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My Ref. Thomas S5

The Secretary,
 64 Marlborough Street,
 Dublin 1,
 D01 V902

21st June 2022

RE: SECTION 5 REFERENCE

AN BORD PLEANÁLA	
LDG-	054666 - 22
ABP-	
21 JUN 2022	
Fee: €	220 Type: cash
Time:	16:55 By: head

Dear Secretary,

On behalf of Ms. Marian Thomas, 3 New Toberaheena, Cahir Road, Clonmel, Co. Tipperary, please find this referral of a declaration by Donegal Co. Council pursuant to section 5(3) of the Planning and Development Act 2000 as amended (PDA2000) in relation to a question as to what is or is not development or is or is not exempted development. This referral letter is accompanied by a report by Digital Land Surveyors Ltd. Please note the referrer is not the owner of the site the subject of this section 5.

- The appropriate fee has been paid.
- A copy of the decision of the Planning Authority dated 7th June is attached.
- A report by Digital Land Surveyors Ltd is attached.
- A copy of the enforcement file is attached ref. UD1414124.
- An Affidavit by the referrer is attached.
- This letter sets out the grounds of the referral.

Please refer all correspondence to the agent.

Address of site the subject of this section 5 reference: New Row, Mullans, Donegal Town. Co. Donegal, F94 V6D6.

Owner of site the subject of section 5 reference: Ms. Noreen Portno.

Name and address of referrer (appellant): Ms Marian Thomas, 3 New Toberaheena, Cahir Road, Clonmel, Co. Tipperary.

Please note the personal address of the owner of the site is unknown to the referrer. As a recent planning application was made on the site the subject of the section 5 reference, (Ref. 22/50241) and which is subject to a current appeal ABP. Ref. 313444, the detail of the relevant

owner's address is available to the planning authority on question 28 of the application form which is excluded from the public record but is retained by the planning authority. This was highlighted to the planning authority in the section 5 reference. There is no reference in the planning report that the question was referred to the owner. The planning application also contains the name and address of the agent of Ms. Portno for that application.

The Board is requested to seek the full file including all the planning and other reports as Donegal Co. Council do not place the details of section 5 referrals on their website in accordance with Section 5(7B) of the PDA2000. The legislation requires the planning authority to make the following to be available on their website which may be summarised:

- a copy of the question arising, and any information, particulars, evidence, written study or further information received or obtained;
- a copy of any submissions or observations in relation to the question arising;
- a copy of any report prepared by or for the authority; and
- a copy of the declaration.

1. Introduction

The question that has arisen that the referrer seeks a declaration on relates to the following.

Whether works including an increase in height c. 0.5 m on the site of a former domestic garage, located on a site at New Row, Mullans, Donegal Town, Co. Donegal is or is not development and is or is not exempted development?

The works and change of use the subject of this reference, that have taken place are identified as follows.

- *Removal of a front gable parapet with lower monopitch roof behind and replacement with new higher roof with an amended roof profile on a previously used garage structure now used as a gym. The previous highest point of the monopitch roof was at the same level as the window cill on the window of the adjacent property at a distance of c 0.5 m. The new roof profile blocks the gable window on the adjacent property.*
- *Removal of vehicular access and on-site parking provision.*
- *Removal of garage door, erection of new steps, erection of new double glazed door access facing the river and new door in side elevation. The finished floor level has been raised.*
- *Change of use from garage to gym.*
- *Provision of vents on side elevation of gym/garage onto side passage with adjacent property.*
- *Oversailing of adjacent property by new roof profile.*

2. Site location

The site the subject of this section 5 reference (the subject site) comprises an irregular-shaped site c. 0.041 ha on the northern side of the River Eske in Donegal Town opposite the grounds of Donegal Castle, a National Monument.

The subject site consists of a period, hipped roof bungalow, an attached conservatory extension to the south east, and a detached former garage now used as a gym. The site is bounded to the rear (north east) by the grounds of Donegal Post Office elevated above the site. To the north west of the site is a period building formerly in medical use. The subject site bounds the referrer's property to the southeast which is a semi-detached two-story house on a confined site.

The part of the subject site at issue is the single-storey garage/gym structure. Prior to the works that have taken place, the garage consisted of a monopitch roof behind a higher gable parapet that fronted New Row and the river. The monopitch roof sloped upwards from the north west elevation to the south east elevation and was lower than the gable parapet on the front building line. The gable parapet was a design feature screening the lower garage roof to the rear. The highest point of the monopitch roof was level with the window cill of the sole gable window in the house of the referrer adjacent. The lowest point of the monopitch roof was lower than the conservatory extension. The distance between the two gables of the properties is narrow, at c 0.5 m. The finished floor level (FFL) of the gym has been increased from the former garage use and sits c 1 m above the FFL of the referrer's house.

Fig. 1 Site location Source: MyPlan.ie



Plate 1 Current view of subject site detached garage/gym with referrers property in yellow adjacent



3. Development that has been carried out on site

While the previous gable parapet on the garage was higher than the monopitch behind, it did not block light to the gable window owing to its location and that the highest point of the monopitch was at cill level. The altered roof profile to the former garage blocks light and casts a shadow on the adjacent gable window. See Plate 1 above. The altered roof profile is close to a flat roof across the garage/gym structure with a slight angle.

Plate 2 Google earth image of the subject site before works were carried out



Plate 3 Works being carried out illustrating change in roof profile



Plate 4 Google earth image of subject site **after** works carried out at similar angle to plate 2



Plate 5 Google earth image of subject site illustrating the previous lower height of monopitch roof on north-western elevation of garage in relation to existing conservatory extension



The google historical imagery on google earth demonstrates that the height of the elevation of the garage that faces the conservatory did not exceed the height of the conservatory as occurred after the works were carried out. The historical imagery does not allow an exact

comparison from the same angle. The sole gable window in the referrer's house is at a lower level than the windows in the front elevation providing lighting to the hall stairs and landing.

Plate 6 Google earth image of subject site illustrating the previous lower height of monopitch roof on north western elevation of garage in relation to existing conservatory extension (blue line) and previous higher height (red line) and existing window in yellow



Plate 7 Google earth historical imagery on right and illustrating the parapet wall in front of the lower mono pitch roof behind



Plate 8 Impact of raised roof on gable window



4. Relevant planning and enforcement history

4.1 Planning history

A notification to grant permission for *“Demolition of flat roof conservatory and construction of new conservatory including extensions to rear of property together with alterations to facades and all associated site development works”* issued by Donegal Co. Council is the subject of a current planning appeal.

Application details

Planning Application Reference: 22/50241

Planning Authority: Donegal County Council

Planning Authority decision and date: Notification of grant subject to conditions 7th April 2022

Development Address: New Row, Mullans, Donegal Town, Co. Donegal

Applicant name: Noreen Portno

Appeal Reference: ABP-313444-22

Appeal Date: 27th April 2022

4.2 Enforcement history

Planning Authority Ref. UD14125

The planning authority considered that there was no increase in height of the garage structure. This conclusion was informed by communications with an architect representing the developer and the builders for the developer. This assumption is totally incorrect and was grounded in discussions with the developer which is demonstrated in the enforcement documents recently obtained and attached to this referral. The planning authority considered that the development was exempt pursuant to sections 4(1)(h) and 4(1)(j) of the PDA2000. The complaint to the planning authority was on behalf of the referrer's deceased mother who was an elderly lady who suffered poor health for a number of years.

While a section 5 reference is an independent planning process, this submission confirms that the assumptions by the planning authority were incorrect in considering there was no increase in height of the garage. Please also see attached to this letter a report where Digital Land Surveyors Ltd. carried out a survey which confirms works completed have increased the height of the roof to the garage within the subject site property by 500mm. This was submitted with the section 5 reference but has not been addressed in the planning report. The original mono-pitch roof height prior to the new works extended to the same level of the window cill located on the north western gable of the referrer's house. The extended garage roof has increased the roof level and blocks the lower section of the gable window.

The conclusion of the planning authority on an enforcement complaint is not a formal section 5 determination and there is nothing in the legislation to prevent any person seeking a declaration on any question in order to determine if development is or is not exempted development at any time and to seek a review of a declaration from the Board. A section 5 determination is a statutory provision that is separate from enforcement proceedings.

5. Relevant Policy

The subject site is zoned as 'Town Centre' in the Seven Strategic Towns Local Area Plan (Donegal Town) 2018-2024, as varied. The subject site is defined within the 'Town Centre' boundary and is designated within an 'Area of Townscape Character' and 'Indicative Pedestrian and Cycling Linkages'. The subject site is located immediately north of River Eske and Lough Eske and Ardnamona Wood SAC (000163). The subject site is within an area of High Scenic Amenity.

The site is opposite Donegal Castle a National Monument.

Policy UB-P-27 of the Donegal county council Development Plan 2018-2024 also applies

"Proposals for extension to a dwelling shall be considered subject to the following criteria:

(a) The development reflects and respects the scale and character of the dwelling to be extended and its wider settlement;

*(b) Provision is made for an **adequate and safe vehicular access and parking**; and*

*(c) The proposal **would not adversely affect the amenity of adjoining properties.**" (bold my emphasis).*

6. Appropriate Assessment and Environmental Impact Assessment

The Habitats Directive (92/43/EEC) and the associated Birds Directive (2009/147/EC) are transposed into Irish legislation by Part XAB of the PDA2000 and the Birds and Natural Habitats Regulations 2011. Screening for appropriate assessment (AA) must be carried out by the competent authority. If significant effects cannot be excluded based on objective information, without extensive investigation or the application of mitigation, a project should be considered to have a likely significant effect and appropriate assessment should be carried out. This is a light trigger and must be based on the precautionary principle. A section 5 referral also requires to be screened for AA and EIA. The screening shall also take into account the direct, indirect and in-combination impacts.

The Board as the competent authority shall carry out Environmental Impact Assessment (EIA) screening for all plans and projects. If the proposed project is of a class set out in Schedule 5, Part 2 of the Planning and Development Regulations 2001 (PRD2001) but does not meet or exceed the relevant threshold, it is a 'sub-threshold development' and must be screened for EIA.

7. Legislative provisions and application

7.1 Relevant legislation

The Planning and Development Act 2000, as amended (PDA2000) and the Planning and Development Regulations 2001 (PDR2001) apply in seeking a determination from the Planning Authority whether a question is a question development and is or is not exempted development.

7.2 Interpretation and definitions –PDA2000

Section 2 of the PDA2000 provides statutory interpretations relevant to a section 5 referral. The relevant definitions are as follows:

"alteration" includes—

(a) plastering or painting or the removal of plaster or stucco, or

(b) the replacement of a door, window or roof,

that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures;

"exempted development" has the meaning specified in section 4;

[.....]

"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, 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;

"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.

(bold my emphasis)

Section 3 of the PDA2000 defines development as follows:

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.*

7.3 Exempted Development PDA2000

Section 4(1) of the PDA2000 provides for situations of exempted development.

Of relevance to this section 5 referral is as follows;

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;

[...]

(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;

(bold my emphasis)

Subsection (2)(a) provides that the Minister may by regulation, provide classes of development to be exempted development for the purposes of this Act.

Section 4(4) of the PDA2000 provides that development shall not be exempted from development if an EIA or an AA of the development is required.

7.4 Exemptions and restrictions PDR2001

Article 6 of the PDR2001 provides that subject to the restrictions on exemptions in Article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development, provided that such development complies with the conditions and limitations specified in column 2.

Article 9 of the PDR2001 provides restrictions on exemptions.

Article 10 provides 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 subject to a list of restrictions in (a) to (d).

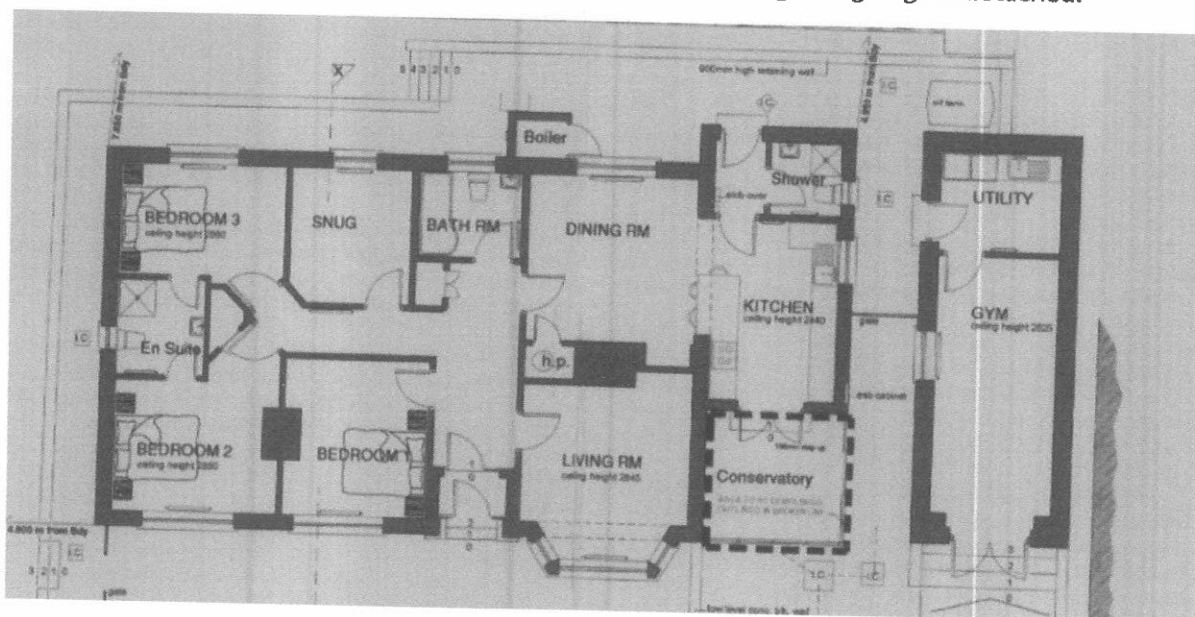
Schedule 2, Part 1, Exempted Development, General, Class 1, relates to development within the curtilage of a house "The extension of a house, by the construction or erection of an extension (including a conservatory) to the **rear of the house** or by the conversion for use as part of the house of any garage, store, shed or other similar structure **attached to the rear or to the side of the house.**" (bold my emphasis). This is subject to 7 conditions/ restrictions which are detailed below in section 10.3.1.

The referrer has no objection to the change of use of the garage to the gym but has an issue with the works that facilitate it and the blocking of the adjacent window.

Despite not having an issue with the change of use, it may be noted, in summary, that Class 1 does not apply as the garage is not **attached** to the side of the house. A conservatory has been placed attached to the side of the bungalow. The garage is not attached to the side of the house and therefore class 1 cannot apply, and the planning authority has erred in the application of Class 1 in their declaration.

Further, the extension to the garage that has taken place at wall and roof level is not to the rear of the house and therefore class 1 could not apply.

Fig. 2 Extract from planning application ref. 22/50241 illustrating that garage is detached.



8. Section 5 review of the declaration

Section 5(3) of the PDA2000 provides the details of the process of a declaration and referral on development and exempted development and facilitates a review by An Bord Pleanála of the determination.

"5.—(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter." (bold my emphasis)

.....

(3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such 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.

(bold my emphasis)

9. Application of relevant legation to this referral

9.1 Does a question arise?

Applying section 5 of the PDA2000, in this case, it is submitted that a **question** has arisen. The referrer considers that works that have taken place on the site are development, and are not exempted development. The Planning Authority concurs that development has taken place.

9.2 Is or is not development?

Section 3 of the PDA2000 provides that "development" means, 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.** (Bold my emphasis)

This referral is considered development pursuant to the definition in relation to works.

9.3 Works

The relevant interpretation of "works", "alteration" and "use" are outlined above in section 6.2 above.

The developer has increased the height of the monopitch roof and altered the roof profile, raising it across the structure. The elevations have been altered.

There can be no doubt that **development has been carried out** pursuant to section 3 of the PDA2000.

Works have taken place externally and internally. The external works consist of an increase of the south eastern elevation of the garage/gym, removal of vehicular access, new steps and new double PVC doors. The finished floor level has been raised.

The internal works to the existing garage/gym structure facilitate a change of use.

9.4 Material change in the use of any structures or other land

The change of use is outlined in section 1.

In summary, a change of use from domestic garage to gym has taken place. The on-site parking has been removed.

There can be no doubt that **development has been carried out** pursuant to section 3 of the PDA2000.

10. Application of the potential relevant exempted provisions and assessment of restrictions

10.1 Potential exemptions under PDA2000.

The relevant potential exemptions and an assessment against the restrictions are set out below. The Board will be aware that only one of the criteria in the restrictions to exemptions needs to apply in order for development not to be exempted development.

10.2 Works to the interior or external appearance

Section 4(1)(h) provides *“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;**” (bold my emphasis)*

Assessment

The exemption does not apply because of the following.

1. The works render the appearance inconsistent with the character of the structure and/or of neighbouring structures as the impacts are **material**. The works block an adjacent window and overshadow same. The character of the neighbouring structure has been materially altered by having the lower part of the window blocked.
2. The Courts consider that the term “material” means material in planning terms. This matter was addressed recently in *Stanley v An Bord Pleanála* [2022] IEHC 177. The Court held the following.

*“46. The applicant accepts in these proceedings that the inspector proceeded to identify the correct legal test to determine whether there has been a material change of use in his report by reference to the decision of the Supreme Court in *Monaghan County Council v. Brogan* [1987] I.R. 333. In this decision the Supreme Court confirmed that the term “material” in this context means material in planning terms, that is whether the issues raised by the change of use would raise matters that would normally be considered by a planning authority if it were dealing with an application for planning permission, such as “residential amenity, traffic safety or policy issues in relation to statutory plans” (bold my emphasis).*

In the section 5 planning report, the Council have not addressed in any part the material impact on the neighbouring property. Having regard to the Stanley case, there is no evidence that the residential amenity in the form of loss of light was considered correctly as the previous statement on behalf of the developer that no increase in the monopitch appears to have been accepted. The report submitted by Digital Land Surveyors to Donegal Co. Council which clearly illustrated that the roof of the garage was increased in height adjacent to the adjacent gable window was not referenced in the planning report.

The attached report by Digital Land Surveyors clearly illustrates that the roof height was raised in the last photograph (No. 4). The street-facing gable parapet that was removed did not block light to the gable window as it was not located on the side elevation. It is normal planning practice where there are gable windows on semi-detached houses to ensure they are not blocked. To block a window is a material consideration.

3. The material impact of the works that have taken place in the form of the increased roof profile height is that daylight and sunlight have been severely compromised on adjacent property. The sites along this road are compromised owing to the high retaining walls to the rear and limited rear private open space. It is incumbent on the planning authority to protect residential amenities as these are material planning issues.
4. Development has taken place outside of the boundary of the subject site encroaching on to referrer's property.
5. It may also be noted that the structure is opposite Donegal Castle in an area of high amenity where the openings have been replaced by modern pvc replacements.
6. This exemption specifically applies to "works" and not "change of use". Even if external works fall under 4(1)(h), the change of use cannot fall under this exemption. The previous use of the structure is the established structure.
7. The definition of "alteration" while including the replacement of a door, window or roof, clearly does not include the increase of height of any such structure.
8. The development materially contravenes Policy UB-P-27 of the Donegal County council Development Plan 2018-2024.

Section 4(1)(j) provides "*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;*"

This exemption applies to use only and does not apply to external works. A change of use is a separate material planning consideration. The referrer has no issue with the use.

10.3 Potential exemptions under PRR2001

10.3.1 Schedule 2 PDR2001

The Board may wish to consider Article 6 Schedule 2 Part 1 of the PDR2001 for certain works that have taken place on the site. In the interest of providing all relevant information to assist the assessment, the following information is provided. It is also the case that the planning authority has relied on Class 1 of Schedule 2.

CLASS 1 *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.*
(bold my emphasis)

The conversion of use from garage to gym is not at issue for the referrer. The works to facilitate the change of use of the garage are at issue, namely increasing the roof height and blocking light to the referrer's window on the gable of the adjacent property.

The planning report states "*The planning authority considers that there is no material change of use from a garage to a private gym as Schedule 2, Part 1, Class 1 of the Planning & Development Regulations 2001 (as amended) exempts the conversion of any garage/sheds to the side of the house to residential use. The use of the shed as a private gym is not a material change of use.*"

The planning report has failed to correctly restate the legislative provision that class 1 applies to where a garage is **attached** to the side of the house. The garage/gym is clearly not attached to the side of the house as may be seen on-site, in the recent planning application drawings, in the site map submitted with the section 5 and the submitted photographs and therefore Class 1 does not apply. It also may be noted a conservatory has been placed to the side (not the rear) of the house.

In addition to the generality of class 1 not being applicable, the conditions and limitations are outlined below which also make class 1 inapplicable.

Conditions and limitations to class 1	Application to development
<p>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.</p>	<p>Class 1 applies to 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 <u>attached to the rear or to the side</u> of the house. The provision of a detached garage or any works thereto are not exempt.</p>
<p>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</p>	<p>As above.</p>

<p>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</p>	
<p>3. Any above ground floor extension shall be a distance of not less than 2 metres from any party boundary.</p>	<p>It may be noted the FFL has been increased in height. The FFL is c 1 m higher than the adjacent property.</p>
<p>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</p>	<p>Class 1 applies to 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. The provision of a detached garage or any works thereto are not exempt. Furthermore, the height of the walls of the garage as altered exceeds the height of the rear wall and side wall of the house. While the height of the roof is provided in (c), subsections (a) and (b) also apply and the height of any extension shall not exceed the height of the rear walls of the house. The garage as extended does exceed this height.</p>
<p>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</p>	<p>It may be noted that the area to the rear of the house on the subject site is severely restricted. The dimensions were not provided on the planning application but appear less than 25sqm.</p>
<p>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</p>	<p>N/a</p>

<i>shall not be less than 11 metres from the boundary it faces.</i>	
7. <i>The roof of any extension shall not be used as a balcony or roof garden.</i>	N/a

(Bold my emphasis.)

CLASS 5 *The construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or wooden fence or a wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.* The limitations provide inter alia that 1. *The height of any such structure shall not exceed 2 metres or, in the case of a wall or fence within or bounding any garden or other space in front of a house, 1.2 metres.* The height of the wall in question exceeds 2 m and therefore class 5 does not apply.

Class 11 *"The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of a) any fence (not being a hoarding or sheet metal fence), or (b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete"* does not apply as the wall is a boundary wall. Further, the restrictions on class 11 provide that *"The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater and in any event, shall not exceed 2 metres"* and *"Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered"*. (bold my emphasis) Class 11 does not apply. (Bold my emphasis.)

Article 10(1) of the Regulations states that development, which consists of a change of use within one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act. Therefore, the change from one use to another within the same use class does not require planning permission. In terms of any potential change of use exemption, none apply.

10.3.2 Further restrictions on exemptions

Article 6(1) of the PDR states as follows:- *"Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1."*

Article 9(1) details development to which article 6 relates and shall not be exempted development for the purposes of the Act.

The Planning Authority in their report relies on subsections (iii) *"endanger public safety by reason of traffic hazard or obstruction of road users,* and (xi) *"obstruct any public right of way"* in Article 9(1).

Article 9(1) also includes the following relevant subsections where if the carrying out of such development would— (bold my emphasis)

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,” and*

ii) *“consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width,”*

(bold my emphasis)

Therefore, any potential exemption does not apply because:

1. The change of use from garage to gym is not exempted development within Class 1 as the garage is not attached to the rear or side and is, therefore, an unauthorised use. As it is an unauthorised use, it shall not be exempted development for the purposes of the Act.
2. The development includes the formation of new access (steps and new double doors) onto a road which exceeds 4 metres and therefore is not exempted development.

It may be noted that the change of use of garage to gym, removes an off-street parking space where it is an objective in Policy UB-P-27 of the Donegal County Council Development Plan 2018-2024 to make provision for adequate and safe vehicular access and parking.

11. Conclusion

The signed planning report that grounded the declaration has not addressed the material impact of the increased height of the garage on the residential amenity of the adjacent property. The planning authority has relied on section 4(1)(h) of the PDA2000 without any analysis of what is a material impact on neighbouring property or in fact any impact on the adjacent property. Despite the key issue of the blocking of the neighbouring window, the planning report has not once addressed this point. The impact on the character of the property has been described above. The location of the garage structure north-west of the gable window directly impacts the afternoon and evening sun. The houses on New Row are on constrained sites and the referrer's property only has one window on the gable providing light to the hall, stairs and landing.

As the planning authority has refused to address the central material issue raised of the blocking of the neighbouring window at any point in the planning report, one must assume that they are seeking to rely on the incorrect position taken in the previous investigation that the roof profile was not raised despite the clear evidence to the contrary. The referrer, in this case, is very genuine and truthful in the assertion that the roof profile was increased blocking the window and this is confirmed by the report from Digital Land Surveyors Ltd. who consented to have their report included in any planning submissions.

The referrer has also sworn an affidavit to confirm the same and in order to place her sworn position on the record to attest to her truthfulness. The referrer has at all times wished for cordial relations but the development that has taken place has caused considerable damage and loss of amenity to her property. The referrer has not any issue with a change of use from garage to gym subject to the correct planning processes but has a serious issue with the increase of height of the roof owing to the severe negative impact and to the oversailing of the property also from the new roof profile and the insertion of vents onto side her property.

Inexplicably, the planning report states that *“Furthermore the oversailing for buildings is a civil matter between the parties involved and is not a consideration for the planning authority.”* It is fundamental in proper planning that orderly development is achieved, and that development does not take place on property outside the ownership of the developer. Proper planning and sustainable development include the protection of existing residential amenities as a core principle.

A site inspection of the referrer’s property, both internally and externally can be arranged at the convenience of the Board and in this regard please contact the agent to arrange access in advance.

12. Recommendation

Having regard to the stated question that has arisen whether the same is or is not development or is or is not exempted development and having regard to the request for a review of the declaration on this question by Donegal County Council and particularly to –

- a) Sections 2, 3, 4, and 5 of the Planning and Development Act, 2000, as amended;
- b) Articles 5, 6, 9 and 10 of the Planning and Development Regulations 2001, as amended;
- c) Parts 1 and 4 of the Second Schedule to the Planning and Development Regulations 2001, as amended;
- d) The provisions of the Donegal County Development Plan 2018- 2024;
- e) The nature of the work carried out on the site;
- f) The proximity to a gable window in an adjacent property, the material nature of the negative impact of the increase of height; and
- g) The location of the site and the pattern of development in the area,

The Board is invited to concur with the referrer that the works described in the question is development and is not exempted development for the reasons outlined in this referral contrary to the declaration that has issued from Donegal Co. Council.

Yours sincerely,



Rosemarie McLaughlin BA(Hon), BL, MRUP, MIPI.

ENCL.

- Letter seeking review of declaration (this letter)
- Report by Digital Land Surveyors Ltd.
- Decision of the planning authority
- Enforcement history file
- Fee
- Affidavit



Ref. No: S5 22/15

7th June 2022

Marion Thomas
C/o RML Planning
3 David Road
Drumcondra
Dublin 9
D09H2V6

- Re:**
- Removal of a front gable parapet with lower monopitch roof behind and replacement with new higher roof with an amended roof profile on a previously used garage structure now used as a gym. The previous highest point of the monopitch roof was at the same level as a window-sill on the window of the adjacent property at a distance of 0.5 m. The new roof profile blocks the gable window on the adjacent property.
 - Removal of vehicular access and on-site parking provision.
 - Removal of garage door, erection of new steps, erection of new double-glazed door access facing the river and new door inside elevation. The finish floor level has been raised.
 - Change of use from Garage to gym.
 - Provision of vents on side elevation of gym/garage onto side passage with adjacent property. Oversailing of adjacent property by new roof profile.

At New Row, The Mullans, Donegal Town, Co Donegal

A Chara,

I refer to your request received on 11th May, 2022 under Section 5 of the Planning and Development Act, 2000 (as amended). Same has now been decided and I now issue to you herewith the Council's Declaration thereon. You are now advised that, in accordance with Section 5 (3) (a) of the Planning & Development Act, 2000 (as amended) where a Declaration is issued, any person issued with such a Declaration may, on payment to An Bord Pleanála of such fee as may be prescribed, refer a Declaration for review by the Board within 4 weeks of the date of issuing of the Declaration.

Mise, le meas,

7.60 - 7

For A/Senior Ex. Planner
Planning Services

/mp

Planning and Development Acts, 2000 (as amended)
(Declaration and Referral on Development and Exempted Development)

DECLARATION

Chief Executive's Order No: 2202PH1487

Reference No: S5 22/15

Name of Requester: Marion Thomas
C/o RML Planning
3 David Road
Drumcondra
Dublin 9
D09H2V6

Summarised Description of development the subject matter of request:

- Removal of a front gable parapet with lower monopitch roof behind and replacement with new higher roof with an amended roof profile on a previously used garage structure now used as a gym. The previous highest point of the monopitch roof was at the same level as a window-sill on the window of the adjacent property at a distance of 0.5 m. The new roof profile blocks the gable window on the adjacent property.
- Removal of vehicular access and on-site parking provision.
- Removal of garage door, erection of new steps, erection of new double-glazed door access facing the river and new door inside elevation. The finish floor level has been raised.
- Change of use from Garage to gym.
- Provision of vents on side elevation of gym/garage onto side passage with adjacent property. Oversailing of adjacent property by new roof profile.

Location: New Row, The Mullans, Donegal Town, Co Donegal

IT IS HEREBY DECLARED THAT THE SUBJECT MATTER OF THE REQUEST AS ABOVE

IS Development

IS Exempted Development

WITHIN THE MEANING OF THE ABOVE ACT

The Planning Authority in considering this referral, had regard particularly to:

- Section 2, 3, 4 and 177U of the Planning and Development Act, 2000 (as amended), and
- Article 6, 9 and Class 1 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended)

And concluded that:

The proposal **IS Development** within the meaning of the Planning & Development Act, 2000 (as amended) and **IS Exempted Development** as it falls within the scope of Section 4(1)(h) of the Planning and Development Act, 2000 (as amended) and Schedule 2, Part 1, Class 1 of the Planning and Development Regulations, 2001 (as amended).

Dated this 7th day of June, 2022



for A/Senior Ex. Planner
Planning Services



Digital Land Surveyors Ltd

LAND SURVEYS • SETTING OUT • LEGAL LAND MAPS

Tel. 074-9127720 Fax. 074-9128396 Mob. 0878323916

24th June 2014

Our Ref: F1413

Marian Thomas
Mullans
Donegal Town
Co Donegal

**Re: Property at Mullans, Donegal Town, Co Donegal.
Folio DL24427F.**

Dear Marian

I refer to the above and to your recent query relating to the boundaries of your property at Mullans, Donegal Town. We visited the property on Thursday 19th June 2014 and carried out a digital boundary survey and recorded digital photos.

When arriving at the property I noted that your neighbour Ms Noreen Portno was in the process of completing renovation works to her property. The building adjacent to your property was recently reroofed.

Following completion of the survey and comparison of same with a certified Property Registration Authority map I can confirm the following with reference to the enclosed map and photos.

- With reference to photo no.1, the north western boundary to your property is the outer surface of the existing wall pertaining to the garage within Noreen Portno's property. This boundary is determined when overlaying the boundary survey onto a certified P.R.A map – folio DL24427F.
- With reference to photo no.2, a 50mm overhang of the fascia board encroaches onto your property known as folio DL24427F. The fascia board forms part of the newly constructed roof to the garage within Noreen Portno's property.
- With reference to photo no.3, the 50mm overhang to the rear of the property that also encroaches onto Folio DL24427F is confining the airflow to the existing chimney. The chimney shown on photo no.3 services the heating system to your property.

No.3 Carnamuggagh Upper,
Kilmacrennan Road,
Letterkenny, Co. Donegal.

Email: info@landsurveyors.ie
web: www.landsurveyors.ie

- With reference to photo no.4, the new works recently completed have increased the height of the roof to the garage within Noreen Portno's property by 500mm. The original garage height prior to the new works extended to the same level of the window cill located on the north western gable of your dwelling, however the new works have increased the roof level which shadows the window opening. Please be advised by an architect to ascertain if same is a planning issue.

I hope all is to your satisfaction and should you have any queries or require further information, please do not hesitate to contact me.

Yours sincerely



Declan McCullagh

Enc.

593050 mE, 878740 mN

The Property Registration Authority
An tÚdarás
Cláirúcháin Maoine

Official Property Registration Map
 This map should be read in conjunction with the folio.

Registry maps are based on OSI topographic mapping. Where registry maps are printed at a scale that is larger than the OSI published scale, accuracy is limited to that of the original OSI map scale.

For details of the terms of use and limitations as to scale, accuracy and other conditions relating to Land Registry maps, see www.pra.ie.

This map incorporates Ordnance Survey Ireland (OSI) mapping data under a licence from OSI. Copyright © OSI and Government of Ireland.

- (centre-line of parcel(s) edged)
- Freehold
 - Leasehold
 - Sub-Leasehold
 - 'S' Register

(see Section 8(b)(ii) of Registration of Title Act, 1964 and Rule 224 & 225 Land Registration Rules 1972 - 2010).

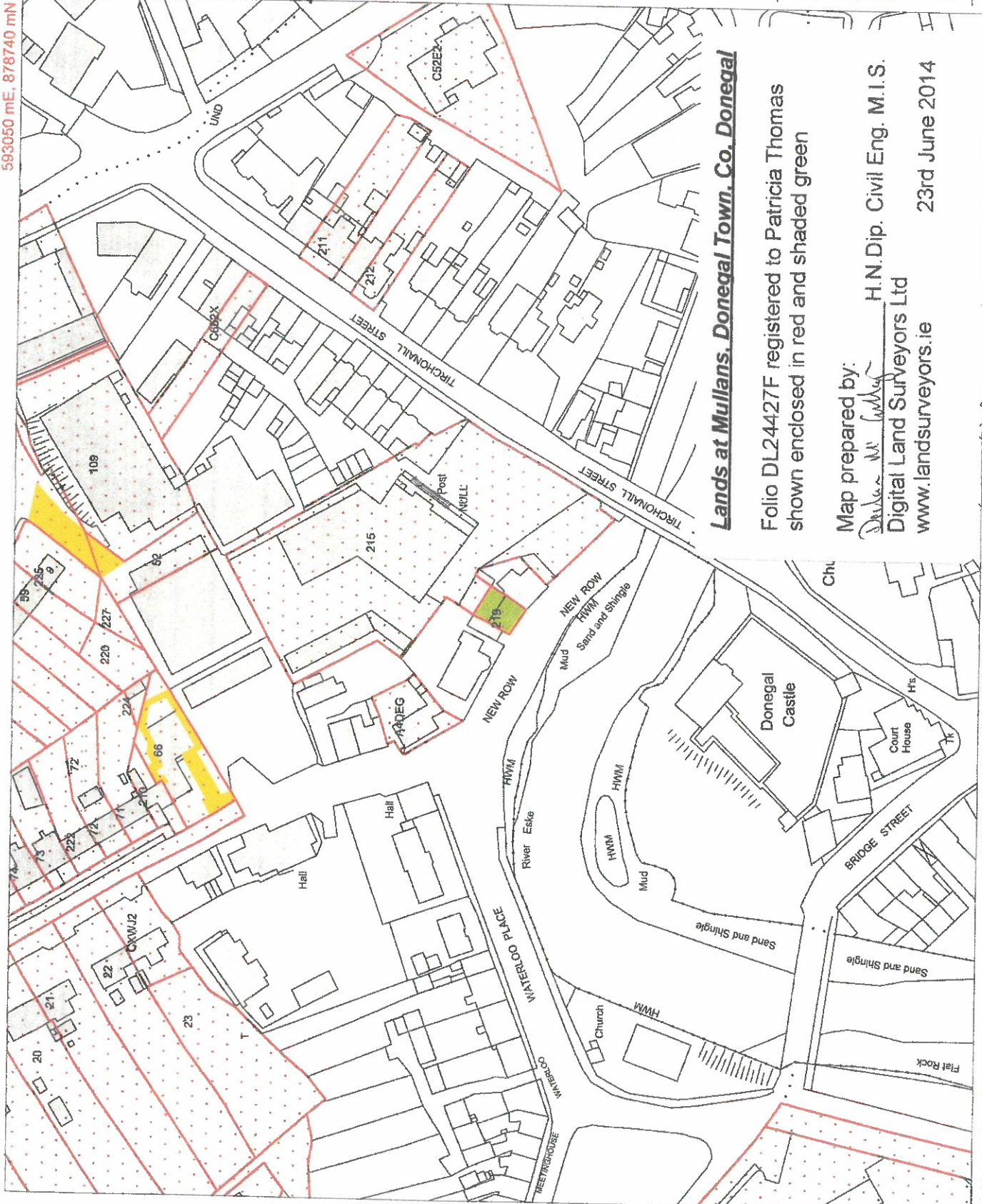
- Burdens** (may not all be represented on map)
- Right of Way / Wayleave
 - Turbary
 - Pipeline
 - Well
 - Pump
 - Septic Tank
 - ▽ Soak Pit



A full list of burdens and their symbology can be found at: www.landdirect.ie

The registry operates a non-conclusive boundary system. The Registry Map identifies properties not boundaries meaning neither the description of land in a register nor its identification by reference to a registry map is conclusive as to the boundaries or extent. (see Section 85 of the Registration of Title Act, 1964). As inserted by Section 62 of the Registration of Deed and Title Act 2006.

1:1000



Lands at Mullans, Donegal Town, Co. Donegal

Folio DL24427F registered to Patricia Thomas shown enclosed in red and shaded green

Map prepared by:
Patricia Thomas
 H.N.Dip. Civil Eng. M.I.S.
 Digital Land Surveyors Ltd
www.landsurveyors.ie 23rd June 2014

592730 mE, 878480 mN

Creation Date: 19 June 2014 11:36:50

Application Number: S2014LR008669Q

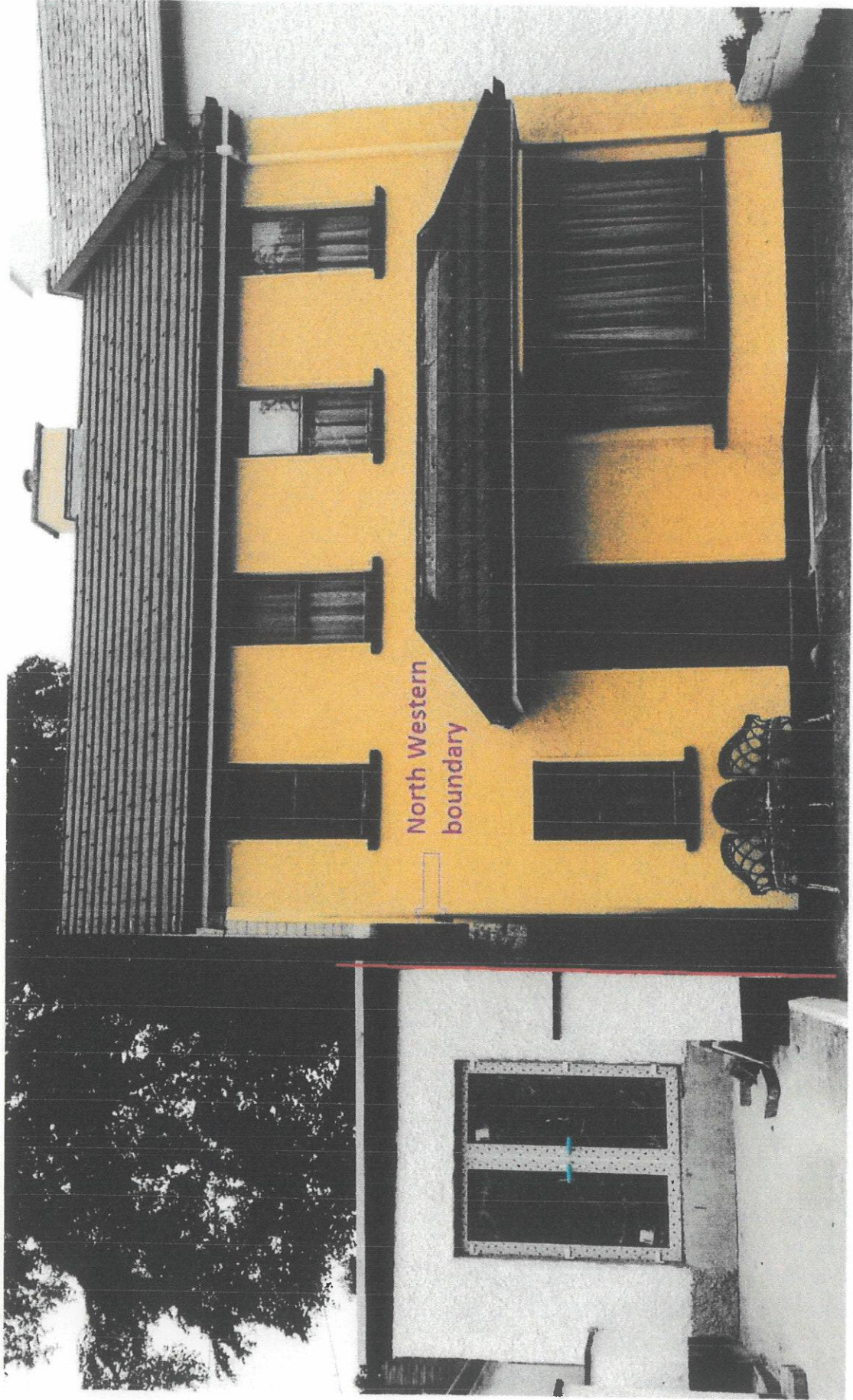
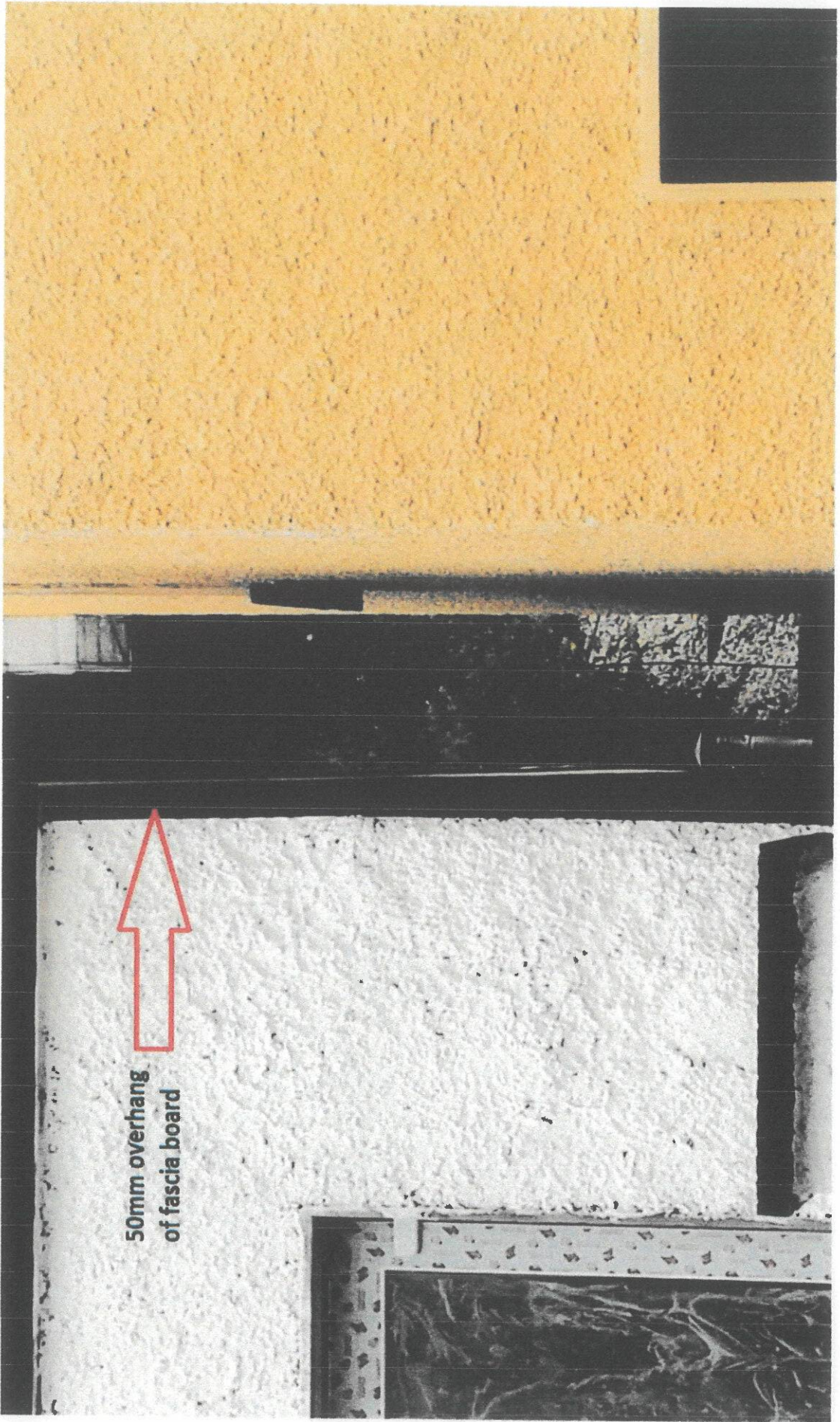


Photo No. 1 – Boundary position shown in red.



50mm overhang
of fascia board

Photo No. 2 – 50mm overhang of fascia board extending beyond the boundary wall.

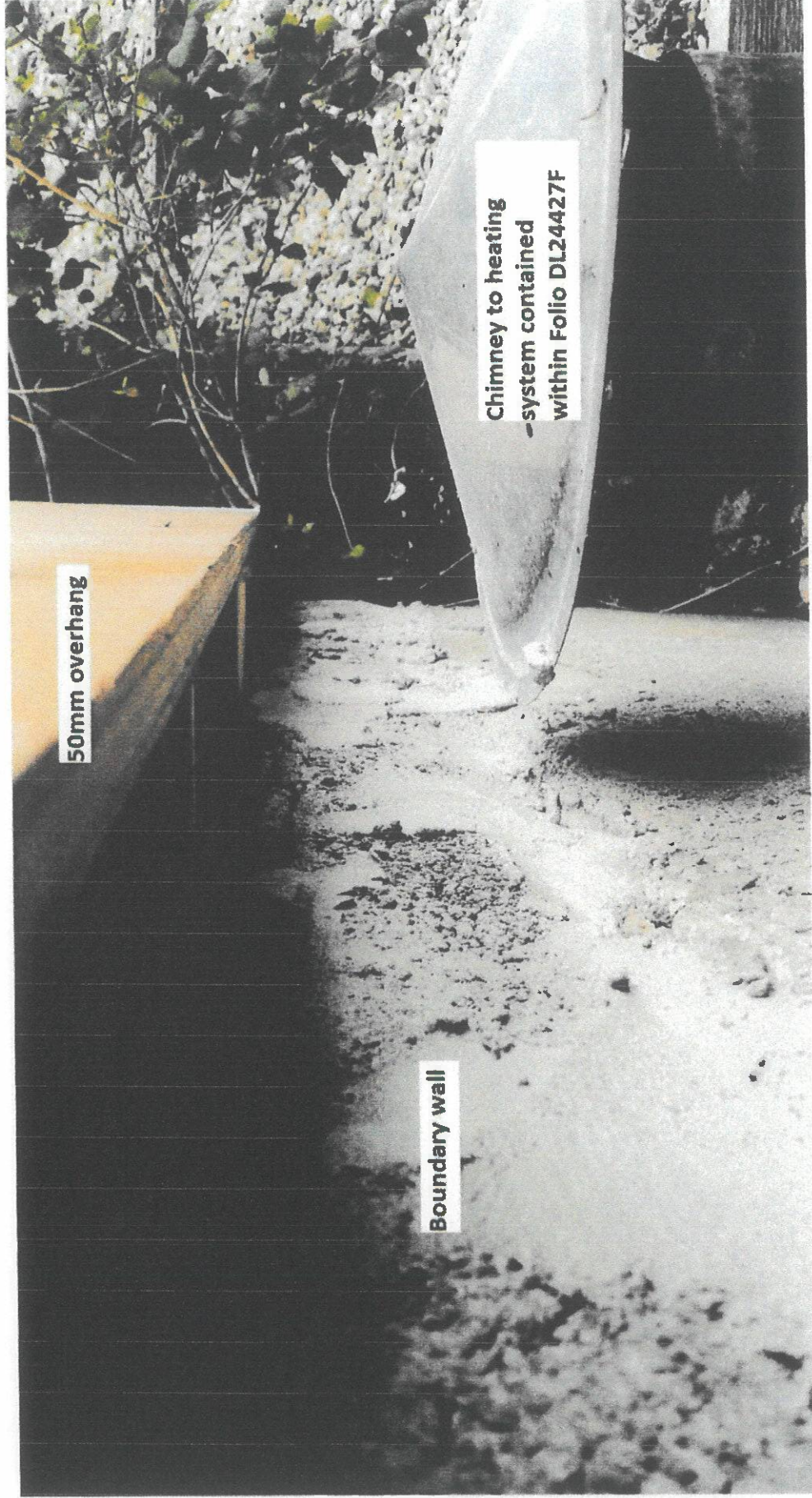


Photo No.3 – Fascia overhang in relation to existing chimney.

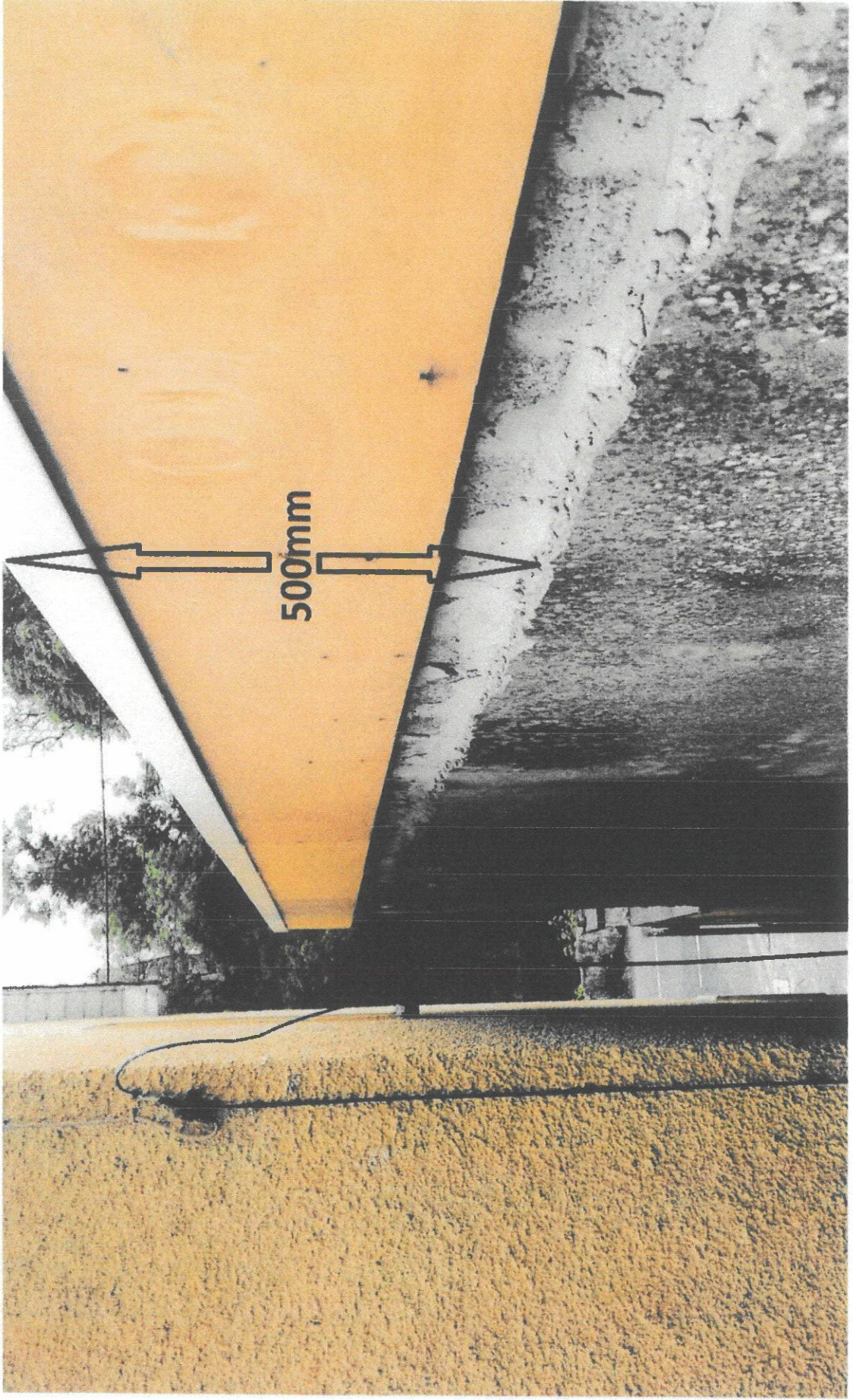


Photo No.4 -- Illustrates the extend of the recent works in relation to the original structure.

Unauthorised Development

Report of Unauthorised Development

Date received: 03/06/2014

Name: [Redacted]
Address: [Redacted]
Telephone No.: [Redacted]
ringing on behalf of her mother [Redacted]

Please tick as appropriate

- Telephone
- Fax
- Letter
- In Person
- E-mail

Owner/Developer & Location: Norzean Portno @ Waterloo Pla
Deregel Town

(Norzean doesn't live there)

Direction to Site: Take right @ Water Bank to Water Str.
Go over bridge - Take left - Go under next bridge - 3
houses together - 3rd house is where works are being
carried out.

Details of Alleged Unauthorised Development

Detached garage demolished - built higher
Garage built attached to neighbour's wall -
wall now built higher + garage roof
overhanging into neighbour's garden.
Adviser wants to know if this is civil
issue or can we deal with it under
Planning law. Adviser thinks new garage may
be lived in or used as business!!

File Ref: _____

Date: _____

To: _____

Can you please:

- Inspect and complete attached report.
- Recommend what action to be taken.
- Other: _____

Notes:

[Large empty box for notes]

Signed: _____

Date: _____

