



An
Bord
Pleanála

Inspector's Report ABP-318478-23

Question

Whether the restoration and refurbishment of an outbuilding is or is not development or is or is not exempted development.

Location

Lower Road, Strawberry Beds,
Castleknock, Dublin 15

Declaration

Planning Authority

Fingal County Council

Planning Authority Reg. Ref.

FS5W/018/23

Applicant for Declaration

Declan Ferguson

Planning Authority Decision

Is not exempted development

Referral

Referred by

Peter Rafter and Julia Harun

Owner/ Occupier

Peter Rafter and Julia Harun

Observer(s)

None

Date of Site Inspection

27th September 2024

Inspector

Philip Maguire

1.0 Introduction

- 1.1. This case is a referral under Section 5(3)(a) of the Planning and Development Act 2000, as amended, in respect of a declaration made by Fingal County Council regarding the restoration of a building at Lower Road¹, Strawberry Beds, Dublin 15.
- 1.2. At the outset, the Board should note that broadly similar questions have been referred and determined regarding the subject referral site in April 2021 and February 2022.
- 1.3. The planning authority issued a similar unchallenged declaration in April 2019.

2.0 Site Location and Description

- 2.1. Located in the townland of Astagob, in a locality known as Strawberry Beds, and to the north of the River Liffey, the referral site is c. 3.5km south of the Blanchardstown Centre in Dublin 15. The site is situated along, and north of, the Lower Lucan Road (R109²), west of the M50/River Liffey viaduct. Somerton Lane bounds the site to the north and rises at a steady gradient towards its junction with the Porterstown Road.
- 2.2. The surrounding area between the Lower Lucan Road and Porterstown Road is characterised by leisure and recreational uses associated with Castleknock Hotel, Castleknock Golf Club and Castleknock GAA Club, and detached houses ribboning along, and generally elevated above, the northern side of the adjoining road network.
- 2.3. The referral site is roughly triangular shaped and predominantly under grass, mature trees and vegetation. It extends to some 1.2ha and has a primary road frontage of c. 245m along the Lower Lucan Road, although I note that the boundary along Somerton Lane extends to c. 200m, and it is from here that the grassed area and some structures to the northeast corner of the site are accessed. The referral structure, an outbuilding, is located to the southwest corner however, and accessed via the Lower Lucan Road.
- 2.4. This structure has a modest set back from the roadside boundary which is defined by a short section of roughcast render wall. In addition to the gated access, which was locked during my inspection, I note a smaller pedestrian gate some 10m east, albeit significantly overgrown. The outbuilding is finished in pointed stonework and profiled roof tiles. It is gabled towards the road with a brick arched opening at ground level

¹ Also referred to as the Lower Lucan Road.

² Also referred to as the L3103.

and a centrally located upper floor opening, albeit boarded over. A rooflight opening is located in the western roof plane. To the immediate east is a larger unroofed structure. It has four distinct bays with brick reveals and a roughcast render finish. It is significantly dilapidated and appears to be internally supported by scaffolding poles.

- 2.5. I have reviewed the description of the structures as provided by the Inspectors appointed to report on ABP-308807-20 and ABP-310767-21 and I note them to be in a broadly similar condition, although access was not gained to observe the interiors.

3.0 The Question

- 3.1. The matter has been referred by the owner/occupier of the land in question. Section 5 of the application form describes the proposed development as *inter alia*:

The restoration and refurbishment of a formerly derelict building.

- 3.2. In addition to the application form, the submission to the planning authority included a site location map ("Map 2"), with the subject lands outlined in red and a star symbol immediately west of the roofless structure to indicate the "current project". A photograph entitled "The property being restored/renovated" was also submitted. I note this photograph is primarily of the outbuilding adjacent to the roofless structure.

- 3.3. By correspondence dated 5th October 2023, the planning authority responded to the referral submission, suggesting that the referred works were unclear and querying whether the development in question differed in any way to the proposals considered under previous referral applications, PA refs. FS5W/010/21 and FS5W/20/20. The applicant was therefore requested to submit the following further information:

- (a) *A full description of works associated with this proposal.*
- (b) *Clarification as to whether these works relate to the same matters considered under application refs. FS5W/010/21 and FS5W/20/20.*

- 3.4. By correspondence date received 6th October 2023, the applicant stated *inter alia*:

- (a) *Externally the roof has been repaired while most of the recent work has taken place inside the property. This work includes the insulation and drylining of the structure and the introduction of a second floor within it. Partition walls are also being erected.*

(b) *I view this as additional development that has taken place since the matters covered under FS5W/010/21 and FS5W/20/20.*

3.5. The referral documentation date received 16th November 2023 includes a supporting statement prepared by the owner/occupier in addition to:

- Notification of application from the Fingal County Council dated 12th October 2023
- Correspondence from the District Veterinary Office (DAFM) dated 3rd June 2021
- An Bord Pleanála documentation relating to case ref. RL17.RL2748.

3.6. Having regard to the above and the observations made during my site inspection, I intend to proceed with my assessment on the basis of the question as submitted to the planning authority, albeit marginally reformulated as follows:

Whether the restoration and refurbishment of an outbuilding is or is not development or is or is not exempted development.

4.0 Planning Authority Declaration

4.1. Declaration

4.1.1. A declaration was issued by Fingal County Council on 23rd October 2023. It states:

1. (a) *The structure on the site has previously been deemed to be a derelict structure and the works proposed would facilitate the reintroduction of residential use to the building which would constitute a change of use that is material, having regard to the potential for consequences in planning terms, including the potential for implications in terms of servicing the site including wastewater, the potential for the intensification of use of the access and the local road network in the vicinity and the impact on visual amenity in this sensitive area would, therefore, constitute development, which development does not come within the scope of any of the provisions for exempted development, as set out in the Planning and Development Regulations, 2001 (as amended); and*

(b) The external works and alterations to reconstruct and restore the structure would not come within the scope of Section 4(1)(h) of the Planning and Development Act 2000, as amended, being works which would materially affect the external appearance of the structure.

4.2. Planning Authority Reports

4.2.1. The Planning Officer's Report (04/10/23) can be summarised as follows:

Assessment

- Notes the referred question and accompanying site location map and photograph.
- Notes that works did not appear to be underway at the time of inspection.
- Considers that the applicant should be required to clarify the full nature of the works involved, having regard to previous referrals, specifically PA refs. FS5W/010/21 and FS5W/20/20.

Appropriate Assessment

- Considers that a full description of the development is required for AA.

Environmental Impact Assessment

- Considers that a full description of the development is required for EIA screening.

4.2.2. The Planning Officer's Report (23/10/23) can be summarised as follows:

Relevant Case Law

- Noted the *Narconon Trust* judgements and the circumstances where the Board is precluded from determining the same, or substantially the same, question and there is no change in facts or circumstances.

Assessment

- Noted that the investigation of alleged unauthorised development is a separate statutory process.
- Notes the structure on this site has previously been determined as being in a derelict condition and therefore the works proposed in the previous referrals would not be exempted development as they would not come within the remit of Section 4(1)(h) of the Planning Act and the resumption of a residential use would constitute a change of use that is material.
- Considers this application refers to roof repairs, internal works, including the insulation and drylining of the structure, and the construction of a second floor and partition walls. Considers this represents works and is therefore development.

- Notes that the works proposed are such that they could facilitate the reintroduction of the use of the structure and as determined by the Board under FS5W/20/20 this could constitute a change of use that is material, having regard to the potential for consequences in planning terms and is thus development.
- Having regard to the derelict nature of the building, the works would not come within the remit of Section 4(1)(h) as they would materially affect the external appearance of the structure.

Appropriate Assessment

- Considers that there is no likelihood of significant effects on any European sites, individually or in combination with another plan or project.

Environmental Impact Assessment

- Consider no EIA, including sub-threshold EIA, requirements arise.

Conclusion and Recommendation

- Having regard to Sections 2 and 3 of the Planning Act generally; Section 4(1)(h) of the Act specifically; the previous Section 5 applications and case law pertaining to the Section 5 process; and the nature of the works proposed, considers the proposal to be development and not exempted development.

5.0 Planning History

5.1. Referral site:

Southwestern Corner

- 5.1.1. PA ref. FS5W/010/21 – in February 2022, the Board generally agreed with the planning authority and concluded that the weatherproofing of the structure which fronts the Lower Lucan Road at Strawberry Beds, Castleknock, Dublin 15 was development and was not exempted development (ABP-310767-21). In this case, the referral was made by the applicant under the provisions of Section 5(3)(a) of the Planning Act.
- 5.1.2. PA ref. FS5W/20/20 – in April 2021, the Board concluded that the restoration of the previously permitted pre-1963 dwelling to its previous condition at Somerton Lane / Lower Lucan Road, Strawberry Beds was development and was not exempted development (ABP-308807-20). The planning authority was the referrer in this case.

- 5.1.3. PA ref. FS5W/07/19 – in April 2019, the planning authority declared that the use of the site at Somerton Lane / Lower Road, Castleknock for residential purposes and/or any works ancillary to and/or relying on an exemption derived from residential use was development and was not exempted development. I note that this declaration was made having particular regard to the subject site, and the available evidence that: the house was without a roof covering or windows; overgrown with vegetation; and with no evidence of access from a public road, leading to the conclusion that any reported former residential use of this site was abandoned, and having regard to: the provisions of Sections 2, 3 and 4 of the Planning and Development Act 2000, as amended.

Northeastern Corner

- 5.1.4. PA ref. FW24A/0484 – planning application lodged with the planning authority for the construction of a dome shaped potting shed measuring 5.9sq.m and 2.5m high. A decision from Fingal County Council is pending at time of completion of this report.
- 5.1.5. PA ref. FS5W/02/19 – in March 2019, the planning authority declared that: (1) the transfer of soil from the lower to the upperpart of the site; (2) the construction of a retaining wall in excess of 3m high; (3) the construction/storage of two sheds on the upper levels of the site, the use of the sheds to store materials and the storage of materials for the construction of a log cabin; (4) the construction of a log cabin on the site; and (5) the erection of fencing associated with the storage of materials in place for c. 4 years was development and was not exempted development. I note that this declaration was made having particular regard to *inter alia* the Special Area Amenity Order, the specific Development Plan objective to preserve a view of special amenity value onto Somerton Lane and in the absence of an established residential use etc.

5.2. Adjacent sites:

Woody Cottage, Lower Lucan Road (immediately west)

- 5.2.1. PA ref. F98B/0393 – in September 1998, the planning authority granted permission for alterations and additions to the existing cottage.

Brooklin View, Somerton Lane (immediately east)

- 5.2.2. PA ref. FW10A/0128 – in December 2010, the planning authority granted permission for the demolition of an existing extension and detached outbuildings and the construction of a single-storey extension to the rear (east) of the existing cottage,

refurbishment, and alteration of the existing cottage, works to the main entrance and associated site developments including a new wastewater treatment plant. This permission was subsequently altered in December 2013 under PA ref. FW13A/0106.

Carroll's Cottage, Somerton Lane (west, northwest)

- 5.2.3. PA ref. F01B/0071 – in May 2001, the planning authority granted permission for alterations and additions to the existing cottage.

Longwood, Somerton Lane (due north)

- 5.2.4. PA ref. F98B/0181 – in June 1998, the planning authority granted permission for a garage conversion, first floor extension and alterations to front elevation.

Somerton Cottage, Somerton Lane (due north)

- 5.2.5. PA ref. F05B/0750 – in February 2006, the planning authority granted permission for a ground floor extension to the side gable with dormer accommodation at first floor, together with new extension to rear at first floor and upper levels.

Woodcrest, Somerton Lane (due north)

- 5.2.6. PA ref. F97B/0418 – in November 1997, the planning authority granted permission for alterations and additions to the existing dwelling.

6.0 Policy Context

6.1. Local Planning Policy

Fingal Development Plan 2023-2029

- 6.1.1. The current Development Plan came into effect on 5th April 2023. The planning authority decision of 23rd October 2023 was made under the provisions of this Plan. This referral shall also be considered under this current Development Plan.
- 6.1.2. The site is zoned 'High Amenity' with a zoning objective to '*protect and enhance high amenity areas*'. The vision for this zoning seeks to '*protect these highly sensitive and scenic locations from inappropriate development and reinforce their character, distinctiveness and sense of place. In recognition of the amenity potential of these areas, opportunities to increase public access will be explored*'.

6.1.3. The referral site also lies within a River Valleys/Canal Landscape Character Type, which is identified as being highly sensitive to development (Table 9.3). I also note that the referral site is bound north and south by a Specific Objective to 'Preserve Views' and is adjacent to Local Objective Point 122 which relates to the preparation of a traffic management plan for the Lower Road from Glenmaroon to Lucan, including Somerton Lane, Rugged Lane and the Luttrellstown Road.

6.1.4. The main objectives are set out in chapter 9 (Green Infrastructure and Natural Heritage) of the Written Statement. The following sections are case relevant:

- 9.6.14 – Landscape Character Assessment
- 9.6.15 – Views and Prospects

6.1.5. Summary of the relevant policies and objectives:

- | | |
|---------|--|
| GINHP25 | Seeks to ensure the preservation of the uniqueness of a landscape character type by having regard to its character, value and sensitivity. |
| GINHO58 | Seeks to resist development which would interfere with the character of highly sensitive areas or with a view or prospect of special amenity value, which it is necessary to preserve. |
| GINHP26 | Seeks to preserve views and prospects and the amenities of places and features of natural beauty or interest. |
| GINHO60 | Seeks to protect views and prospects that contribute to the character of the landscape, particularly those identified in the Development Plan. |

6.2. Liffey Valley Special Amenity Area Order

6.2.1. The referral site is located within the Liffey Valley Special Amenity Area Order (SAAO) which was confirmed by the Minister for the Environment on 8th March 1990.

6.3. Natural Heritage Designations

6.3.1. The referral site is located within 70m of the Liffey Valley proposed Natural Heritage Area (pNHA) (site code 000128). The nearest European site, Rye Water Valley/Carton SAC (site code 001398), is c. 6.60km away, and upstream of the site.

7.0 The Referral

7.1. Referrer's Case

7.1.1. The referrer's case can be summarised as follows:

- Referrer not afforded the opportunity to make an input into the Section 5 application with notification dated 12th October 2023, some eleven days before decision.
- Suggests that the Planning Officer was selective in their interpretation of Section 4(1)(h) and notes that neighbouring structures must also be taken into account.
- Refers to a previous Board decision under ABP case ref. RL2748 as precedent, and I note documentation enclosed in the submission in respect of same.
- Suggests that the Planning Officer did not inspect the referral site and raises concerns regarding the assumptions made in their report, including services.
- Submits that the applicant for the declaration has unauthorised structures and removed a mature treelined boundary giving an uninterrupted view of the site.
- Raises concerns regarding the reference to “an enforcement notice” in the Planning Officer's Report and states that “there has been no enforcement notice or other enforcement proceedings” in respect of either of the referral structures.
- Raises concerns regarding the ‘policy’ of the planning authority regarding the restoration and modernisation of structures in the Liffey Valley Special Amenity Area, suggesting that this is at odds with current government policy.
- States that all services on site are in use and all structures have been surveyed and are sound. The referrer also states that they have a licence to keep poultry at the site and I note correspondence enclosed in the submission in respect of same.

7.2. Planning Authority Response

7.2.1. The planning authority's response can be summarised as follows:

- The Board's attention is drawn to the Chief Executive's Order for this application and to the previous Section 5 decisions made in relation to this site, a number of which were also referred to the Board.

8.0 Statutory Provisions

8.1. Overview

- 8.1.1. The relevant provisions are set out in the Planning and Development Act 2000, as amended, ('PDA 2000 or the Act') and the Planning and Development Regulations 2001, as amended, ('PDR 2001 or the Regulations').

8.2. Planning and Development Act

Section 2

- 8.2.1. Section 2(1) provides the following interpretations which are relevant:

"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;

"habitable house" means a house which—

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

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

"structure" means *inter alia* 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 where the context so admits, includes the land on, in or under which the structure is situate etc.;

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal etc.; and

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

Section 3(1)

- 8.2.2. Except where the context otherwise requires, “development” is defined as *inter alia*:

The carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land.

Section 4

- 8.2.3. Section 4(1) provides a list of statutory exemptions, including:

(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

(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.

- 8.2.4. Section 4(4) provides that development shall not be exempted development if an environmental impact assessment or appropriate assessment (AA) is required.

Section 5

- 8.2.5. Section 5(3)(a) provides for a referral of a declaration for review by the Board within 4 weeks of the date of issuing of the declaration.

Section 138

- 8.2.6. Section 138 provides the Board with an absolute discretion to dismiss a referral where it is of the opinion that the referral is vexatious, frivolous or without substance etc.

Section 177U

- 8.2.7. Section 177U(9) provides that in deciding a referral under S. 5 the Board, shall where appropriate, conduct an AA screening in accordance with the provisions S. 177U.

8.3. Planning and Development Regulations

Article 6

- 8.3.1. Subject to the restrictions in Article 9, Article 6(1) provides for the classes of exempted development under column 1 of Parts 1, 2 and 3 of Sch. 2, subject, where applicable, to the conditions and limitations opposite such classes as set out in column 2.
- 8.3.2. Schedule 2, Part 1 (Development within the curtilage of a house), Class 1 relates 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 limitations include restrictions on floor area and height etc.
- 8.3.3. Schedule 2, Part 1 (Development within the curtilage of a house), Class 3 relates to the construction, erection or placing within the curtilage of a house of any shed etc. The limitations include restrictions on floor area, height and use of the structure etc.

Article 9

- 8.3.4. Article 9 imposes specific restrictions on development of classes specified in Parts 1, 2 and 3 of Schedule 2 and in effect de-exempts certain classes of development that would be exempt under normal circumstances. The restrictions under Article 9(1)(a) apply if the carrying out of such development would *inter alia*:

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

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,

- 8.3.5. The restrictions under Article 9(1)(b) apply in an area to which a SAAO relates under certain specified classes of development, including Classes 1 and 3 of Pt. 1, Sch. 2.

8.4. Precedent Referral Cases

Abandonment of Use

- 8.4.1. Under case ref. ABP-306083-19, the Board considered whether the proposed extension to the rear of an existing stone cottage at Townleyhall, Drogheda, Co. Louth was/was not development/exempted development. The Board concluded *inter alia* that the existing cottage was not in residential use and there is no evidence of any residential use of this cottage in recent times, or for a significant period of time, and the resumption of such residential use would now constitute a change of use that is material, having regard to the potential for consequences in planning terms, including the potential for implications in terms of wastewater, the provision of services in an unzoned, unserviced rural area, proximate to Natura 2000 sites and the potential for the intensification of use of the access and local road network in the vicinity, and would, therefore, constitute development beyond the scope of exempted development.
- 8.4.2. Under case ref. RL3395, the Board considered whether the reconstruction/renovation and extension of a derelict cottage/shed at Rinn, Strandhill, County Sligo was/was not development/exempted development. The Board concluded *inter alia* that there was no evidence of any residential use of this derelict building in over 30 years, and was, therefore, satisfied that the residential use was abandoned; and the resumption of a habitable use of the subject building would constitute a change of use that is material.
- 8.4.3. Under case ref. RL3352, the Board considered whether works carried out to a derelict single-storey farmhouse for habitable use at Carrigmartin, Ballyneety, County Limerick were/were not development/exempted development. The Board concluded *inter alia* that there was no evidence of any residential use of this derelict building in over 20 years, or any evidence of an intent to resume such use over that time, and the Board was, therefore, satisfied that the residential use was abandoned; and the resumption of a habitable use of the building would constitute a change of use that is material.

Alterations / Improvement of a Structure

- 8.4.4. Under case ref. ABP-302930-18, the Board considered whether the refurbishment of a timber house and associated infrastructure and entrance at The Chalet, Furbo Hill, Spiddal, County Galway was/was not development/exempted development. The Board concluded *inter alia* that the works involved the substantial removal of the original chalet and its replacement by the structure now existing on the site, and,

therefore, notwithstanding that the structure now existing on the site may have had the same floor area and be on the same footprint as the original chalet, would not come within the scope of Section 4(1)(h) of the Planning Act, not being works for the maintenance, improvement or other alteration of the original structure, but rather works for the provision of a new structure that has replaced that original structure.

8.4.5. Under case ref. RL2748, the Board considered whether the replacement and/or alterations of windows and doors at 'The Mews', Ballinlough, Dunshaughlin, County Meath was/was not development/exempted development. The Board concluded *inter alia* that the works came within the scope of Section (4)(1)(h) of the Planning Act as they did not materially affect the external appearance of the structure so as to render it inconsistent with the character of the structure or of neighbouring structures.

8.4.6. Under case ref. RL2592, the Board considered whether (a) a domestic extension and (b) works of repair and renewal to a dwelling known as 'Rose Cottage' at Brockagh, Glendalough, County Wicklow were/were not development/exempted development. The Board concluded *inter alia* that the works were of a nature and scale consistent with the purposes of maintenance, improvement or other alteration to a structure and which did not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and therefore came within the exempted development provisions of Section 4(1)(h) of the Planning Act.

8.5. Precedent Legal Judgements

Abandonment

8.5.1. In *Dublin County Council v Tallaght Block Co. Ltd.*, it was determined that a use of land can be abandoned and that a change of use will occur when an abandoned use is recommenced. Hederman J. in the Supreme Court stated: "*where a previous use of land has been not merely suspended for a temporary period and determined period, but has ceased for a considerable time, with no evidenced intention of resuming it at any particular time, the tribunal of fact was entitled to find that the previous use had been abandoned, so that the resumption constituted a material change of use.*"

8.5.2. In *Cork County Council v Ardfert Quarries Ltd.* a site had been used as an animal food processing plant from 1953 to 1966, it had been vacant from 1966 to 1970 and it had been used to manufacture and store tyres from 1970 to 1974. The High Court held that the use of the premises as a general industrial building from 1953 to 1966 had

been abandoned by its none use from 1966 to 1970. Murphy J. stated: “*having regard to the elapse of time and the absence of any satisfactory explanation therefore, I must conclude that the use as of the operative date was subsequently abandoned.*”

Improvement of a structure etc.

- 8.5.3. In *McCabe v Córas Iompair Éireann [2006] IEHC 356*, the High Court considered whether works to a railway bridge, including the replacement of the bridge arch with a flat deck, constituted exempted development. The court held that Section 4(1)(h) covered the renewal and reconstruction of the bridge, where the extent of the renewal or reconstruction was not such as to amount to the total or substantial replacement or rebuilding of the original structure. It was also held that the court had to assess the character of the structure by looking objectively at the entity as a whole, and that shape was only one of the contributing features to the character of a structure. The works which had been carried out to the bridge did not render its appearance inconsistent with the character of the bridge. However, Herbert J. noted that there were exceptional cases in which a single feature of a structure was so outstandingly remarkable or so important from an aesthetic, architectural or engineering perspective that it could properly and rationally be said to derive its entire character from that single feature.
- 8.5.4. In *Wicklow County Council v Jessup and Smith [2011] IEHC 81*, the High Court considered whether works to a cottage constituted exempted development. The court held that, despite the paucity of admissible evidence, a reference to the character of the property by the respondents’ agent represented a declaration against their interest and was duly admissible as evidence that the works in question were not exempted development within the meaning of S. 4(1)(h) of the Planning and Development Act. I note that the concept of abandonment was also considered, where Edwards J. held that the evidence as to the state of disrepair of the cottage, which was alleged to have been abandoned before habitation resumed, was vague, unsatisfactory and equivocal.
- 8.5.5. In *Michael Cronin (Readymix) Ltd. v An Bord Pleanála and Others [2017] IESC 36, [2017] 2 I.R. 658*, the Supreme Court considered whether an extension to a structure (a concrete yard within a quarry) constituted exempted development. The court agreed with the Board’s submission that the exemption under Section 4(1)(h) of the Act applies to a limited category of works that amounts to alterations (with the concepts of maintenance and improvement being subsets), which are either wholly internal or,

if external, are insignificant. An “improvement”, for the purposes of an exemption, must be something that relates to the internal use and function of the structure, resulting in either no externally noticeable difference or an insignificant difference.

Matters previously determined

- 8.5.6. In *Narconon Trust v An Bord Pleanála and Others* [2021] IECA 307, the Court of Appeal upheld the High Court ruling that the Board is precluded from determining a S. 5 referral in circumstances where a planning authority previously determined substantially the same question in respect of the same land and where there is no evidence of a change in planning facts and circumstances. Heslin J., in the High Court, [2020] IEHC 25, also held that the referral requests were, in fact and in substance, attempts to question the validity of the prior decision by seeking to obtain a different answer to the question that had already been answered by the planning authority.

Planning Unit

- 8.5.7. In *Redmond v An Bord Pleanála and Others* [2020] IEHC 151, Simons J. noted the Court of Appeal decision in *Burdle v Secretary of State for the Environment*, the leading English authority on the matter. In *Burdle*, Bridge J. stated that: “*It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.*”

Reformulation of referral question

- 8.5.8. In *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210, the High Court considered that the Board is entitled to reformulate questions posed where necessary.

9.0 Assessment

9.1. Preliminary Points

Referrer’s Case

- 9.1.1. It should be noted at the outset, that the purpose of the referral is for the Board to conclude upon whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development. Therefore, the procedural concerns raised by the referrer in relation to the manner in which the planning authority

made their decision on this question, which has now been referred to the Board, are outside of the Board's remit as they do not have an ombudsman role on such matters.

- 9.1.2. Likewise, the enforcement of planning control falls outside the remit of the Board. This is for the planning authority to deal with as they see fit. I do not, therefore, propose to deal with these two matters as raised by the referrer in their submission to the Board.
- 9.1.3. Nor do I propose to interrogate the referrer's claims in respect of site services and the soundness of the structures given the paucity of information submitted. At the very least, one would have expected corroborating evidence, such as the purported survey.
- 9.1.4. Finally, I note the referrer's statement regarding the poultry licence, and I do acknowledge the District Veterinary Office correspondence in this regard. The referrer, however, has not advanced an 'agricultural case' and therefore I do not propose to deal with this, or attempt to put meat on the bones where there is none.

Planning Authority Declaration

- 9.1.5. I note that the declaration is couched in terms of the roofless structure, referred to as "a derelict structure". This is apparent having reviewed the planning authority reports.
- 9.1.6. Having reviewed the applicant's submission and having particular regard to their further information response, which alludes to repairs to the roof, it is apparent that the referral structure is the outbuilding to the immediate west of the roofless structure.
- 9.1.7. In such circumstances, I consider that that the planning authority has fallen into the trap of assessing the question having regard to, and being somewhat distracted by, the previous Section 5 referrals at this site, which focussed on the roofless structure.
- 9.1.8. This is not fatal to the decision-making process however as both structures have been considered derelict and assessed as such, it is just a matter to note for completeness.

Legal Jurisdiction

- 9.1.9. I therefore draw the Board's attention to the previous decisions in relation to the referral site, and the roofless structure. These are summarised in sections 5.1.1 and 5.1.2. The unchallenged decision of the planning authority is summarised in section 5.1.3.
- 9.1.10. In this regard, the Board should be mindful of the *Narconon Trust* judgement and may wish to consider whether the referred question could amount to a collateral challenge

against the previously determined questions under ABP-308807-20 and ABP-310767-21, and specifically the unchallenged planning authority decision, PA ref. FS5W/07/19.

9.1.11. In such circumstances, the Board has the option of dismissing this referral under the provisions of Section 138 of the Planning Act. I consider this to be a reasonable course of action having particular regard to the wording of the declaration under FS5W/07/19.

9.1.12. The subject referral appears to be, by fact and by substance, an attempt to question the validity of this prior decision by the planning authority by seeking to obtain a different answer to that question which has already been answered and resolved.

9.1.13. However, should the Board proceed to determine the referral, I note a subtle difference that may allow for a sufficient distinction to be drawn. Regarding PA ref. FS5W/07/19, the declaration related to the use of the referral site for residential purposes and/or any ancillary works relying on an exemption derived from such a residential use. The primary issue was therefore ‘use’ with ‘works’ being ancillary as such. I also adduce from the Planning Officer’s report that the declaration was ‘primarily concerned’ with the unroofed structure, although it states that the site contained ‘two derelict structures fronting onto the Lower Road’. In this referral, the issue relates to ‘the restoration and refurbishment’ of the outbuilding, which could be framed as ‘works’ to facilitate a ‘use’.

9.1.14. For completeness, the question considered under ABP-310767-21 related to the ‘weatherproofing’ of the roofless structure and similarly ABP-308807-20 related to the restoration of the ‘pre-1963 dwelling’ (the roofless structure), to its previous condition.

9.1.15. In this regard, I specifically note the commentary of the Inspector in ABP-310767-21:
“In the intervening years the [roofless] structure has continued to decay. Whereas it would appear that significant works have been carried out to the outbuilding to its immediate west which around 2009 appeared to be also a ruin. This referral case does not include this structure as part of the question posed.” (section 9.3.6).

9.1.16. The subject referral is therefore an opportunity to provide all parties with absolute certainty in relation to the planning status of both structures into the future, without fundamentally altering the applicant’s submission or prejudicing any of the parties.

Reformulated Question

9.1.17. Finally, the Board should note the marginal reformulation of the referral question where the words “formerly derelict” are omitted due to the danger of confirmation bias.

9.2. Development – *Is or is not?*

- 9.2.1. The referred question, by its nature, includes elements of repair and renewal. This encompasses the restoration and refurbishment already executed and that proposed in the future, including the purported internal works which I was unable to observe.
- 9.2.2. In this regard, I refer the Board to the publicly available ‘street view’ imagery where the subject outbuilding was significantly overgrown with vegetation in May 2009, with openings on the front elevation just about visible, but significantly more so in the next available imagery dated June 2014, albeit without the profiled roof tiles which are currently in situ. Having regard to more recent imagery, external works to the structure appear to have generally stagnated, although at some point between June 2019 and my inspection in September 2024, a rooflight was inserted in the western roof plane.
- 9.2.3. Regrettably, I cannot comment on, or verify, the extent of the internal works including the alleged partition walls, additional upper floor area, or insulation and drylining. Nor do I have any plans or particulars before me to provide a visual representation of the applicant’s question or the referrer’s case, which is unhelpful. However, there is no statutory requirement for same, and the Section 5 process relates equally to questions regarding operations that have been executed as well as supposed future operations.
- 9.2.4. In this regard, I am satisfied to proceed on the basis of the reformulated question which incorporates any and all restoration and refurbishment since the outbuilding was evidenced to be in a state of ruin, including new roof, pointed stonework and roof light.
- 9.2.5. Section 2(1) of the PDA 2000 defines “works” as including “any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal” etc. I am satisfied that, in accordance with the above definition, the restoration and refurbishment of the outbuilding constitutes ‘works’. This is not disputed by the parties.
- 9.2.6. In terms of Section 3(1), “development” means, except where the context otherwise requires, the carrying out of works on, in, over or under land etc. I am therefore satisfied that these ‘works’ comprise ‘development’ and this is not a source of dispute.

Conclusion on Development

- 9.2.7. The restoration and refurbishment of the referred outbuilding is therefore development.
- 9.2.8. I am also satisfied that this outbuilding is derelict, albeit no longer in a ruinous state.

9.3. Exempted Development – *Is or is not?*

- 9.3.1. Having established that the restoration and refurbishment of the outbuilding is development, one must now consider whether it is, or is not, exempted development.

Statutory Provisions

- 9.3.2. Section 4(1)(h) of the Planning Act provides a broad statutory exemption for the carrying out of works for the maintenance, improvement or other alteration of any structure etc. Reliance on this exemption to restore the adjacent unroofed structure to its previous condition, namely a dwelling, (ABP-308807-20) and more recently to weatherproof it (ABP-310767-21) have been rejected by the Board as detailed above.
- 9.3.3. Section 4(1)(j) provides a narrower exemption 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 does not include ‘works’, such as restoration and refurbishment etc. Moreover, it only applies to a ‘structure or other land within the curtilage of a house’, and the Board has established under ABP-308807-20 that ‘there is no evidence of any residential use of the roofless structure including in recent times’. It is therefore important to reiterate that the residential use of the site is abandoned.
- 9.3.4. Similarly, Article 6 of the Planning Regulations provides for various classes of exempted development. Class 1 of Part 1 of Schedule 2 relates to the extension of a house and Class 3 relates to the construction of any shed or similar structure, and presumably an outbuilding, within the curtilage of a house. For the same reason, these classes of exempted development would not apply, nor are they relevant in any event.
- 9.3.5. The only statutory provision, therefore, that warrants consideration is Section 4(1)(h).

Section 4(1)(h)

- 9.3.6. Like the adjacent unroofed structure, the outbuilding is derelict with no apparent functional use and the available evidence, including historical ‘street view’ imagery and that documented in previous decisions, shows that this has been the case for a significant period of time. It is presumed that its functional use was, however, associated with the now abandoned residential use of the unroofed derelict structure.
- 9.3.7. Together these structures form the planning unit, and it would be remiss not to consider the declarations and decisions that have already been made in relation to

this planning unit, although not specifically or explicitly related to the referred structure. However, it is equally important not to predetermine the referral on this basis alone.

- 9.3.8. It is, however, important to consider the totality of the restoration and refurbishment works executed to date, and not just those since the previous decisions. The baseline established by previous Inspector Reports is therefore highly relevant in this regard and I specifically note the commentary in section 9.3.6 of the Inspector's Report under case ref. ABP-310767-21 where the outbuilding was noted as ruinous around 2009.
- 9.3.9. As noted, the exemption under Section 4(1)(h) applies so long as the works for the maintenance, improvement, or other alteration do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures. In this regard, I specifically note the decision in *Michael Cronin (Readymix) Ltd.* where the Supreme Court held that this applies to works which are wholly internal or, if external, are insignificant.
- 9.3.10. Having regard to the baseline in 2009, it is therefore apparent that the significant restoration and refurbishment have materially affected the external appearance of the outbuilding so as to render the appearance inconsistent with its character in that this was a structure in ruins for a significant period of time. The works have also rendered its character inconsistent with the character of the neighbouring unroofed structure.

Conclusion on Exempted Development

- 9.3.11. I consider that the question of this referral constitutes development which does not come within the scope of any of the legislative provisions for exempted development. In particular, it is not exempted development under Section 4(1)(h) of the Planning Act, as inferred by the referrer, who has suggested case ref. RL2748 represents precedent.

10.0 Recommendation

- 10.1. Having regard to the foregoing, I consider that the Board has the following options:
1. Dismiss the referral under the provisions of Section 138 of the Planning and Development Act 2000, as amended, as by fact and by substance it amounts to an attempt to question the validity of a prior decision made by Fingal County Council under PA ref. FS5W/07/19, outside the statutory timeframe for doing so; or
 2. Proceed to determine the question generally in the form submitted by the applicant.

10.2. In the event that the Board proceed with option 2, I recommend that the Board decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the restoration and refurbishment of an outbuilding at Lower Road/Lower Lucan Road, Strawberry Beds, Castleknock, Dublin 15 is or is not development or is or is not exempted development:

AND WHEREAS Declan Ferguson requested a declaration on this question from Fingal County Council and the Council issued a declaration on the 23rd day of October, 2023 stating that the matter was development and was not exempted development:

AND WHEREAS Peter Rafter and Julia Harun referred this declaration for review to An Bord Pleanála on the 16th day of November, 2023:

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

- (a) the nature, scale, extent and scope of the works proposed / executed,
- (b) the existing and past site context,
- (c) Sections 2(1), 3(1), 4(1)(h) and 4(1)(j) of the Planning and Development Act, 2000, as amended,
- (d) Article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Class 1 and Class 3 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the referral site,
- (g) relevant precedent referrals and judgements, and
- (h) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The restoration and refurbishment of the outbuilding constitutes “works” that are “development” under Section 3(1) of the Planning and Development Act 2000, as amended;
- (b) This outbuilding is derelict with no functional use, and is associated with an unroofed structure, a structure that is in a ruinous and derelict state, where there is no evidence of any residential use in recent times, or for a significant period of time, with such a status previously concluded upon by An Bord Pleanála in its determination of case reference numbers ABP-308807-20 and ABP-310767-21; and
- (c) The nature, scope and extent of the works associated with the restoration of the outbuilding, including those already executed to restore the structure from its previous ruinous state, would not come within the scope of Section 4(1)(h) of the Planning and Development Act, 2000, as amended, as these works would comprise of the alteration of this structure in a manner that would materially affect the external appearance of the structure so as to render the appearance inconsistent with its character and the character of adjacent structures, namely the adjacent unroofed structure.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5 of the 2000 Act, as amended, hereby decides that the restoration and refurbishment of an outbuilding at Lower Road/Lower Lucan Road, Strawberry Beds, Castleknock, Dublin 15 is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Philip Maguire

. Senior Planning Inspector

. 29th November 2024

This page is intentionally left blank.