the condition in Article 10(6)(c)(iii) that is in question in this Opinion is as follows:

“(iii) the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development”.

30. Part of the factual background in this case is that the period of vacancy commenced in April 2019 and certain internal works were carried out starting in August 2020 (i.e. prior to the expiry of the 2 year period). Although this issue did not arise in the Section 5 Declaration, for completeness it is proposed to discuss briefly the question of whether the carrying out of works does anything to disturb a period of vacancy.

31. The answer in my view is no. The word “vacant” is not defined in either the PDA 2000 or the PDRs. The ordinary meaning of the word “vacant” when used in relation to a property in law is “not occupied”. See for example the definition of the word “vacant” in the Concise Oxford English dictionary, see also for example section 17(2) of the Landlord and Tenant Amendment Act 1980, which refers to a landlord requiring vacant possession “for the purpose of carrying out a scheme of development of property”. This supports the view that in Irish law, a property remains vacant even where works are being carried out in it.

(c) Application of the relevant legal provisions to the facts of this case

32. Applying these principles to the facts of this case, the following emerges.
-

33. Firstly, given the principle established in *Simons* and in *Roadstone Provinces* that a change of use takes place when the new use commences, the change of use has not yet taken place in this case.

34. Leaving entirely to one side the finding of DLRCC that the works that were carried out in August 2020 were works that facilitated the change of use to residential use, and leaving to one side also the finding by DLRCC that TRC House continues to be advertised for commercial use, my understanding is that it is not disputed that TRC House is not currently resided in by anyone and is not currently used for residential purposes.

35. Applying the principle per *Roadstone Provinces*, the new use has not yet commenced. As such, in accordance with the authority, regardless of the question of whether the August 2020 works were works that facilitated the change of use, and regardless of whether TRC House continues to be advertised for commercial use, it cannot be disputed that the change of use has not yet taken place.

36. Secondly, this means that the “proposed development” for the purposes of Article 10(6)(b) and (c) has not yet taken place. As is outlined above, the “proposed development” for the purposes of Article 10(6)(b) and (c) is the change of use.

37. Thirdly, as referenced above, the property remained “vacant” for the purposes of Article 10(6) throughout the period from April 2019 to the present day notwithstanding that works were carried out with effect from August 2020.

38. Fourthly, the question that therefore arises is whether the following condition in Article 10(6)(c)(iii) has been fulfilled:

“(iii) the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development”.

39. The only possible answer is that this condition has been fulfilled. I understand that it is not disputed that TRC House has been vacant since April 2019 and remains vacant. On the basis outlined above, the proposed development, i.e. the change of use, has not yet taken place. Accordingly, on the assumption that this remains the factual position at the time immediately prior to the taking place of change of use, the condition in Article 10(6)(c)(iii) is clearly fulfilled.

(d) Conclusion in respect of the Section 5 Declaration

40. Accordingly, on the basis of all the above, in my view DLRCC erred in finding in the Section 5 Declaration as follows (at page 4) (with emphasis added):

“Article 10(c)(iii) requires that the subject property, or the relevant part of it, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development. Accordingly, TRC House would need to have been vacant until 29th April 2021 before the change of use and associated internal works can be carried out”.

41. In my view, on the basis set out above, it is not a correct reading of Article 10(6)(c)(iii) to say that it requires that *“TRC House would need to have been vacant until 29th April 2021 before the change of use and associated internal works can be carried out”*. On the basis set out above, the requirement is that TRC House would need to have been vacant for two years before the change of use can be carried out (in an exempted fashion). For the reasons set out above, the associated internal works are not include within the meaning of *“proposed development”* for the purposes of Article 10(6)(c)(iii) and accordingly the carrying out of internal works is of no relevance in determining whether *“the structure concerned... has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development”*.

42. In my view DLRCC also erred in the following finding in the Section 5 Declaration as follows (with emphasis added):

“Notwithstanding, given the nature of the works, which include the provision of ensuite bathrooms in each room and kitchen, dining and living areas, it is considered that those [the August 2020 works] closely relate to the residential use for which a s.5 declaration is sought. This is further evidenced by the existing and proposed drawings submitted were [sic] no physical works appear to be required to facilitate the proposed development. It is noted that works to adapt the structure from Class 1, 2, 3, or 6 of Part 4 of the Regulations to residential use are covered under Article 10(6)(d)(ii) and, thus, s.4(1)(h) of the Planning and Development Act is not deemed of direct relevance in this instance. It is therefore considered that development had commenced before the property had been vacant for 2 years prior.

Given that the development had already commenced on 17th August 2020 and that the subject structure had not been vacant for 2 years at that point in time (the property was vacated on 29th April 2019) and therefore having regard to Article 10(6)(c)(iii) of the Regulations, the proposed development is not deemed to be exempted development”.

43. It is clear from the above quotation that the basis for DLRCC’s finding that the condition in Article 10(6)(c)(iii) has not been fulfilled is that (a) the August 2020 works *“closely relate to the residential use for which [the] s.5 declaration is sought”*, and therefore (b) that *“the development had commenced before the property had been vacant for 2 years prior”*.

44. However as is set out above, it is apparent from the statutory provisions that the proposed development which is referred to in Article 10(6)(c)(iii) is the change of use. The question of when related works were carried out is of no bearing on the question of when the *“proposed development”*

i.e. the change of use took place. As such, in my view, DLRC erred in law by finding that the development had commenced in August 2020 on the basis that this was when the associated works were carried out.

Issue (2): Article 10(6)(d)(vi): Did the Planning Authority err in concluding that it cannot consider the change of use to be exempt on the basis of SPPR 9, on the basis that SPPR 9 relates only to 'granting planning permission' and is not relevant to a determination under section 5.

(a) Introduction

45. As we have seen above, Article 10(6)(c) provides that, in order to qualify for an exemption under Article 10(6)(b), the conditions set out in Article 10(6)(d) must be fulfilled. The condition in question in this issue is that set out by Article 10(6)(d)(vi):

"(vi) Dwelling floor areas and storage spaces shall comply with the minimum floor area requirements and minimum storage space requirements of the "Sustainable Urban Housing: Design Standards for New Apartments — Guidelines for Planning Authorities" issued under section 28 of the Act or any subsequent updated or replacement guidelines".

46. The Section 5 Declaration finds as follows in relation to this Condition (this is provided at number (vii), not (vi), on page 6. This would appear to be a numbering error: it is clear from the context and content that it is in fact Article 10(6)(d)(vi) that is being referred to):

" 'Guidelines for Planning Authorities' issued under section 28 of the Act or any subsequent updated or replacement guidelines.

In December 2020 the Department of Housing Local Government and Heritage published an updated version of the 'Sustainable Urban Housing: Design Standards for New Apartments – Guidelines for Planning Authorities'. Section 5.21 of the updated Guidelines states that 'it is a Specific Planning Policy Requirement (SPPR) of these Guidelines that shared accommodation/co-living developments will not generally be permitted'. The amendments to the 2018 version of the Guidelines also include the removal of the internal standards for co-living units. It is considered, consequently, reasonable to assume that it is not in accordance with Article 10(6)(d)(vi) of the Regulations to consider as exempted development a proposal for co-living development when the December 2020 version of the Apartment Guidelines states that co-living developments should not generally be permitted".

(b) The interpretation of Ministerial Guidelines including SPPRs

47. As is clear from the quotation from the Section 5 Declaration above, at the heart of this issue is the interpretation of the updated version of the 2020 Guidelines and in particular the provisions of SPPR 9 contained at section 5.21 of those Guidelines.

48. The 2020 Guidelines are Guidelines made under section 28 of the PDA 2000. Section 28(1) provides as follows:

"The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions".

49. It is clear from the above that planning authorities are obliged to have regard to section 28 Guidelines in the performance of their functions. This would include the performance of functions under section 5 of the PDA 2000.

50. SPPR 9 is a Specific Planning Policy Requirement made pursuant to section 28(1C) of the PDA 2000, which provides as follows:

“(1C) Without prejudice to the generality of subsection (1) , guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply”.

51. It is clear from the above that planning authorities are obliged to comply with SPPRs in the performance of their functions. This would include the performance of functions under section 5 of the PDA 2000.
52. The central question in this case is what is actually required by section 5.21 and SPPR 9 of the 2020 Guidelines.
53. It should be stated at this point that strictly speaking SPPR 9 and section 5.21 of the 2020 Guidelines are not relevant to the question of whether the provision in Article 10(6)(d)(vi) is complied with, as this relates to floor areas and storage spaces. However given the generally applicable obligations upon planning authorities in relation to section 28 Guidelines and SPPRs as provided by section 28(1) and (1C), the question of whether section 5.21 and SPPR 9 of the 2020 Guidelines are specifically relevant to the consideration of Article 10(6)(d)(vi) can be left to one side for the moment.
54. The question of how to interpret Ministerial Guidelines in general and SPPRs in particular (which, as is clear from the above, constitute a specific category of section 28 Ministerial Guidelines), has been considered recently in a number of judgments, including in particular the Court of Appeal judgment in *Spencer Place Development Company Ltd v Dublin City Council* [2020] IECA 268 (at paras. 77-8) (with emphasis added):

“I agree that section 28 guidelines ought not be construed as if they were a statute. However, the scope and effect of such guidelines differ materially from individual planning decisions. Guidelines issued under section 28 PDA, particularly those which contain SPPRs, may impact significantly on the performance by planning authorities and ABP of their functions under the PDA and may have broad and significant planning and development implications for the wider public. It therefore appears reasonable to expect that they should be drafted with care, that the nature and scope of the requirements thereby imposed on planning authorities and ABP should be specified clearly and that they should be capable of operating consistently with the PDA.

I therefore agree with Mr Galligan to the extent that section 28 guidelines should be construed in the context of and by reference to the PDA and, in particular, those provisions of the PDA that provide the statutory framework governing the performance of the “functions” to which such guidelines are directed. In my view, the “ordinary and reasonably informed persons” referred to by McCarthy J in XJS must, in this context, be taken to be aware of such matters. Even allowing that section 28 guidelines do not emanate from the Office of the Parliamentary Counsel, it does not appear to me to impose an excessive burden on the draftsman to assume that he or she is familiar with the structure and language of the PDA and intends such guidelines to operate in a way consistent with it”.

55. Accordingly, the principle to be applied is that section 28 Guidelines should be construed with reference to the PDA. In addition, in interpreting section 28 Guidelines, including SPPRs, it should be assumed that it is intended that the Guidelines are intended to operate in a manner consistent with the PDA 2000 and the language contained therein.

56. In addition, it is clear from recent cases such as *O'Neill v An Bord Pleanála* [2020] IEHC 356 and *Atlantic Diamond Ltd v An Bord Pleanála* [2021] IEHC 322 that the Courts take a careful approach to interpreting and applying SPPRs, and that they are only applied in the specific circumstances provided by the wording of the relevant portion of the Guidelines.
57. Finally, it is established that misinterpretation of a section 28 Guideline is an error of law that is amenable to judicial review by the High Court: see *Simons on Planning Law* 3rd ed., para. 1-471, see also *Spencer Place Development Company Ltd v Dublin City Council* [2019] IEHC 384 at para. 30. In other words, misinterpreting or misapplying a section 28 Guideline is an error that in the ordinary course will result in a quashing of the relevant decision.

(c) The provisions of Section 5.21 of the 2020 Guidelines and SPPR 9

58. Section 5.21 of the 2020 Guidelines provides as follows (with emphasis added):

“Accordingly, it is a Specific Planning Policy Requirement (SPPR) of these Guidelines that shared accommodation/co-living developments will not generally be permitted:-

Specific Planning Policy Requirement 9

There shall be a presumption against granting planning permission for shared accommodation/co-living development unless the proposed development is either:-

(i) required to meet specific demand identified by a local planning authority further to a Housing Need and Demand Assessment (HNDA) process;

or,

iib) on the date of publication of these updated Guidelines, a valid planning application to a planning authority, appeal to An Bord Pleanála, or strategic housing development (SHD) planning application to An Bord Pleanála, in which case the application or appeal may be determined on its merits”.

59. A number of issues immediately arise, of relevance to this case.
60. It is clear from the ordinary wording of the portion quoted above that this provision applies to granting planning permission. This is clear firstly from the use of the phrase *“in granting planning permission”* in the underlined portion in the second paragraph.
61. In its ordinary meaning, “planning permission” does not include a declaration under section 5 as to whether a particular development constitutes development.
62. In addition, this is in accordance with the relevant definition in the PDA 2000. As has been discussed above, it is established by recent Court of Appeal authority that, in interpreting section 28 Guidelines, it shall be assumed that language used is intended to be consistent with the meanings provided by the PDA 2000. Section 2 of the PDA 2000 provides that the following is the definition of the word “permission”:
- “ ‘permission’ means a permission granted under section 34 , 37G or 37N , as appropriate”.*
63. By virtue of section 13 of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the “2016 Act”), this definition is construed during the period of operation of that Act as also including a permission granted under *“section 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016”*.

64. This clearly does not include a decision on an application for a declaration under section 5 of the PDA 2000.
65. That this Guideline applies to decisions on an application for planning permission but not to other decisions is clear also, secondly, from the use of the word "*permitted*" in the underlined portion in the first paragraph quoted above, for two reasons:
- (i) In its ordinary meaning, "*permitted*" is clearly related to "*permission*" and as such "*permitted*" means "*permitted by a planning permission*". As such, this includes permission granted under section 34, 37G, of 37N of the PDA 2000 or section 9 of the 2016 Act, but not a decision under section 5;
 - (ii) Where "*permitted*" is used elsewhere in the PDA 2000 in relation to a development or proposed development, it is clearly intended to mean "*permitted by a planning permission*". See for example section 34(3A), 173A(4)(a), 173B(4)(a), 177E(2A)(a)(iii).
66. As such, in my view the correct interpretation of section 5.21 and SPPR 9 is that the provisions contained therein apply to decisions on applications for planning permission under section 34, 37G or 37N of the PDA 2000 or under section 9 of the 2016 Act, but not to applications for a declaration under section 5 of the PDA 2000. In other words, section 5.21 and SPPR 9 are simply not applicable in the context of a decision under section 5 of the PDA 2000.
67. As such, in my view, DLRC erred in law in applying section 5.21 and SPPR 9 in making its decision on the Section 5 Declaration in this case.
68. Nothing further occurs.

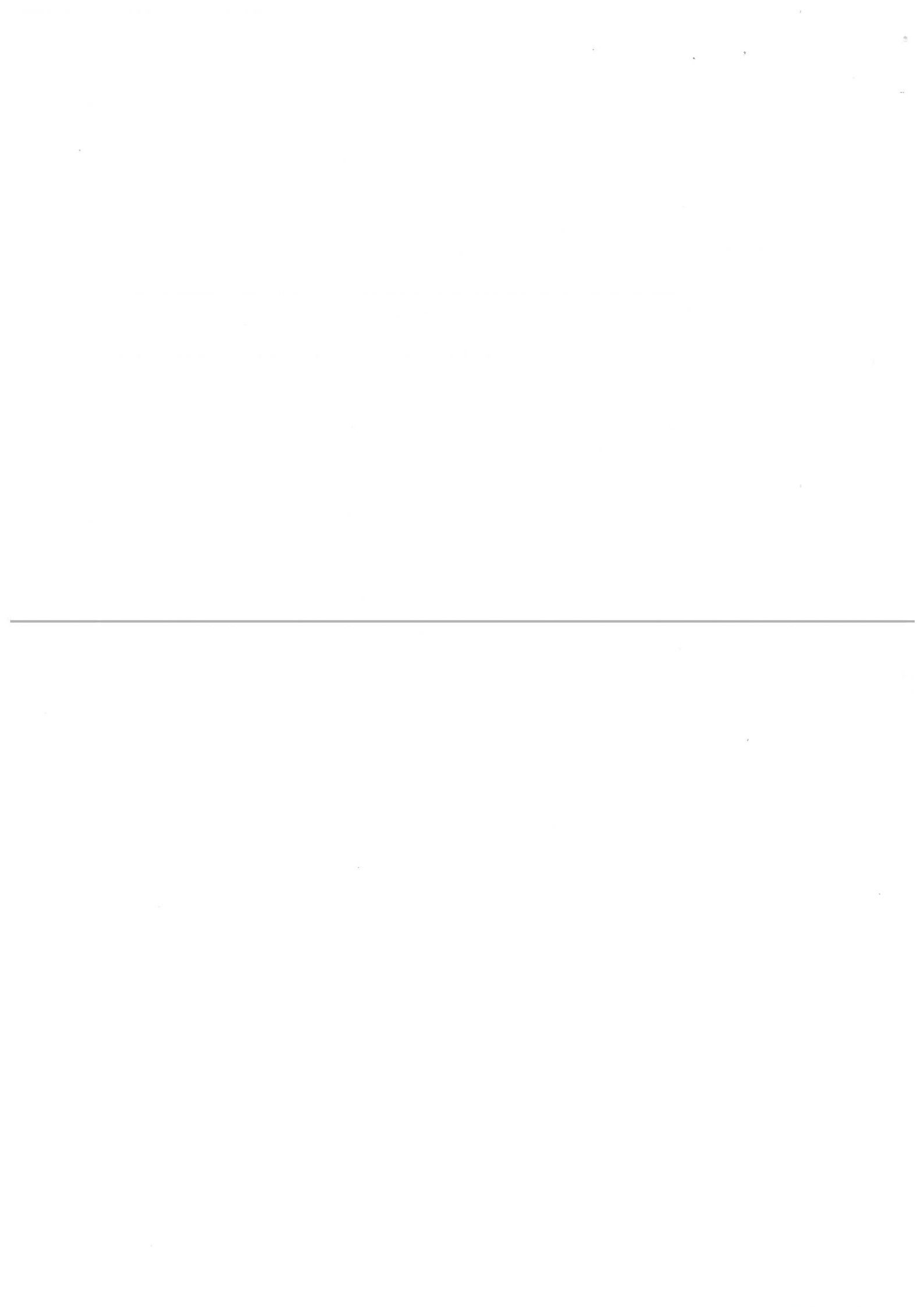
Thank you very much for your instructions. Please let me know if anything arises or if I can help further.

With best wishes,

Yours sincerely,

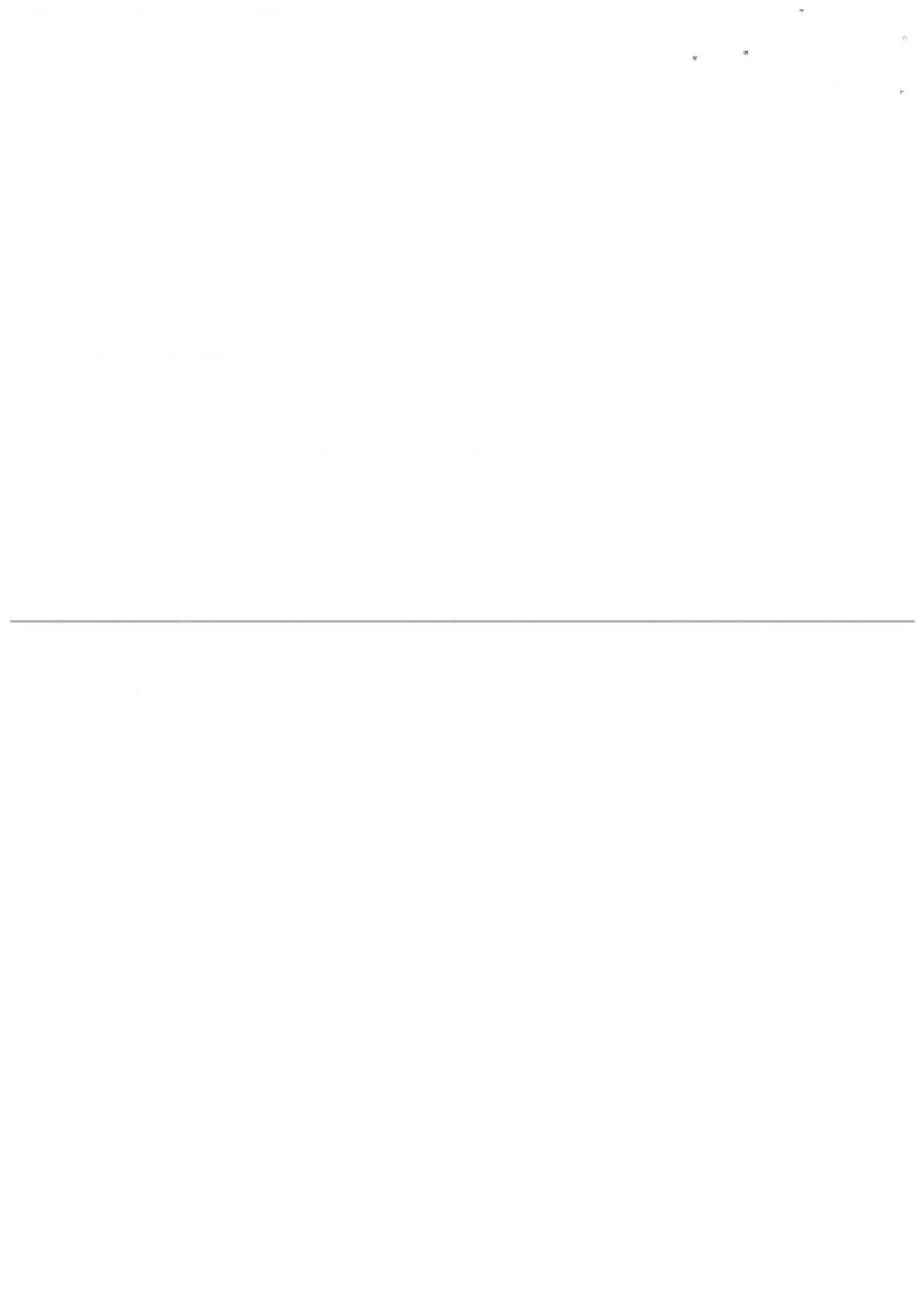
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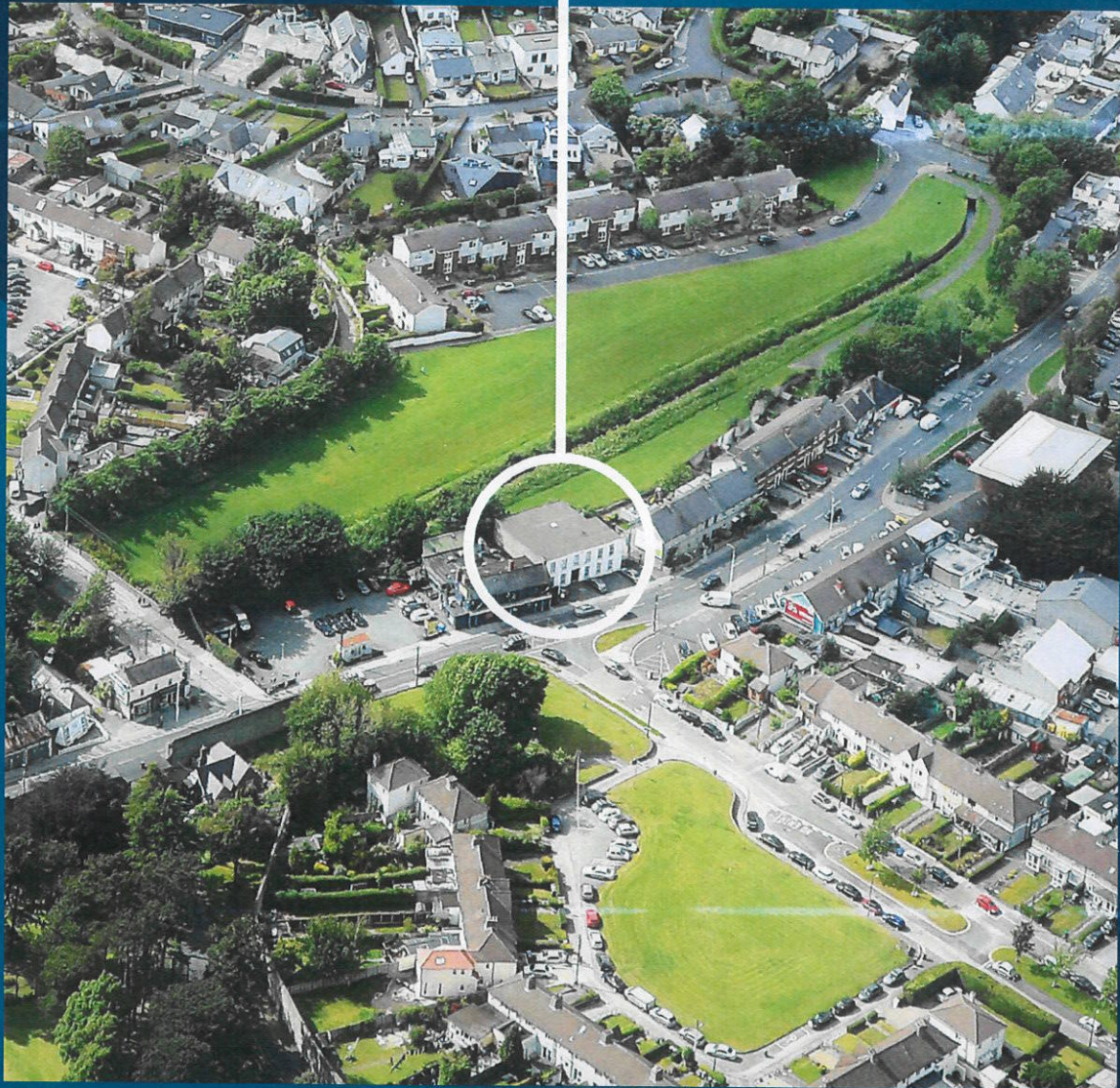
Appendix 3

Sales brochure indicating floor plans at the time of acquisition of the property, and prior to any works being undertaken.



TRC House

Dundrum Road, Windy Arbour, Dublin 14



— *For sale by private treaty* —

BER D2

CBRE

Own door office building extending to approx. 7,403sq. ft. over three floors.

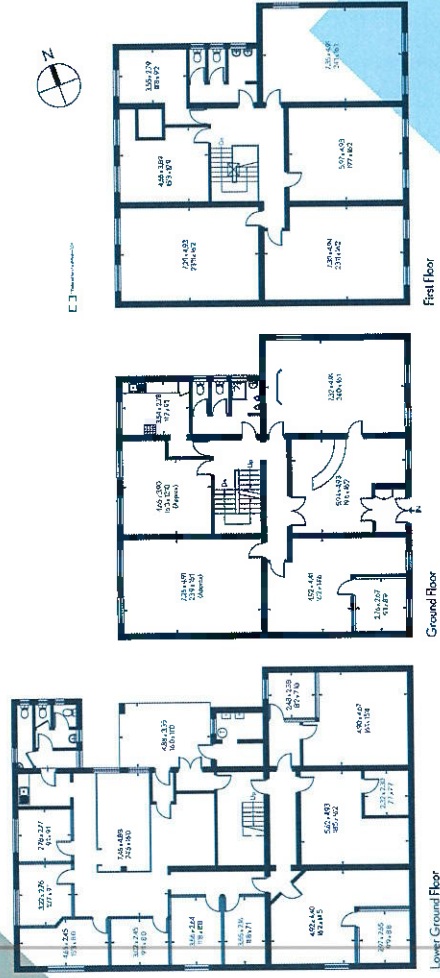
Potential to redevelop to a number of uses (subject to planning permission).

Well-served by road and light-rail infrastructure including Luas, Dublin Bus and M50.

Within walking distance to Windy Arbour Luas stop and Dundrum Town Centre.

Approximate Gross Internal Area = 7403 sq. ft. / 687.8 sq. m.

Surveyed and drawn in accordance with the RICS code of measuring practice [fourwalls-group.ie 236627](http://www.rics.org/uk/standards-and-guidance/codes-of-measuring-practice)



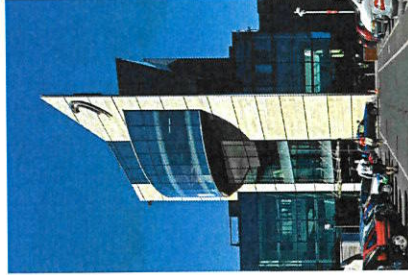
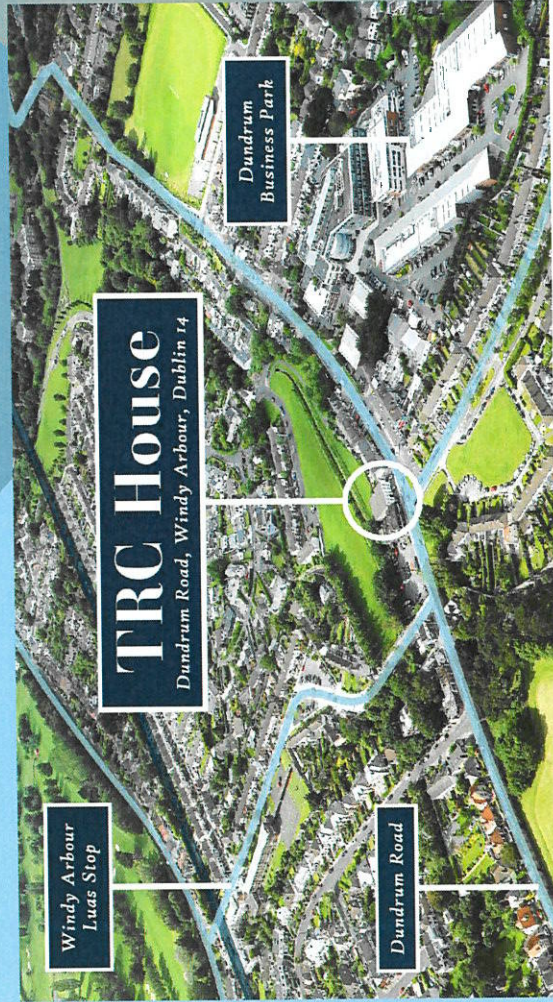
Schedule of Accommodation

	sq. ft.	sq. m.
Basement	2,852	265.0
Ground Floor	2,277	211.5
First Floor	2,274	211.3
Total	7,403	687.8

Description

TRC House is a detached building occupying a prominent position on the Dundrum Road. The property extends to approx. 687.8 sq. m (7,403 sq. ft.) across three floors. TRC House benefits from a private yard to the side of the property which can be accessed via the gates next to the building. Occupiers can avail of eight off-street parking car spaces to the front and side of the property.

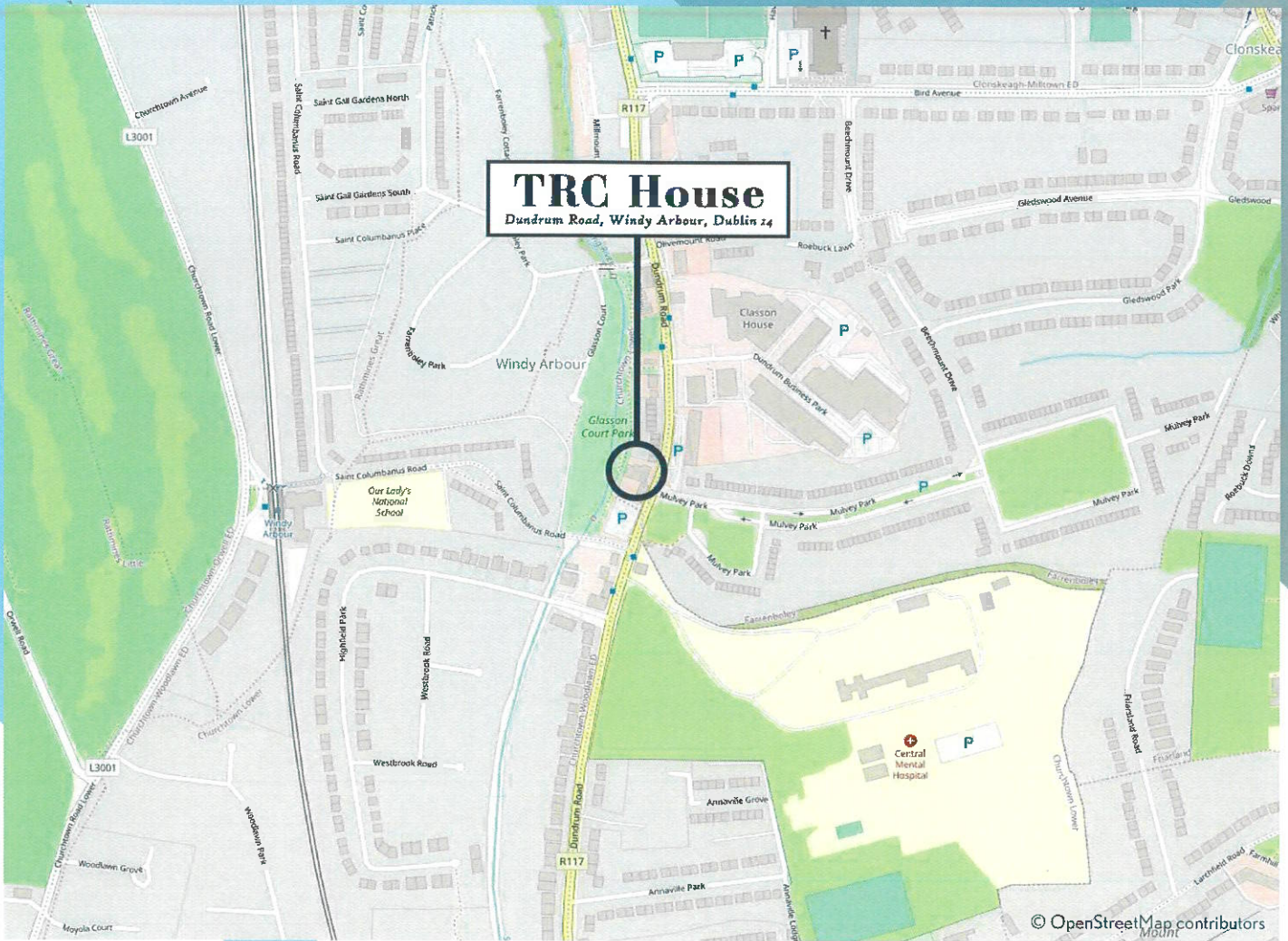
The building and overall site provide a good opportunity to acquire an office building with refurbishment or redevelopment potential near Dundrum Town Centre. TRC House is being sold with vacant possession. This building has the potential for a number of uses, subject to planning permission.



Location

TRC House is ideally located on the Dundrum Road, amongst many cafes, restaurants, shops and other amenities. It is only a two-minute-walk to Dundrum Business Park where many leading international companies such as John Paul Construction, CarTrawler, CKM Purchasing Consultants and FundAssist Ltd are situated. Occupiers benefit from being within 2km of Dundrum Town Centre, Ireland's largest shopping centre - providing an even further variety of restaurants, cafes and shops.

The property is very well connected to many transport links. With Windy Arbour Luas Stop and various bus routes located within walking distance, occupiers are provided with access across the city. Journey times from the property to Dublin city centre can be as short as 15 minutes while also being positioned just minutes from the M50, Dublin Airport can be accessed within 30 minutes.



Viewing: Strictly by appointment through sole agents CBRE.

Services: We understand that all main services are available to the property.

Zoning: Objective NC: To protect, provide for and-or improve mixed-use neighbourhood centre facilities.

Tenure: We understand the property is held Freehold.

Price: On application.

VAT: Any VAT arising as a result of this transaction will be the responsibility of the purchaser.

Contacts

Alex Fahey
alexander.fahey@cbre.com
01 618 5715

Mark Smyth
mark.smyth@cbre.com
01 618 5797

Gianangelo Radaelli
gianangelo.radaelli@cbre.com
01 618 5708

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