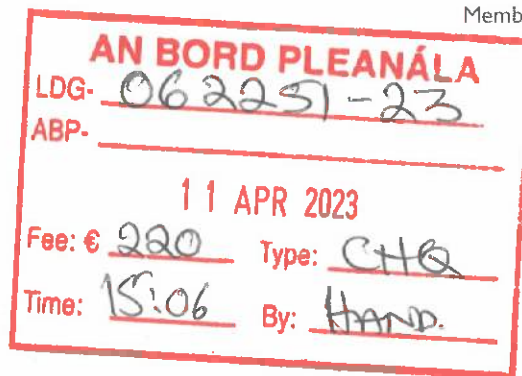


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Tuesday 11 April 2023

The Secretary
An Bord Pleanála
64 Marlborough Street, Dublin 1

First Party Appeal against decision of the Local Authority in connection with a Section 5 Declaration on Behalf of:

Mr. Robert McDonald

No.15 The Park, Wolstan's Abbey, Celbridge, Co. Kildare

Section 5 Referral Description:

Whether or not a second floor window as constructed in side gable wall to No. 16 The Park, Wolstan's Abbey is or is not Exempted Development

LA Plan register no.: **Kildare Co. Co. Ref. no. ED/1004**

Date of decision: **13th March 2023**

Local Authority: **KILDARE County Council**

Dear Sir or Madam,

We refer to the above Section 5 Referral Declaration and on behalf of our clients, and in accordance with Section 5(3)(a) of the 2000 Planning and Development Act (as amended) we wish to submit an Appeal against the Planning Authority's decision declaring that the relevant development is exempted development, and ask that the points below and attached be taken into consideration by the Board when determining this appeal. We enclose herewith a cheque in the sum of €220.00 being the prescribed fee for this appeal, along with a copy of the original Section 5 reference and decision on the referral from the Local Authority.

We will set out below our reasons for appealing the declaration as issued by Kildare County Council in the first instance and why the Board should over turn the decision and declare that the relevant development is not exempted development and that planning permission is required for the window as constructed.

1.0 Introduction:

The property relevant to this Section 5 reference is **No. 16 The Park, Wolstan's Abbey, Celbridge**, a detached two storey with second floor converted attic accommodation.

The Appellants property and home is adjacent to same located at **No. 15 The Park, Wolstan's**

Abbey, Celbridge.

The Appellant has certain concerns in connection with the development as constructed, and is of the strongest opinion that these certain works comprise development, do not comprise exempted development and therefore requires a prior grant of permission, and as same has not been granted represents an unauthorised development.

Of particular concern is the 'as constructed' second floor window to the side gable of No. 16 which has not been constructed in accordance with the planning permission as granted, reference 18/1356 and in particular condition no. 3 as attached to same permission.

The Appellant has requested that the Local Authority issue a Declaration under Section 5 of the Planning & Development Act confirming that the window does not in fact comprise exempted development and, as it is not permitted under planning permission 18/1356, is in fact development and is therefore unauthorised development. The Planning Authority have, remarkably, and against all relevant facts, decided that the window is exempted development and our client now wishes to appeal this decision.

A copy of the original Section 5 Reference is attached at Appendix A and a copy of the decision as issued by the Local Authority is attached at Appendix B, along with the Planners Report informing same decision.

We do not intent to restate all of the original arguments as outlined in the initial Section 5 Reference, as they are available in the attached and respectively refer the Board to Appendix A.

The Board will also be aware, in consideration of this Appeal that the Appellant has already attempted to get this matter resolved by way of an Enforcement Action, however the Local Authority have, in the Appellants strongest opinion, failed in their duty to ensure compliance with a clear planning permission condition by allowing what is an unauthorised development to occur. The Appellant has therefore no other option but to seek to have the relevant development (2nd floor window) formally declared as development and therefore an unauthorised development, so that appropriate steps can be taken.

3.0 Grounds for Appeal:

It is the Appellants strongest contention that the window in question is an unauthorised development for reasons previously stated, namely non compliance with Condition No. 3 of planning permission 18/1356. In addition it is contended that this is a breach of the permission as granted.

In determining this referral, the Local Authority correctly classified the development, namely the forming of a second floor window to the side gable wall as development. We agree with this. We do not agree with the assessment that the window comprises an exempted development.

From a review of the assessment as contained within the Planners Report it appears that in deciding this, the basis of the decision was made on the grounds that the window could be considered as exempted under Section 4.1.(h) of the 2000 Act, and specifically on the basis that such a development would **“not materially affect the external appearance so as to render the appearance inconsistent with the character of the structure or of neighboring structures”**, as stated in the Planners assessment, which is an approximation of S. 4.1.(h).

Firstly, it is arguable that the insertion of such a gable window, regardless of any issues around planning compliance would, in any objective assessment, be considered as having a material impact on the structure and also on neighbouring structures.

It is clear from a review of the houses within the vicinity of the Appellants property that such a gable window is somewhat unique and unprecedented and is not prevalent in the surrounding buildings, therefore it can only be argued that it is material, and that it materially affects the character of the existing structure. In addition, being unprecedented, the window has a material affect on neighbouring structures, particularly the Appellants property and raises the potential for a material impact on same, including overlooking.

Secondly, as has already been outlined, it is clear from any objective and reasonable assessment that the window as constructed does not comply with the planning permission as granted. While the Local Authority have appeared to uphold their previous (and it is contended incorrect) decision to close the previous enforcement file, they do now appear to agree that the window is larger than needed or permitted, as the Planner in their report states:

It does appear from the images provided with the Declaration that the window may be larger than the minimum size acceptable under the section 1.3.7.1 (a) of Technical Guidance Document B – Fire Safety Volume 2 Dwelling Houses (2017) which states that “The window should have an openable section which provides an unobstructed clear open area of at least 0.33 m2. The height should be not less than 450 mm. The width should be not less than 450 mm. The opening section should be capable of remaining in the position which provides this minimum clear open area.”

Additionally, when examining the “fixed” element of the window, the Planner goes onto say that: *The report goes on to again address the non-compliance with condition 3 of 18/1356 and also notes that the window is openable and therefore not “permanently fixed” as the condition states. The “permanently fixed” element of the condition refers to the fixture of opaque glazing to the window, rather than referring to the window to be permanently shut.*

We do not accept the Planners interpretation of the meaning of condition no. 3 (inserted in full below) that fixed refers to the opaque glazing only. The actual wording states that the window **“be reduced in size.....and shall be permanently fixed and maintained with obscured glazing....”**

The Board will be aware of the long standing tradition of the inclusion of conditions to ensure that high level windows overlooking adjoining properties are fixed closed fitted with obscure glazing. As clearly demonstrated in the enclosed correspondence and previous reference this is not the case here, and the window is non compliant.

3. The proposed bedroom window at attic level shall be reduced in size to the minimum acceptable under the Building Regulations and shall be permanently fixed and maintained with obscured glazing only.

Reason: In the interest of visual and residential amenity.

It is contended that the interpretation of the Planner above is incorrect, and does not bear up to scrutiny under normal planning considerations, and is suggested that it may be an attempt to justify a position already taken by the Planning Authority in respect of the previous enforcement action. Clearly, the window is not compliant with condition no. 3.

It is noted that there is a strict principle enshrined within the Planning Legislation which effectively removes exempted development rights in the event of an unauthorised development. Article 9 goes on in section (viii) to clarify that same shall not be exempted development for the purposes of the Act..... if it would.....:

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

Clearly, as already determined above, we are dealing with an unauthorised element of works, being works which are not constructed in accordance with the permitted design. Therefore, there is no way under the legislation that the works can be considered as exempted development.

In addition, the works do have a material impact on both the property and its neighbouring properties, and cannot be considered as exempted development under S.4.1.(h).

Then, as clarified earlier, as the works are defined as development works, are not exempted development, they must secure a grant of planning permission.

4.0 Summary:

In conclusion, we contend in the strongest way that the Local Authority have erred in their determination, and that we have comprehensively demonstrated that the window to the gable wall, as constructed, comprises development, is not constructed in accordance with the original planning permission and as a result is an unauthorised development. Nor can it be classified as an exempted development, therefore the window requires that Planning Permission be obtained. We respectfully ask An Bord Pleanala to confirm same.

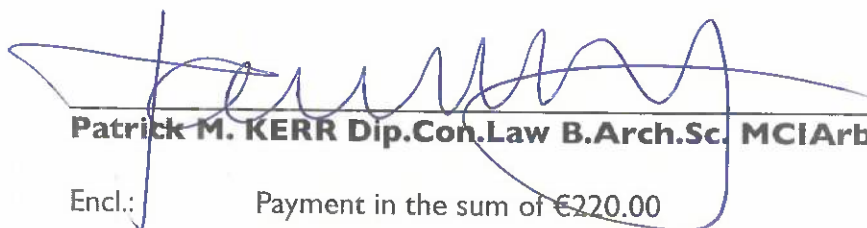
We note that the Planning Authority had previously issued a Section 152 Warning letter in connection with this matter and reference no. UD 7603 refers. We also note that despite our clients previous representations and our subsequent report dated 1st October 2021, the Planning Authority, for whatever reason, have decided not to act on the matter of the legitimate unauthorised development concerns raised by our client. With reference to Kildare Co. Co. correspondence dated 15th February 2021 the Planning Authority had considered the matter closed, and as stated in same correspondence for what appears to be the stated reason that:

"the window in question is now appropriately glazed with opaque (or laminate sheet applied internally) and complies with the requirements of planning reference 18/1356".

As outlined, compliance with Condition No. 3 requires three elements, a reduction in size, that the window be permanently fixed, and that it comprise of opaque glazing (not some easily removable laminate sheet fixed after the fact). The window as installed does not, in any way, comply with the requirements of Condition No. 3, remains an unauthorised development, and continues to cause an obtrusion on our clients property. The purpose of this Section 5 reference appeal is to formally obtain confirmation that the window as constructed is in fact development, is not exempted development and requires a grant of planning permission, so that the matter can be resolved once and for all.

We trust that the above is in order and that a successful decision will be forthcoming.

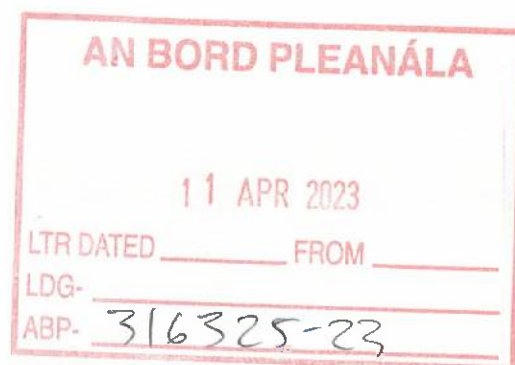
Yours faithfully


Patrick M. KERR Dip.Con.Law B.Arch.Sc. MCIArb FRIAI

Encl.: Payment in the sum of €220.00

Appendix A:

- **Original Section 5 Reference**



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Friday 9 December 2022

Job ref: 21-20

The Secretary, Planning Department,
Kildare County Council, Áras Chill Dara,
Devoy Park
Naas, Co. Kildare

RE: SECTION 5 REFERENCE IN RESPECT OF DEVELOPMENT WORKS AT NO. 16 THE PARK, WOLSTAN'S ABBEY, CELBRIDGE, CO. KILDARE

Dear Sir/Madam,

On behalf of our client Mr. Robert McDonald, owner of No. 15 The Park, Wolstan's Abbey, Celbridge (the Referrer) and in accordance with Section 5 of the Planning & Development Act 2000 (as amended) we formally request the Local Authority to declare whether or not the work as described below is considered as development and if so whether or not it is an exempted development, and if not development, then confirm that Planning Permission is required for same, and in the absence of same that an unauthorised development has in fact occurred.

We note that Section 5 of the Planning & Development Act 2000 (as amended) states that

"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."

In accordance with Section 5 we set out below details of the nature and extent of the development in question and our reasons for contending that same is an exempted development. In addition to this correspondence, and in support of this reference we enclose herewith the following:

- Completed Application Form x 1 copy
- Site location map x 2 copies
- Cheque in the sum of €80.00 being the prescribed fee payable

1.0 DESCRIPTION OF THE PROPERTY AND RELEVANT HISTORY:

The property relevant to this Section 5 reference is **No. 16** The Park, Wolstan's Abbey, Celbridge, a detached two storey with second floor converted attic accommodation.

The Referrer's property and home is adjacent to same located at **No. 15** The Park, Wolstan's

Abbey, Celbridge.

The Referrer has certain concerns in connection with the development as constructed, and is of the strongest opinion that these certain works comprise development, does not comprise exempted development and therefore requires a prior grant of permission, and as same has not been granted represents an unauthorised development and now asked that the Planning Authority confirm same.

2.0 ORIGINAL PLANNING APPLICATION:

On 12th November 2018 a planning application file ref. no. 18/1356 was submitted for development at No. 16 described in the public notices as:

"(a) Permission for proposed single storey extension of 52sqm to rear of existing dwelling comprising of kitchen, dining and living area, 2 No. roof-lights to proposed flat roof extension. (b) Permission for alterations to existing elevations with internal alterations, proposed new bedroom window to south east facing side elevation. (c) Retention permission is sought for as constructed attic conversion comprising of 1 No. bedroom, bathroom, landing and stairs. (d) Retention for as constructed widening of entrance to driveway accommodating two cars. (e) And all associated site works"

On 7th January 2019 a notification of decision to grant permission subject to 10 conditions was issued and the final grant of planning permission was issued on 18th February 2019. A copy of the schedule of conditions is attached at Appendix A, and it is noted that generally the conditions attached are typical of such a permission being quite standard. Of particular note however is condition no. 3 outlined below:

3. The proposed bedroom window at attic level shall be reduced in size to the minimum acceptable under the Building Regulations and shall be permanently fixed and maintained with obscured glazing only.

Reason: In the interest of visual and residential amenity.

On examination of the Planners Report accompanying the decision to the application, as available from the Local Authority online web portal, and outlined below:

Residential Amenity:

Overlooking

Section 17.2.4 of the Development Plan states the following:

'In general, a minimum distance of 22 metres between opposing above-ground floor level windows is required for habitable rooms. In cases of innovative design where overlooking into habitable rooms does not occur, this figure may be reduced.

A separation distance of 35 metres will normally be required in the case of overlooking living room windows and balconies at upper floors.'

Section 17.4.8 part of which states the following:

'The extension should not provide for new overlooking of the private area of an adjacent residence where no such overlooking previously existing.

'In an existing developed area, where a degree of overlooking is already present, the new extension must not significantly increase overlooking possibilities.'

The proposed window at attic level in the side (southeast) elevation is noted with regard to potential for overlooking, however given the orientation of the dwelling in relation to Number 15, and a condition obscuring the glazing and reducing the window to the minimum required for it to comply with Building Regulations, it is considered these mitigating factors will offset the potential for undue overlooking.

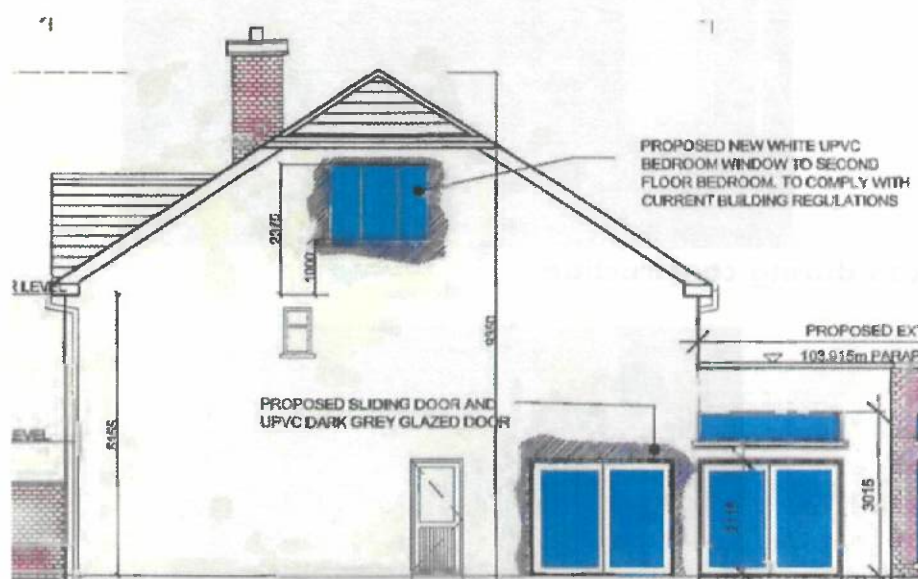
Having regard to the single storey nature of the proposed development extension, it is considered this part of the proposed development will not result in any undue overlooking.

Clearly the Planners have acknowledged the policies and objectives of the County Development Plan to mitigate overlooking and the resultant protection of amenities of neighbouring properties, with particularity regard to windows in close proximity to neighbouring properties. In this particular case, the application proposed the insertion of a new gable window to the southeast elevation which directly overlooks the rear garden of our client's property at No. 15. It is also abundantly clear that the stated intention of the insertion of Condition No. 3 was to mitigate and offset the potential for undue overlooking, by requiring that the window be reduced to the minimum required under the Building Regulations, by the insertion of obscure glazing and by **permanently** fixing the window so that it could not open.

3.0 COMPLETED DEVELOPMENT:

In or around late 2019, early 2020 the Applicants for No. 16 commenced the construction of their permitted development. Some time later, it became clear to our client that the development was not being constructed in accordance with the permitted drawings, as required under Condition No. 1 of the Final Grant of Permission, and in particular with regard to the requirements arising from Condition No. 3.

On careful examination of the drawings submitted as part of the planning application under file 18/1356 and as subsequently granted permission the window in question was shown on drawings no. PI – 103 and as stated on the second floor plan on same drawing the window was intended to have a width of 1800mm and a height (as extrapolated from the stated dimensions) of 1375 which by any measure can be considered as a large opening of almost 2.5m². This window appears to have been divided into 3 equal sections as per the extract from the drawing below.



Correctly, the Planners in their decision sought to reduce the size of this opening to **“the minimum required for it to comply with Building Regulations”** ref. Planners report as above.

While what was constructed did to some degree reduce the size of the above opening, it was only marginally reduced and certainly not reduced to the minimum required to comply with the Building Regulations. On examination of the side gable, as evidenced by the two images below, the window still appears to be a significant size, and while we were not in a position to accurately measure the opening as constructed, we estimate that the size of the window is somewhere in the region of at least 1200mm to 1500mm wide and 1100mm tall, based on a visual and proportional study. Regardless, the window is still significant in size and does not full fill either the express requirement of Condition No. 3 nor the implied requirement of the condition.

In addition, Condition No. 3 clearly requires that the window be “permanently fixed” and also “maintained with obscured glazing only”. This is a typical requirement for such windows on side walls that overlook adjacent properties, as set out, and the clear unambiguous requirement is that the windows be factory fitted with obscure glazing.

In this case, neither the window has been constructed as being “permanently fixed” nor has obscure glazing been utilized, as evidenced from the images below. In fact, when the window was initially constructed it was fitted with clear glazing. Following previous representation from our clients, the applicant has since applied an opaque film of some kind to the glazing, which, it is contended in the strongest possible terms is NOT in compliance with the requirements of Condition No. 3.

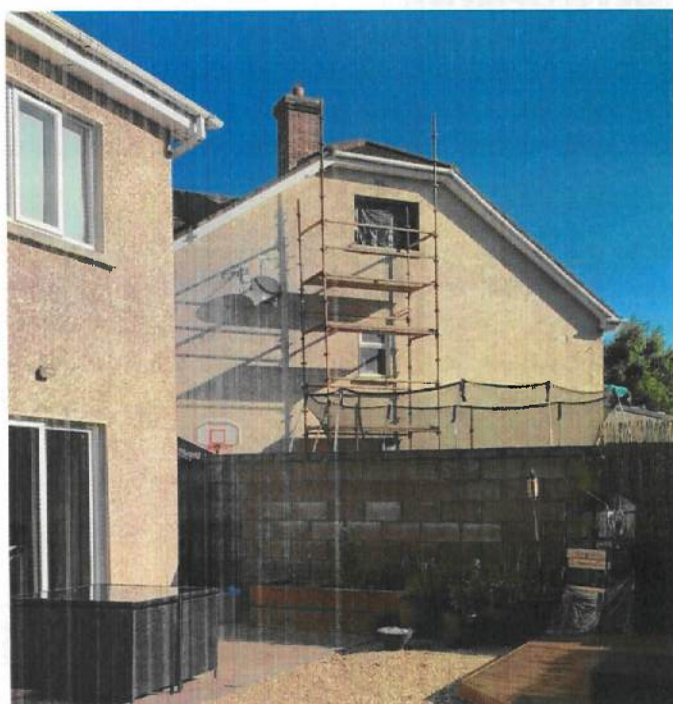


Image taken during construction



Image of Completed Gable

Clearly the above images demonstrate that the works are not in accordance or compliance with Condition No. 3

4.0 DESCRIPTION OF THE QUESTIONS & CONSIDERATIONS FORMING THE SUBJECT MATTER OF THIS SECTION 5 REFERENCE:

The fundamental question framed within this reference is concerned with the new gable window as constructed and as outlined above and firstly whether or not same has been constructed in accordance with the permitted grant of planning permission, and if not then secondly if the window as constructed constitutes development, and thirdly if development, then can it be considered as exempted development or not.

Definition of development:

In assessing whether or not something is or is not to be considered as exempted development it must first be established if an action or activity is in fact development in the first instance. Section 3.(1) of the Planning Act 2000 defines development as follows:

“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.”

Therefore in reviewing the question at hand, it is clear that the works, namely the provision of a new window in the side gable comprises “the carrying out of any work” and is therefore development. The next question is to consider if the development can be considered exempted development or not.

Exempted development:

There are two primary areas in Legislation where exempted development rights arise, firstly Section 4(1)(H) of the Planning & Development Act 2000 which states

“(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;”

And Article 6 of the 2000 Regulations, arising from Section 4.(2) of the Planning & Development Act 2000 which states

“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.”

Clearly, and as has been extensively and comprehensively demonstrated in Section 2.0 & 3.0 above, the window as constructed **has not been** constructed in accordance with the requirements of the grant of planning permission as issued under file ref. 18/1356, and in particular the requirements of condition no. 3 as attached to same. Therefore by any objective assessment, the window represents a material breach of the conditions of the planning permission as granted and the development has not been completed in **“accordance with....plans....except as amended by the conditions of this permission....”** as required by Condition No. 1 of same grant of planning permission.

It is noted that with reference to Section 4.1.(h) of the Principle Act, typically minor works to a property can be considered as exempted development, including alterations to the exterior 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. While others may try to argue that the window in question could be described as such an alteration which does not materially affect the external appearance of the structure so as to render the appearance

inconsistent, we note that this, with reference to Article 9 of the 2000 Planning & Development Regulations which states that:

"Development to which article 6 relates shall not be exempted development for the purposes of the Act—

(a) if the carrying out of such development would—

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

It is further noted that there is a strict principle enshrined within the Planning Legislation which effectively removes exempted development rights in the event of an unauthorised development. Article 9 goes on in section (viii) to clarify that same shall not be exempted development for the purposes of the Act..... if it would.....:

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

Clearly, as already determined above, we are dealing with an unauthorised element of works, being works which are not constructed in accordance with the permitted design. Therefore, there is no way under the legislation that the works can be considered as exempted development. Furthermore, as clarified earlier, as the works are defined as development works, are not exempted development, they must secure a grant of planning permission.

5.0 CONCLUSION:

In summary, we contend in the strongest way that we have comprehensively demonstrated that the window to the gable wall, as constructed, comprises development, is not constructed in accordance with the original planning permission and as a result is an unauthorised development. Nor can it be classified as an exempted development, therefore the window requires that Planning Permission be obtained. We respectfully ask the Planning Authority to confirm same.

We note that the Planning Authority had previously issued a Section 152 Warning letter in connection with this matter and reference no. UD 7603 refers. We also note that despite our clients previous representations and our subsequent report dated 1st October 2021, the Planning Authority, for whatever reason, have decided not to act on the matter of the legitimate unauthorised development concerns raised by our client. With reference to Kildare Co. Co. correspondence dated 15th February 2021 the Planning Authority have considered the matter closed, and as stated in same correspondence for what appears to be the stated reason that:

"the window in question is now appropriately glazed with opaque (or laminate sheet applied internally) and complies with the requirements of planning reference 18/1356".

As outlined, compliance with Condition No. 3 requires three elements, a reduction in size, that the window be permanently fixed, and that it comprise of opaque glazing (not some easily removable laminate sheet fixed after the fact). The window as installed does not, in any way, comply with the requirements of Condition No. 3, remains an unauthorised development, and continues to cause an obstruction on our clients property. The purpose of this Section 5 reference is to formally obtain confirmation from the Planning Authority that the window as constructed is in fact development, is not exempted development and requires a grant of planning permission, so that the matter can be resolved once and for all.

We trust that the above is in order and that a successful decision will be forthcoming.

Yours faithfully,

Pat Kerr, Architect, Dip.Con.Law B.Arch.Sc. FRIAI MCIARB MIDI
Patrick M. Kerr Architecture Ltd.

Appendix A:

Copy of planning permission conditions attached to 18/1356

Comhairle Contae Chill Dara
Kildare County Council



Date: 18/03/2019
PL Ref: 18/1356

Dermot and Imelda Gidda,
C/o Pauline Stynes
Esler Hill
Kildangan
Monasterevin
Co Kildare

Planning Register Number: 18/1356
Application Receipt Date: 12/11/2018

PERMISSION (a) Permission for proposed single storey extension of 52sqm to rear of existing dwelling comprising of kitchen, dining and living area, 2 No. rooflights to proposed flat roof extension. (b) Permission for alterations to existing elevations with internal alterations, proposed new bedroom window to south east facing side elevation. (c) Retention permission is sought for as constructed attic conversion comprising of 1 No. bedroom, bathroom, landing and stairs. (d) Retention for as constructed widening of entrance to driveway accommodating two cars. (e) And all associated site works AT 16 The Park St. Wolstan's Abbey Celbridge Co. Kildare, W23 W421 IN ACCORDANCE WITH THE PLANS SUBMITTED WITH THE APPLICATION.

in pursuance of the powers conferred upon them by the Planning & Development Act 2000 (as amended), Kildare County Council have by Order dated 07/01/2019 GRANTED PERMISSION to the above named, for the above development subject to 10 conditions set out in the attached schedule

Date: 16/02/2019

Summary:

Senior Executive Officer, Planning
Kildare County Council

NOTE: The permission herein granted shall, on the expiration of the period of 5 years beginning on the date of the granting of permission, cease to have effect as regards:

- (1) In case the development to which the permission relates is not commenced during the period, the entire development, and
- (2) In case such development is so commenced, so much thereof as is not completed within that period.

It should be noted that outline permission will cease to have effect after a period of 3 years and also that such permission is subject to the subsequent grant of permission consequent on the grant of permission by the Planning Authority and that until such permission has been obtained to detailed plans of the development proposed, the development is NOT AUTHORISED.

Planning Permission is sought for a) Permission for proposed single storey extension of 52sqm to rear of existing dwelling comprising of kitchen, dining and living area, 2 No. rooflights to proposed flat roof extension. (b) Permission for alterations to existing elevations with internal alterations, proposed new bedroom window to south east facing side elevation. (c) Retention permission is sought for as constructed attic conversion comprising of 1 No. bedroom, bathroom, landing and stairs. (d) Retention for as constructed widening of entrance to driveway accommodating two cars. (e) And all associated site works at 16 The Park, St. Wolstan's Abbey, Celbridge, Co. Kildare, W23 W421- Dermot and Imelda Gildea-18/1356

Schedule 1 – Considerations and reasons on which this decision is based as required by Article 31 of the Planning and Development Regulations 2001, as amended.

Having regard to the nature and design of the development, the character of adjoining development, the reports received from the Council's internal Departments, the provisions of the Kildare County Development Plan 2017-2023 and the zoning (B, 'existing residential/infill') under the Celbridge Local Area Plan 2017-2023, it is considered that, subject to compliance with the conditions attached, the development would not seriously injure the amenities of the area or of property in the vicinity, and would be in accordance with the proper planning and sustainable development of the area.

Schedule 2-Conditions

1. The development shall be carried out and retained in accordance with the site layout plan, plans, elevations and documentation received by the planning authority on 12/11/2018 except as amended by the conditions of this permission.

Reason: To ensure that the development shall be in accordance with the permission and that effective control be maintained.

2. The existing dwelling and the proposed extension shall be jointly occupied as a single housing unit. The extension shall not be subdivided from the remainder of the dwelling and sold or let as a separate dwelling unit. The overall dwelling shall be used for domestic-related purposes only, and not for any commercial, workshop, or other non-domestic use.

Reason: In the interest of clarity and to regulate the use of the development in the interest of the proper planning and sustainable development of the area.

3. The proposed bedroom window at attic level shall be reduced in size to the minimum acceptable under the Building Regulations and shall be permanently fixed and maintained with obscured glazing only.

Reason: In the interest of visual and residential amenity.

4. The finishes shall be as per details submitted on the 12/11/2018 unless otherwise agreed in writing with the Planning Authority.

Reason: In the interest of visual amenity.

5. Site development works shall be confined to the hours of 8.00am to 6.00pm Monday to Friday and 8.00am to 1.00pm Saturdays. No site development works shall take place outside of these hours.

Reason: To safeguard the environment and living conditions of the residents and businesses of the surrounding area.

6. All service lines and cables servicing the proposed development shall be located underground except where otherwise agreed in writing with the Planning Authority.

Reason: In the interest of orderly development and visual amenities.

7. (a) Only clean uncontaminated surface water from the development shall be discharged to the surface water system.

(b) Only foul sewage and soiled water from the development shall be discharged to the foul system.

Reason: In the interest of public health, to avoid pollution and to ensure proper development.

8. All surface water shall be collected and disposed of to soakaways or the surface water system designed and constructed in accordance with B.S. 8301:1985 and BRE Digest 365 and provided with inspection manhole covers. No surface water shall be discharged to the foul system or 'combined drain' or onto the public road.

Reason: In the interest of sustainable drainage of the catchment.

9. (a) No surface water run-off from the site shall be discharged onto the public road.

(b) Existing land and roadside drainage shall not be impaired with and the revised entrance shall be retained to ensure the uninterrupted flow of the exiting roadside drainage.

Reason: So as to ensure that the developer keeps the public areas adjacent the development in a suitably clean state of repair during construction works.

10. The applicant/developer to pay to Kildare County Council the sum of €2,700 being the appropriate contribution to be applied to this development in accordance with the Development Contribution Scheme adopted by Kildare County Council on 5th November 2015 in accordance with Section 48 of the Planning and Development Act 2000 as amended. Payments of contributions are strictly in accordance with Section 13 of Development Contribution Scheme adopted by Kildare County Council on 5th November 2015.

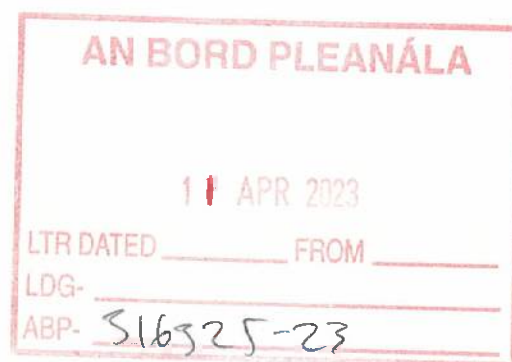
Note: Please note water and wastewater development contribution charges now form part of the water connection agreement, if applicable, with Irish Water.

Reason: It is considered reasonable that the developer should make a contribution in respect of public infrastructure and facilities benefiting development in the area of the Planning Authority.

ADVICE NOTE TO APPLICANTS All applicants are advised to make themselves aware of the requirements of the Building Control (Amendment) Regulations (S.I. No 9) 2014 which comes into effect on 1/3/2014 and the Construction Products Regulations (CPR) (Regulation (EU) no. 305/2011) which came into effect on 1/7/2013. Information leaflets can be viewed or downloaded on the council's website <http://kildare.ie/CountyCouncil/Planning/BuildingControlDepartment/> or the Department of the Environment Community and Local Government website <http://www.environ.ie/en/>

Appendix B:

- **Copy Local Authority S.5 Determination**
- **Copy Planners Internal Report S.5 Determination**



Date: 13/03/2023
Our Ref: ED/1004

Comhairle Contae Chill Dara
Kildare County Council



REGISTERED POST

Robert McDonald
c/o Patrick Kerr
39A Maynooth Road
Celbridge
Co. Kildare

RE: Application for a Declaration of Exempted Development under Section 5 at 16 The Park, St. Wolstan's Abbey, Celbridge, Co. Kildare.

Dear Sir/Madam,

I refer to your correspondence received 15th December 2022 & 19th January 2023 in connection with the above.

Please find attached declaration made under Section 5 of Planning and Development Acts 2000 (as amended) in this regard.

Yours sincerely,

PP anne-marie sucke
Senior Executive Officer
Planning Department

appeal date

10 / April / 23

11 / April / 23

**Declaration of Development & Exempted Development under
Section 5 of the
Planning and Development Act 2000 (as amended)**

WHEREAS a question has arisen as to whether the construction of a second floor window located on the side gable of an existing residential dwelling at 16 The Park, St Wolstan's Abbey, Celbridge, Co. Kildare is exempted development or is not exempted development.

AS INDICATED on the plans and particulars received by the Planning Authority on 15/12/2022 and further information received on 19/01/2023.

AND WHEREAS Robert McDonald requested a declaration on the said question from Kildare County Council,

AND WHEREAS Kildare County Council as the Planning Authority, in considering this application for a declaration under Section 5 of the Planning and Development Act 2000 (as amended), had regard to;

- (a) Planning and Development Act 2000 (as amended); and
- (b) Planning and Development Regulations 2001 (as amended);

AND WHEREAS Kildare County Council has concluded that the proposal comprises of development to which the provisions of the following applies:

- (a) Sections 2, 3, 4, and 5 of the Planning and Development Act 2000 (as amended);
- (b) Article 6 and Article 9 of the Planning and Development Regulations 2001 (as amended); and
- (c) The nature, extent and purpose of the development.


NOW THEREFORE Kildare County Council, in exercise of the powers conferred on it by Section 5(2)(a) of the Planning and Development Act 2000 (as amended), hereby decides that –

A second floor window located on the side gable of an existing residential dwelling at 16 The Park, St Wolstan's Abbey, Celbridge, Co. Kildare;

IS development and IS exempted development under Section 4(1)(h) of the Planning and Development Act 2000 (as amended).

Please note that any person issued with a declaration under Section 5 of the Planning and Development Act 2000 (as amended) may on payment to the Board of the prescribed fee, refer a declaration to An Bord Pleanála within 4 weeks of the issuing of the decision.

13th March, 2023



Senior Executive Officer

KILDARE COUNTY COUNCIL



PLANNING & STRATEGIC DEVELOPMENT DEPARTMENT

Section 5 referral & declaration on development & exempted development

Planning & Development Act 2000 (as amended)

Reference No. ED/001004

Name Of Applicant(s):	Robert McDonald
Address Of Development:	16 The Park, St Wolstan's Abbey, Celbridge, Co. Kildare.
Development Description:	Second floor window located in side gable of existing dwelling

Introduction

This is a request for a **DECLARATION** under Section 5(1) of the Planning and Development Act 2000 (as amended) to establish whether under Section 5 of the Act the works a second floor window located on the side gable of an existing residential dwelling at 16 The Park, St Wolstan's Abbey, Co. Kildare is exempted development.

Site Location

The site is located within St Wolstan's Abbey housing scheme, to a cul-de-sac layout known as 'The Park'. The property is a two-storey detached brick-fronted dwelling house. There are neighbouring properties to the north and south. Access to the site is gained from the west and another access road bounds the site to the east.

Description of Proposed Development

The development is the provision of a second floor window located on the side gable of the existing dwelling on site.



Fig 1: Site Location and context

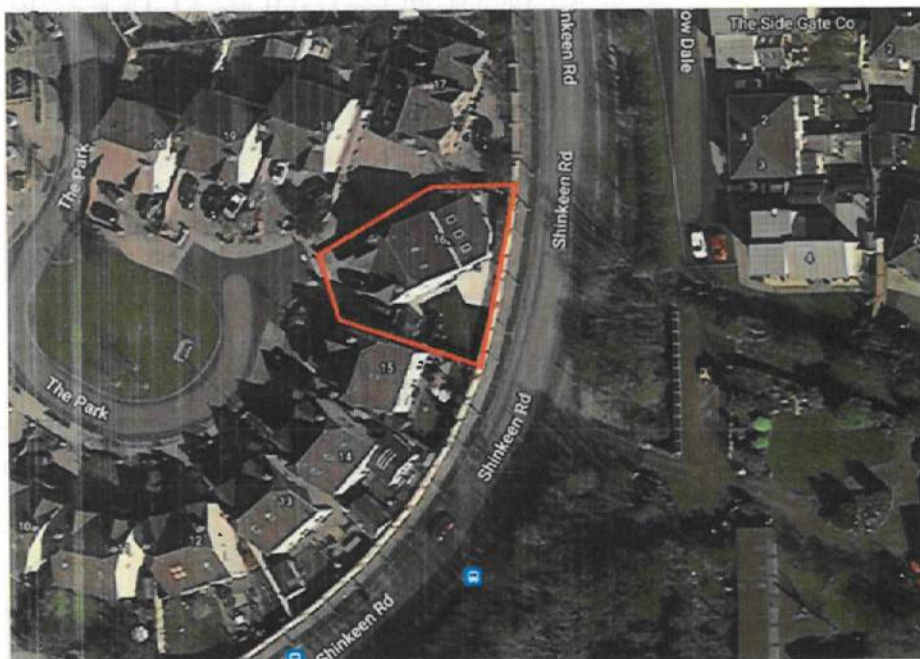


Fig 2: Aerial view of subject site (Google Images)

Planning History

UD7603 – Non – compliance with condition no. 3 of Pl. Ref. 18/1356 – Case closed

18/1356 – Permission granted to Dermot and Imelda Gildea for (a) Permission for proposed single storey extension of 52sqm to rear of existing dwelling comprising of kitchen, dining and living area, 2 No. rooflights to proposed flat roof extension. (b) Permission for alterations to existing elevations with internal alterations, proposed new bedroom window to south east facing side elevation. (c) Retention permission is sought for as constructed attic conversion comprising of 1 No. bedroom, bathroom, landing and stairs. (d) Retention for as constructed widening of entrance to driveway accommodating two cars. (e) And all associated site works. Condition no. 3 of the permission is of note:

Reason: In the interest of visual and residential amenity



Planning and Development Act 2000 (as amended)

'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.

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.

The following shall be exempted development for the purposes of the Act-

Section 5(2)(c)

A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question

Section 5(7) EIA Screening

The proposed development is not specified in Part 2 of Schedule 5 of the Planning and Development Regulations 2001(as amended). In any event, it is considered, having regard to nature, size and location, the proposed development would not be likely to have significant effects on the environment. Therefore, EIA is not required.

Planning and Development Regulations 2001 (as amended)

Article 6(1)

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

Article 9 (1)(a)(i)

Restrictions on exemption.

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

(a) if the carrying out of such development would—.....(15 items)

Assessment

The provision of a window and thereby altering the facade or elevation of a structure constitutes 'works' as defined by Section 2 of the Act and 'development' as defined by Section 3 of the Act.

The legislation provides for the carrying out of works for the improvement of a structure which *do not materially affect the external appearance* so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

The documentation submitted with the Declaration indicates that the existing second floor window located on the side gable of the dwelling does not accord with Condition no. 3 of Pl. Ref. 18/1356. Condition no. 3 outlines that *"The proposed bedroom window at attic level shall be reduced in size to the minimum acceptable under the Building Regulations and shall be permanently fixed and maintained with obscured glazing only"*.

The window appears to have been fitted with obscure glazing, this is also noted under the Enforcement Officer's report dated 10th November 2020 which relates to UD7603. It should be noted that while a Warning Letter was issued under UD7603, the issue was addressed by the owner of the site and the enforcement case was closed by the Planning Authority.

The outstanding issue raised in this Declaration, then remains around the size of the window constructed on the second floor of the south eastern elevation. The Applicant has failed to provide exact measurements of the window in question and has instead undertaken a visual assessment. It does appear from the images provided with the Declaration that the window may be larger than the minimum size acceptable under the section 1.3.7.1 (a) of Technical Guidance Document B – Fire Safety Volume 2 Dwelling Houses (2017) which states that *"The window should have an openable*

section which provides an unobstructed clear open area of at least 0.33 m². The height should be not less than 450 mm. The width should be not less than 450 mm. The opening section should be capable of remaining in the position which provides this minimum clear open area." Given the lack of exact measurement provided with the declaration and noting the fact that the referrers of this declaration are not the landowners of the subject site, further details will be required from the landowner under Section 5(2)(c) of the Planning and Development Act 2000 (as amended), in order to address the issue of compliance with Condition no. 3 of PI. Ref. 18/1356.

Conclusion

Further information was required in order to adequately assess the application and additional information was requested from the applicant and the owner of the property as follows

1. Please note that a Section 5 Declaration has been received by the Planning Authority in relation to your property regarding the existing second floor window on the south eastern elevation. To enable the Planning Authority issue the declaration on the question and consistent with Section 5(c) of the Planning and Development Act 2000 as amended, the owner of the subject site is requested to clarify the exact size of the existing second floor window on the south-eastern elevation of the dwelling which was permitted under PI. Ref. 18/1356. The owner is also requested to comment on the compliance of the development with Condition no. 3 of 18/1356 in terms of the size of the window in accordance with Technical Guidance Document B – Fire Safety Volume 2 Dwelling Houses (2017).

Response to further information request was submitted on 19/01/2023

Response and Assessment

It is noted that at the time of writing, the owner has not responded to the further information request, however the Applicant of the Section 5 application has submitted a response. The response, carried out by Patrick M. Kerr Architecture on behalf of the Applicant, reiterates the fact that the exact dimension of the window is unclear. However, the report states that based on visual observations it is considered at least 1200mm wide and 1100mm in height. The report goes on to again address the non-compliance with condition 3 of 18/1356 and also notes that the window is openable and therefore not "permanently fixed" as the condition states. The "permanently fixed" element of the condition refers to the fixture of opaque glazing to the window, rather than referring to the window to be permanently shut.

In any case, having regard to the minor scale of the development and to Section 4(1)(h) of the Planning and Development Act 2000 (as amended), it is considered that the works carried out under PI. Ref. 18/1356 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. Therefore, the development in question is considered exempted development.

Conclusion:

Having regard to:

- Sections 2, 3, 4 and 5 of the Planning and Development Act 2000 (as amended).
- Article 6 and 9 of the Planning and Development Regulations 2001 (as amended);
- The planning history of the site;

It is considered that the existing second floor window located on the side gable of an existing residential dwelling **constitutes development** as defined in Section 3(1) of the Planning and Development Act 2000 (as amended) and **is exempted development** as defined under Section 4(1)(h) of the Planning and Development Act 2000 (as amended), as amended.

Recommendation

It is recommended that the applicant be advised that the development as described in the application is development and is exempted development.
(See declaration included overleaf)



Oisín Boland
Assistant Planner
22/02/2023



Kehinde Oluwatosin
Senior Executive Planner
23/02/2023


Emer Uí Fhátharta
Senior Planner

February 23rd 2023

Declaration of Development & Exempted Development under
Section 5 of the
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Please note that any person issued with a declaration under Section 5 of the Planning and Development Act 2000 (as amended) may on payment to the Board of the prescribed fee, refer a declaration to An Bord Pleanála within 4 weeks of the issuing of the decision.

Signed: _____

Appendix 1: Appropriate Assessment Screening

AN BORD PLEANÁLA

designated for wetland

habitats - bog, fen,

11 APR 2021

LTR DATED _____ FROM _____

LDG- _____

ABP- 316325-23



APPROPRIATE ASSESSMENT SCREENING REPORT AND DETERMINATION

(A) Project Details

Planning File Ref	ED1004
Applicant name	Robert McDonald
Development Location	16 The Park, Wolstan's Abbey, Co. Kildare
Site size	Unknown
Application accompanied by an EIS (Yes/NO)	No
Distance from Natura 2000 site in km	The rye Water Valley/Carton SAC is located c. 4km northeast of the subject site.

Description of the project/proposed development –

a second floor window located on the side gable of an existing residential dwelling

(B) Identification of Natura 2000 sites which may be impacted by the proposed development

			Yes/No If answer is yes, identify list name of Natura 2000 site likely to be impacted.
1	Impacts on sites designated for freshwater habitats or species. <u>Sites to consider:</u> River Barrow and Nore, Rye Water/Carton Valley, Pollardstown Fen, Ballynafagh lake	<i>Is the development within a Special Area of Conservation whose qualifying interests include freshwater habitats and/or species, or in the catchment (upstream or downstream) of same?</i>	No
2	Impacts on sites designated for wetland habitats - bogs, fens, marshes and heath.	<i>Is the development within a Special Area of Conservation whose qualifying interests include wetland habitats</i>	No

	<u>Sites to consider:</u> River Barrow and Nore, Rye Water/Carton Valley, Pollardstown Fen, Mouds Bog, Ballynafagh Bog, Red Bog, Ballynafagh Lake	<i>(bog, marsh, fen or heath), or within 1 km of same?</i>	
3	Impacts on designated terrestrial habitats. <u>Sites to consider:</u> River Barrow and Nore, Rye Water/Carton Valley, Pollardstown Fen, Ballynafagh Lake	<i>Is the development within a Special Area of Conservation whose qualifying interests include woodlands, dunes or grasslands, or within 100m of same?</i>	No
4	Impacts on birds in SPAs <u>Sites to consider:</u> Poulaphouca Reservoir	<i>Is the development within a Special Protection Area, or within 5 km of same?</i>	No

Conclusion:

If the answer to all of the above is **No**, significant impacts can be ruled out for habitats and bird species.

No further assessment in relation to habitats or birds is required.

If the answer is **Yes** refer to the relevant sections of **C**.

(G) SCREENING CONCLUSION STATEMENT

Selected relevant category for project assessed by ticking box.

1	AA is not required because the project is directly connected with/necessary to the conservation management of the site	
2	No potential significant affects/AA is not required	Y
3	Significant effects are certain, likely or uncertain. Seek a Natura Impact Statement Reject proposal. (Reject if potentially damaging/inappropriate)	

Justify why it falls into relevant category above (based on information in above tables)

Having regard to the proximity of the nearest SAC sites, and the relatively small-scale nature and extent of the proposal, it is not considered a potential exists for significant effects on the Natura 2000 network.

Name:	Oisin Boland
Position:	Assistant Planner
Date:	11/01/2023

