

## Building Control Regulations

### APPLICABILITY OF PROVISIONS OF S.I.9 OF 2014 TO HOUSE EXTENSIONS

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*The author is an architect in private practice and is not legally qualified. In the absence of any guidance from others, he has written this paper to clarify his own thoughts around the topics discussed and offers it to colleagues as a possible help to their own thinking. The author takes no responsibility for the consequence of any reliance on his opinions herein.*

#### **Preamble**

This paper considers (a) the circumstances in which a Commencement Notice should be served under the building control regulations (as amended) in respect of house extensions; and (b) in those circumstances where a Commencement Notice is required, the circumstances where the provisions of article 9 (2) of the consolidated regulations apply.

As Part III of the regulations does not apply to a dwelling other than a flat, the various provisions of the regulations where Part III influences the requirements are outside the scope of this paper.

#### **When must a Commencement Notice be served?**

Dating from 1997 (S.I.497 of 1997), the relevant text is as follows.

*7. (1) Subject to sub-article (2) and articles 3 and 6, this Part applies to—*  
*(b) the material alteration or extension of a building ....*  
*(2) (a) .... this Part shall not apply ....., where—*  
*(i) the works are or the material change of use is exempted development for the purposes of the Local Government (Planning and Development) Acts, 1963 to 1993.*

One must serve a Commencement Notice under the building control regulations, unless the works are exempted development under the 1963-1993 Planning Acts. Since this text was written in 1997, the planning regulations have been changed. The principal regulations (there are others also) are now in S.I. 601 of 2001, made under the 2000 Planning Act.

Under the 2005 Interpretation Act, a reference to an old Act is interpreted as a reference to the current Act which replaced the old Act.

Many two storey domestic extensions do not require planning permission under the 2001 planning regulations. Under the 1963-1993 Acts and regulations, they all did. It might be reasonable to take the view that “where it’s exempted development under the 2001 planning regulations, S.I.9 does not apply”, even though the regulations don’t say as much. On the other hand however, some development which would have been exempted development under the earlier Planning Acts is no longer exempted under the 2000 Act. An example might be internal alterations affecting the character of a Protected Structure.

In my view, there is considerable lack of clarity around the circumstances in which a Commencement Notice is to be served under building control regulations in respect of a material alteration to a Protected Structure requiring planning permission. To consider this further is beyond the scope of this paper.

### **House extensions and S.I.9**

Given the requirement to serve a Commencement Notice under the building control regulations, the next consideration which arises is the circumstances in which “the full S.I. 9 applies”, i.e., the need for a Design Certifier, Assigned Certifier, Inspection Plan and the rest as set out in article 9(1)(b) of the regulations.

Article 9(2) sets out those circumstances:-

*(9) (2) The requirements of paragraph (1)(b) shall apply to the following works and buildings -*

*(a) the design and construction of a new dwelling,*

***(b) an extension to a dwelling involving a total floor area greater than 40 square metres***

### **“An extension to a dwelling involving a total floor area greater than 40 square metres”**

The meaning of the phrase “*an extension to a dwelling involving a total floor area greater than 40 square metres*” has caused much debate and as it applies to houses is the subject of the rest of this paper.

It will be recalled that this phrase is an amendment of the corresponding phrase in S.I.80 of 2013. The legislator re-considered his 2013 wording, and changed it in the 2014 regulations. Presumably the re-draft was considered carefully.

### **Varying views on the text**

The following views – other, wilder, retrospective suggestions have also been made – have been advanced as to what this short phrase “*an extension to a dwelling involving a total floor area greater than 40 square metres*” actually means:-

- Where a new extension, added to the total of all extensions built onto the dwelling since the 1963 Planning Act came into force in 1964, exceeds 40 sq m in floor area;
- Where a new extension, added to the total of all extensions built onto the dwelling since the building regulations came into force on 1 January 1992, exceeds 40 sq m in floor area;
- Where the extension and the dwelling together involve a total floor area greater than 40 sq m;
- Where the combined area of all extensions being built onto the house at one and the same time, involves a total floor area greater than 40 sq m;
- Where an extension involving a total floor area greater than 40 square metres is built onto a dwelling.

### **Interpreting an obscure, ambiguous or literally absurd statutory instrument**

Section 5(2) of the Interpretation Act 2005 (No. 23 of 2005) provides as follows.

*In construing a provision of a statutory instrument ....*

*(a) that is obscure or ambiguous, or*

*(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,*

*the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the*

*instrument as a whole in the context of that enactment.*

So is the relevant text then obscure, ambiguous, or even absurd?

### **The meaning of the phrase**

I think we can discount the notions that the phrase silently incorporates a reference to either 1964 or 1992. Nowhere can I see any “plain intention” that the drafter intended a 22 (or indeed 50) year long retrospective application of these regulations. No ordinary common sense reading can impose a time frame which is not referred to anywhere else in the text. Imagine trying to reckon back to 1964 to see what extensions had been built since then!!

No. Any legal drafter of normal intelligence and with a sense of responsibility who intended “where the area of the new extension or extensions, when added to the total area of all extensions built onto the dwelling since 1 January 1964 (or 1992) exceeds 40 square metres” would have written as much and put the matter beyond doubt. We should pay the drafter the commonsense respect of knowing what he was doing.

On the face of it, a theory that the phrase is intended to mean “*Where the extension and the dwelling taken together exceed 40 square metres in total floor area*” might be more plausible.

However, the number of situations where the total floor area of a dwelling and an extension thereto taken together (and yet being exempted development) would *not* exceed 40 square metres in floor area is tiny, far less than 1% of all such projects. Furthermore, the section 7 exemption from Commencement Notice requirements for exempted development would appear to have a contradictory intention.

I am therefore of the view that an interpretation that the 40 sq m refers to the area of the house and the extension taken together would be absurd.

### **Does the phrase mean “all extensions”, or “one extension”?**

In my view, the question to be considered is whether the phrase means “*Where the combined area of all extensions being built onto the house at one and the same time, involves a total floor area greater than 40 sq m*”, or whether it means “*Where an extension involving a total floor area greater than 40 sq m is built onto a dwelling*”.

Again in my view, if the drafters intended to say “*Where the total area of all extensions being built onto the house at one and the same time, exceeds 40 sq m*”, they would have said so, or perhaps have said, for instance “*Where the dwelling is being extended by a total floor area greater than 40 square metres*”. In two drafts of this legislation, separated by a year, they have not said that.

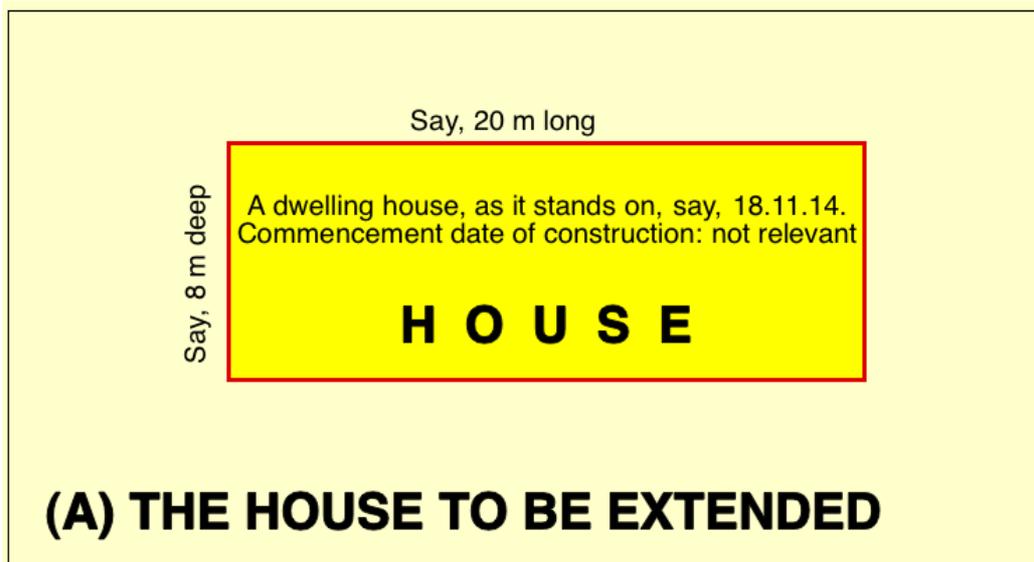
My own view is that article 9(2)(a)(i) means none of these. My view is that the text should be interpreted literally, and that the simple, literal interpretation is far from absurd. The text should be taken to mean exactly what it says:- that “*an extension to a dwelling involving a total floor area greater than 40 square metres*” is subject to the DC/AC provisions of S.I.9.

It follows that any extension smaller than 40 square metres is not so subject.

In my view, the text of 9(1)(b) is neither ambiguous nor absurd. It is only those people who, for their own reasons, wish to impose S.I.9 on as many projects as they can, who distort the text and seek complicated meanings.

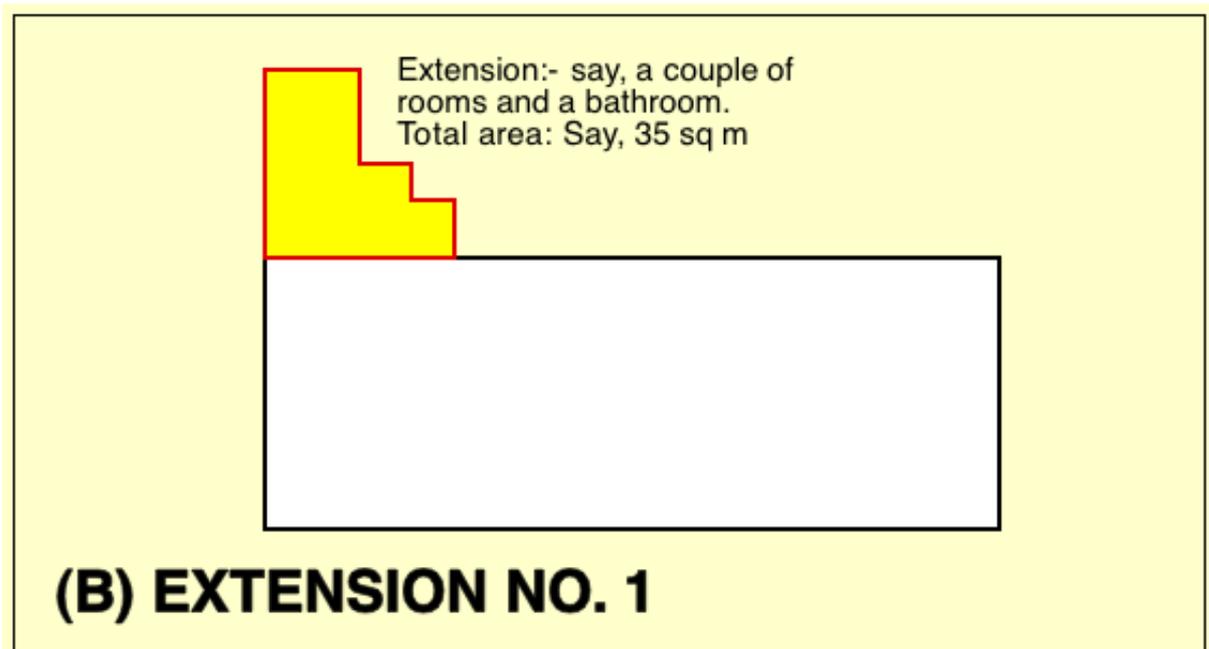
### **The basis for and consequences of this view**

Take a dwelling, to be extended. The architecturally literate reader is asked to overlook the simple graphic style.



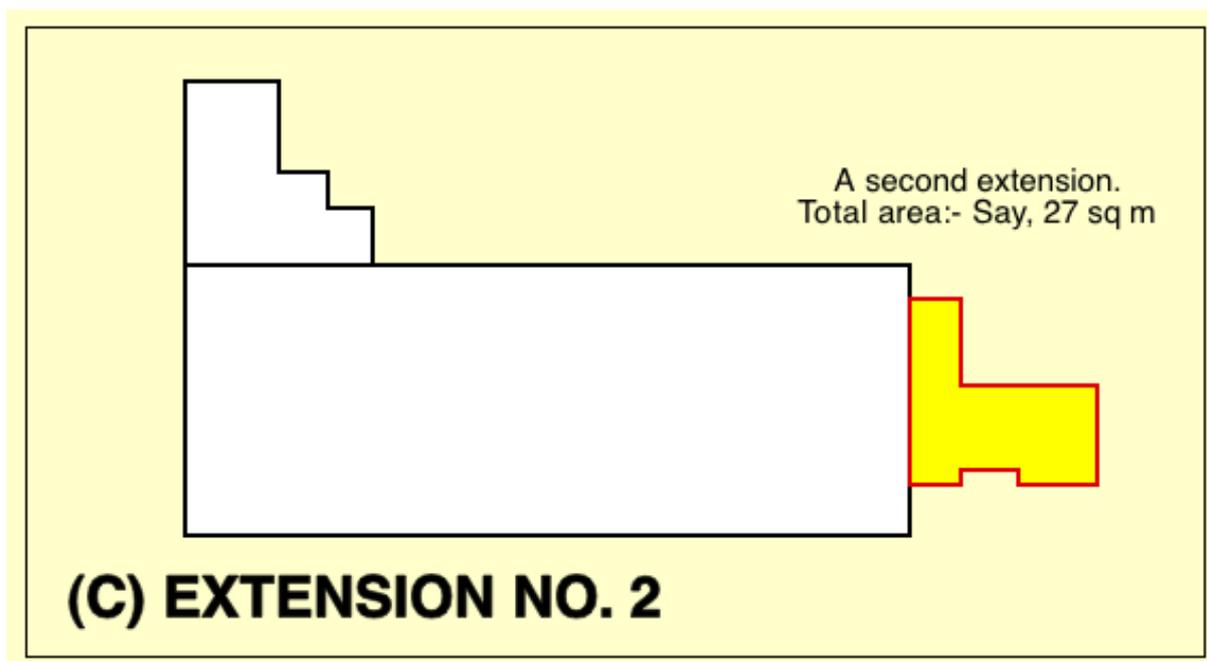
**An extension to the dwelling house**

Extend it by, say, a couple of rooms and a bathroom; of total area, say, 35 square metres.



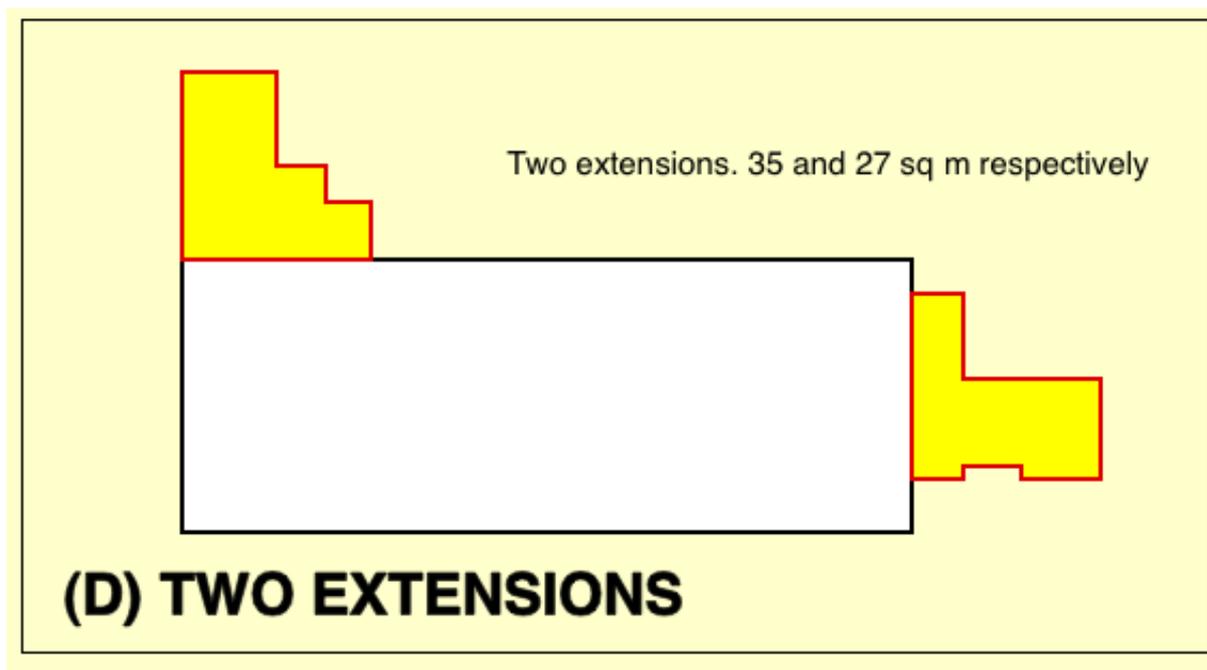
In my opinion, this extension falls within the exemptions in article 9(2):- *“an extension to a dwelling involving a total floor area greater than 40 square metres”*.

**Another extension to the same dwelling house**



In my opinion, this extension also, “extension no. 2”, also falls within the exemptions in article 9(2):-  
*“an extension to a dwelling involving a total floor area greater than 40 square metres”*

#### Two extensions to the same dwelling house



This diagram shows two extensions: one of 35 and the other of 27 square metres. This is not “an extension of total floor area 62 square metres”. It is two extensions, of total floor area 62 square metres.

Even if these extensions were commenced and completed upon exactly the same dates – and they never are, in practice – they are still two extensions.

**If building two extensions as in diagram (D), a Commencement Notice is needed to comply with the requirements of article 9(1), to comply with the building control regulations. In my view, the Notice should refer to two extensions, of total area 62 square metres. As these extensions are**

**each of total area less than 40 square metres, in my view they both fall within the exemptions in article 9(2), even though if taken together they would total more than 40 square metres and whether or not any other extensions were built previously.**

**In my view, article 9(2) means that these two extensions would not be subject to the Design Certifier, Assigned Certifier, Inspection Plan etc. provisions of article 9(1)(b).**

### **The use and meaning of the word “Total”**

Some opinion holds that inserting the word “total” into article 9(2)(a)(i) changes its meaning. They say the text “*An extension to a dwelling involving a **total** floor area greater than 40 square metres*” means something different to the text “*An extension to a dwelling involving a floor area greater than 40 square metres*”.

I do not agree that the ordinary meaning of “total floor area” is sufficiently different to that of “floor area” to change the effect of the text. Consider our original 8 m by 25 m dwelling. The **floor area** of this house is 200 sq m. But the reader is as likely to say that, including hallway, kitchen, bedrooms, living room etc., “the **total floor area** of this house is 200 sq m”. Likewise, the **total floor area of an extension** includes the area of all the rooms within the extension: bathroom, bedrooms, whatever.

### **Conclusion**

Taking this to its logical conclusion, in my opinion, one can build as many separate extensions as one likes, at one and the same time, and the S.I. 9 provisions do not apply, so long as the total area of each extension is less than 40 sq m.

In my opinion, confusion only arises for those who believe that S.I.9 will cure everything, and for those who seek to impose the burden of S.I. 9 on other people. In my opinion, the former is mistaken and the latter is dishonest. It should be remembered that S.I.9 is a set of procedural rules. S.I. 9 is not a set of requirements to build better buildings.

It should be remembered that every extension must comply with the building regulations, as regards fire safety, thermal insulation, ventilation and all the rest of it. This is the substantive requirement.

It should also be remembered that to build an extension or extensions which are not exempted development under the Planning Acts, one must serve a Commencement Notice on the Building Control Authority. With a Commencement Notice, the authority are on notice of the works and can inspect at any time. Nothing is hidden.

In my view, the exemptions allowed under article 9 (2) as regards domestic house extensions allow many extensions to be designed and built without Design Certifiers or Assigned Certifiers. This might offer some comfort to those whose livelihoods have been affected by this legislation.

Eoin O Cofaigh