



An
Bord
Pleanála

Inspector's Report ABP-302804-18

Question

Whether the opening of a pedestrian gate from the rear of house into a green area of Millbridge Avenue is or is not development and is or is not exempted development.

Location

8 Millbridge Court, Mill Lane, Naas, Co. Kildare.

Declaration

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

UD7133.

Applicant for Declaration

Des Murray & Caroline Flynn.

Planning Authority Decision

Is development and is exempted development.

Referral

Referred by

Des Murray & Caroline Flynn.

Owner/ Occupier

Mark & Dearbhla McDaid

Observer(s)

None.

Date of Site Inspection

6th December, 2018

Inspector

A. Considine

1.0 Site Location and Description

- 1.1. The subject site is located within an existing and well established residential estate within the town of Naas. The site is occupied by a two storey detached dwelling house and the rear of the property backs onto an area of public open space associated with the wider estate. The site is bound on east by a stream and to the south by the public open space.
- 1.2. The owners of the property installed a pedestrian gate in the rear boundary wall which provides access to the public open space area. The boundary wall is approximately 1.8m in height and is set back from the public road by approximately 45m.

2.0 The Question

- 2.1. The question arising is whether the opening of a pedestrian gate from the rear of the house into an area of public open space is or is not development or is or is not exempted development, at 8 Millbridge Avenue, Naas, Co. Kildare.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority considered the opening of the gate following an objection to same by a third party. An Unauthorised Development File was opened, file ref UD7133, and on the 25th of September, 2018, the PA decided that the creation of the opening in the existing wall and construction of a pedestrian entrance gate constitutes exempted development pursuant to Class 5 under Part 1, Schedule 2 of the Planning and Development Regulations, 2001 as amended. The Planning Authority advised all parties that the UD file was closed and no further enforcement action was to be taken.

Mr. Des Murray & Ms. Caroline Flynn referred the question to An Bord Pleanala on the 17th October, 2018.

3.2. Planning Authority Reports

3.2.1. Planning Reports

There are no planning reports on file specifically relating to the referral issue. The submission from the Planning Authority however, provides details of the planning permission for an extension to the subject property, PA reference 15/978.

3.2.2. Other Technical Reports

None noted.

4.0 Planning History

PA ref 15/978: Permission granted for the demolition of an existing conservatory and the construction of a one and two storey extension at 8 Millbridge Court, Mill Lane, Naas, Co. Kildare.

5.0 Policy Context

5.1. Development Plan

The Kildare County Development Plan, 2018 advises that Local Area Plans will be prepared for a number of towns in Co. Kildare, including Naas. The LAP for Naas is currently at pre-draft stage.

The expired Naas Town Development Plan, 2011-2017 identified the subject site as being located on lands zoned for residential infill with an R2 zoning objective 'to protect and improve existing residential amenity, to provide for appropriate infill residential development and to provide for new and improved ancillary services.'

5.2. Natural Heritage Designations

The site is not located within any designated site and is located within developed lands in the urban environment.

6.0 The Referral

6.1. Referrer's Case

Mr. Des Murray & Ms. Caroline Flynn submitted an objection to the opening of the pedestrian gate by Mr. & Mrs. McDaid from their property onto the public open space associated with the wider Millbridge Avenue residential estate. The referrer notes that permission was granted for the extension to the house but that there was no indication of the intention to open an access onto the common area. The objections to the gate are summarised as follows:

- Access to the gate is approximately 45m from a public footpath.
- There is potential that the developers would consider constructing a footpath across the common area.
- The gate could result in cars or vehicles going across the common area to allow easier access for movement of goods through the new entrance.
- The entrance is adjacent to the referrers property.
- The developers still have an access to the rear of their property.
- While it is convenient for the developers in terms of access to Naas town centre, it is to the detriment of a green common area within the estate.
- Similar construction was rejected by the Council to no. 30. Millbridge Avenue, which sets a precedent for the reinstatement of the wall.

It is requested that the Board issue an Enforcement Order against an unauthorised development and order that the boundary wall be immediately reinstated to its full original purpose and appearance.

6.2. Planning Authority Response

The Planning Authority responded to this referral and submitted documents relating to the recent grant of planning permission for the extension to the house.

6.3. Owner/ occupier's response

Mr. & Mrs. McDaid responded to the referral. The submission presents a background to the issue raised by the referrer and is summarised as follows:

- Following a request by the referrers to Kildare County Council to issue enforcement action to return the wall to its original condition, the Council advised that the works were considered exempted development.
- It is accepted that the works carried out constitute development within the meaning of Section 3 of the Planning & Development Act, 2000 as amended.
- It is considered that the development constitutes exempted development as it comes within the scope of Class 5, Part 1, Schedule 2 of the Planning & Development Regulations, 2001 as amended.

In response to the issues raised by the referrers, the following is submitted:

- There is no intention of constructing a footpath or to move goods, requiring cars or vehicles, through the gate.
- The area is open space adjacent to their home to which they have full entitlement to access and use. The gate gives their young children safer access to the common green and provides a more convenient access to Naas town centre.
- It is unclear how the referrers will be impacted by a pedestrian gate accessing a grassed area.
- Kildare County Council have determined that there is no unauthorised development at the property.
- While they are not familiar with the precedent cited, it is understood that the opening was for a car and suspect that it was determined not to be exempt by virtue of contravening Articles 9(1)(a) (ii) & (iii).

6.4. Further Responses

None.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. Section 2 (1) of the 2000 Planning and Development Act states as follows:-

“In this Act, except where the context otherwise requires – ‘development’ has the meaning assigned to it by Section 3 ...”

In Section 2 (1) of the Act “works” are interpreted as including “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”.

7.1.2. Section 3 (1) of the 2000 Planning and Development Act states as follows:-

“In this Act, ‘development’ means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or other land.”

7.1.3. Section 4(1) of the Planning and Development Act identifies what may be considered as exempted development for the purposes of the Act, and Section 4(2) of the Act provides that the Minister, by regulations, provide for any class of development to be exempted development. The principal regulations made under this provision are the Planning and Development Regulations, 2001.

7.2. Planning and Development Regulations, 2001

7.2.1. Article 6(1) of the Planning & Development Regulations, 2001 as amended states as follows:-

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

7.2.2. Article 9(1) of the Planning & Development Regulations, 2001 as amended, provides a number of scenarios whereby development to which article 6 relates shall not be exempted development for the purposes of the Act. In particular, I consider the following to be relevant:

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—

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

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

(iii) endanger public safety by reason of traffic hazard or obstruction of road users,

(xi) obstruct any public right of way

7.2.3. Schedule 2, Part 1 of the Planning & Development Regulations deal with Exempted Development – General and in terms of the subject referral, Class 5 and Class 9 are relevant, and state as follows:

Column 1 Description of Development	Column 2 Conditions and Limitations
<p>CLASS 5</p> <p>The construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or wooden fence or a wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>1. The height of any such structure shall not exceed 2 metres or, in the case of a wall or fence within or bounding any garden or other space in front of a house, 1.2 metres.</p> <p>2. Every wall other than a dry or natural stone wall bounding any garden or other space shall be capped and the face of</p>

	<p>any wall of concrete or concrete block (other than blocks with decorative finish) which will be visible from any road, path or public area, including public open space, shall be rendered or plastered.</p> <p>3. No such structure shall be a metal palisade or other security fence.</p>
<p>CLASS 9</p> <p>The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway.</p>	<p>The height of any such structure shall not exceed 2 metres.</p>

7.3. Roads Act, 1993

Public Road means a road over which a public right of way exists and the responsibility for the maintenance of which lies with the authority;

'road' includes -

- Any street, lane, footpath, square, court, alley or passage,
- Any bridge, viaduct, underpass, subway, tunnel, overpass, overbridge, flyover, carriageway (either single or multiple), pavement or footway,
- Any weighbridge or other facility for the weighing or inspection of vehicles, toll plaza or other facilities for the collection of tolls, service area, emergency telephone, first aid post, culvert, arch, gully, railing, fence, wall, barrier, guardrail, margin, kerb, lay-by, hard shoulder, island, pedestrian refuge, median, central reserve, channelliser, roundabout, gantry, pole, ramp, bollard, pipe, wire, cable, sign, signal or lighting forming part of the road.

7.4. Other

In terms of referrals relating to similar questions, the Board is advised of referral RL3380 which relates to the opening of an ope in the rear wall of a garden to provide pedestrian entrance from the public road / pavement and to provide 1.95m high pedestrian timber gate opening into the rear garden of a dwelling. The subject referral was one of 11 no. concurrent referrals made to the Board in respect of a road of terraced houses in a housing estate in Dublin. All houses had rear boundaries adjoining a residential cul-de-sac. The subject question related to the provision of a pedestrian entrance at the rear boundary of the dwelling.

The Planning Authority declared that the works were exempted development. The Board decided that the works were development and not exempted development as follows:

- The works were development per Section 3(1) of PDA, 2000 and came within the exempted development provisions of Part 1 Schedule 2 Class 5 of PDR, 2001
- The works were de-exempted under Article 9(1)((a)(ii) (adjoining road was public road the surfaced carriageway of which exceeded 4 m width).

I note that a number of the gates opened onto the grass verge of the public road.

8.0 Assessment

The question posed is as follows:

‘Whether the opening of a pedestrian gate from the rear of a house into a mature landscaped green area of Millbridge Avenue at 8 Millbridge Court, Mill Lane, Naas, Co. Kildare, is or is not development or is or is not exempted development.

8.1. Is or is not development

- 8.1.1. Section 2(1) of the Act defines ‘works’ as including “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". I am satisfied that, in accordance with the above definition, the subject referral relates to 'works'.

- 8.1.2. In terms of Section 3(1) of the 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". I am satisfied that the said 'works' comprise 'development'. This determined, consideration is required as to whether the 'works' would constitute 'exempted development'.

8.2. Is or is not exempted development

- 8.2.1. Having established that the 'works' undertaken amount to 'development', the issue to be considered is whether the development is exempted development or not. Section 4(1) of the Act defines certain types of development as being 'exempted development'. it is possible that the works might be considered under Section 4(1)(j) being

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;

Therefore, the works might be considered to be exempted development under the provisions of Section 4(1) of the Planning & Development Act, 2000-2013.

8.3. Restrictions on exempted development

- 8.3.1. In terms of the Planning & Development Regulations, Article 6 relates to Classes 5 and 9 of Part 1, Schedule 2. The detail of both classes is provided above and I consider that the works come within the scope of Class 5, Schedule 2, Part 1 of the Regulations. In terms of Article 9(1)(a), and the assessment of previous similar referrals, I consider it appropriate to determine if the gate comprises the creation of an access onto a public road which exceeds 4m in width.

- 8.3.2. While Millbridge Avenue is a public road which is +4m in width, given that the gate is located at approximately 45m from the road, across an area of public open space which could not be considered as a road margin for the purposes of defining a road, I would not consider that it falls within this restriction. In relation to Article 9(1)(a)(iii), I am satisfied that the gate does not endanger public safety by reason of traffic hazard or obstruction of road users. As such, I do not consider that the restrictions associated with Article 9(1)(a)(iii) apply in this instance. Finally, I am satisfied that the provision of the gate does not interfere with or obstruct any public right of way and therefore, the restrictions associated with Article 9(1)(a)(xi) do not apply.
- 8.3.3. In light of the above, I am satisfied that the provision of the pedestrian gate is development and exempted development.

9.0 Recommendation

- 9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the opening of a pedestrian gate from the rear of the house at 8 Millbridge Avenue, Mill Lane, Naas, Co. Kildare into an area of public open space is or is not development or is or is not exempted development:

AND WHEREAS Mr. Des Murray & Ms. Caroline Flynn requested a declaration on this question from Kildare County Council and the Council issued a declaration on the 11th day of October, 2018 stating that the matter was development and was exempted development:

AND WHEREAS Mr. Des Murray & Ms. Caroline Flynn referred this declaration for review to An Bord Pleanála on the 17th day of October, 2018:

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

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) Article 6(1) and article 9(1) of the Planning and Development

Regulations, 2001, as amended,

(c) Class 5, Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,

(d) the planning history of the site,

(e) the Roads Act, 1993

AND WHEREAS An Bord Pleanála has concluded that the opening of a pedestrian gate from the rear of the house into an area of public open space:

(a) Would constitute the carrying out of works which comes within the meaning of development in Section 3(1) of the Planning and Development Act, 2000

(b) Would come within the scope of Class 5, Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, and

(c) Would be exempted development by reason of Article 9(1)(a)(ii) of the Planning and Development Regulations, 2001, because the gate does not affect a public road within the meaning of the Roads Act, 1993;

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the said the opening of a pedestrian gate from the rear of the house at 8 Millbridge Avenue, Mill Lane, Naas, Co. Kildare into an area of public open space is development or is exempted development.

A. Considine
Planning Inspector

23rd January, 2019