



An
Bord
Pleanála

Inspector's Report ABP-305105-19

Question

Whether the construction of a front boundary wall to a house is or is not development or is or is not exempted development

Location

St. Oran's Park, Buncrana, County Donegal

Declaration

Planning Authority

Donegal County Council

Planning Authority Reg. Ref.

S5 19/14

Applicant for Declaration

Marie & Peter Carey

Planning Authority Decision

Is development and is exempted development

Referral

Referred by

Marie & Peter Carey

Owner/ Occupier

Ann Cassidy

Observer(s)

None

Date of Site Inspection

23rd October 2019

Contents

1.0 Site Location and Description 3

2.0 The Question 3

3.0 Planning Authority Declaration..... 4

4.0 Planning History..... 5

5.0 Policy 6

6.0 Statutory Provisions 7

 6.1. Planning and Development Act 2000, as amended 7

 6.2. Planning and Development Regulations 2001-2019 7

7.0 The Referral..... 9

8.0 Assessment 11

 8.1. Introduction 11

 8.2. Is or is not development 11

 8.3. Is or is not exempted development 12

9.0 Environmental Impact Assessment - Preliminary Examination 14

10.0 Appropriate Assessment 14

11.0 Recommendation 14

1.0 Site Location and Description

- 1.1.** The referral site is situated between St. Oran's Park and St. Oran's Drive off St. Oran's Road (R238 regional road), approximately 500m south of Buncrana town centre. It comprises a residential property with primary vehicular access from the northeast side off St. Oran's Drive. The immediate area is characterised by detached houses fronting southeast onto residential access roads and open space.
- 1.2.** Currently on site is a single-storey detached house with an expansive garden to the front leading down to the right bank of the Mill River. This front garden area is enclosed by a timber panel fence along the riverside, a hedge on the northeast side with St. Oran's Drive and a capped wall with an attached pier on the southwest side, which is the subject of this referral. This wall separates a recently set lawn area to a private front garden from the established cut-lawn green area to St. Oran's Park. The red-brick pier with capping stone atop is situated on the northwest end of the boundary wall, with a black rail gate attached to this fronting onto the estate access road serving St. Oran's Park. Ground levels in the immediate vicinity drop gradually moving south towards the river, which features a walkway that can be accessed via a set of steps from St. Oran's Park and also from St. Oran's Drive.

2.0 The Question

- 2.1.** The following is questioned by the referrer:
 - 'whether the construction of a block wall rendered and capped at St. Oran's Park, Buncrana, County Donegal is or is not exempted development';
- 2.2.** In the interest of clarity, it is considered appropriate that the question referred to the Board be reworded as follows:
 - whether the construction of a front boundary wall to a house at St. Oran's Park, Buncrana, County Donegal, is or is not development, or is or is not exempted development.
- 2.3.** I intend to proceed with my assessment on the basis of the reworded question.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On 24th day of June 2019, a request for a declaration on the above question was received by Donegal County Council from Marie and Peter Carey with an address at No.3 St. Oran's Park. The request was accompanied by correspondence outlining why the boundary wall would not constitute exempted development and an extract of map 13.1A from the Donegal County Development Plan 2018-2024, showing the land-use zoning for Buncrana and identifying the approximate location of the subject boundary wall.
- 3.1.2. On the 24th day of July 2019, the planning authority issued their declaration under Section 5 of the Planning and Development Act 2000, as amended (hereinafter referred to as 'the Act') (referral reference S5 19/14), setting out that the construction of a block wall rendered and capped at a height not exceeding 1.2m along the front/southwestern boundary of the referral site would constitute development and that it would also constitute exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The conclusion of the assessment contained in the Planning Officer's report (July 2019) reflects the outcome of the declaration issued by the planning authority and this report can be summarised as follows:

- permission was granted for a house on the referral site front garden area under planning ref. P.02/49 and this area did not form part of the open space to serve St. Oran's Park;
- the lands are privately-owned and zoned for amenity/recreation use;
- restrictions on the exempted development rights for the property would not arise based on amenity (landscape), ecological (appropriate assessment) or other considerations;
- the construction of the wall would entail works and, therefore, would constitute development;

- the wall comes within the scope of Class 11 to Part 1 of Schedule 2 to the Planning and Development Regulations 2001-2019 (hereinafter referred to as 'the Regulations').

3.2.2. Other Technical Reports

- None received.

4.0 Planning History

4.1. Referral Site

4.1.1. The following planning applications relate to the referral site:

- Buncrana Urban District Council Ref. P.02/49 – permission was granted in February 2003 for a residential estate comprising ten detached houses to be served by a vehicular access off St. Oran's Road and a riverside amenity area. This permission allowed for a two-storey detached house in the location of the front garden to the referral site, which was identified as plot no.10;
- Donegal County Council (DCC) Ref. 14/51107 – following a request for further information, a planning application for development comprising a house on plot no.10 with access off St. Oran's Park was withdrawn in June 2015;
- DCC Ref. 17/50147 – an application was submitted for development comprising a two-storey house on plot no.10 with access off St. Oran's Park and this was subsequently withdrawn by the applicant in March 2017.

4.1.2. The following planning applications relate to the Oran's Park residential estate:

- DCC Ref. 06/90029 – permission was granted by the planning authority in August 2006 for amendments to the site layout previously permitted under DCC Ref. P.02/49, entailing the re-location of the house on plot no. 9 and the provision of alterations, an extension and a garage to this house;
- DCC Ref. 07/90094 – retention permission was granted by the planning authority in January 2008 for change of house types on plot nos. 7 and 8.

4.2. Relevant Referrals

4.2.1. The following recent referrals decided by the Board are considered relevant:

- ABP Ref. RL06F.RL.2845 – in June 2011 the Board decided that the construction of a boundary wall at No.20a Brookhaven Rise, Blanchardstown, Dublin 15, is development and is not exempted development. It was concluded that while the wall would come within the scope of either Class 5 or Class 11 to Part 1 of Schedule 2 to the Regulations, the subject lands had been habitually open to the public during the ten years previous for recreational purposes, and the restrictions under article 9(1)(a)(x) of the Regulations would apply;
- ABP Ref. RL19.RL.2565 – in February 2009 the Board decided that the construction of a boundary wall at Adams Villa, Tullamore, County Offaly, is development and is not exempted development. It was concluded that while the wall would come within the scope of either Class 5 to Part 1 of Schedule 2 to the Regulations, at 3.1m in height the wall would exceed the 2m height limit set within the conditions and limitations of Class 5.

5.0 Policy

5.1. Donegal County Development Plan 2018-2024

5.1.1. Statutory planning policies and objectives for Buncrana are contained within Part C of the Donegal County Development Plan 2018-2024. The northern area on the referral site containing the house, has a land-use zoning 'established development', where it is a stated objective of the Plan 'to ensure the protection of the character and biodiversity of established areas and to allow for new development that is both appropriate and orderly in the context of the established area'. The southern area of the referral site, containing the front garden area and subject boundary wall, has a land-use zoning for 'amenity / recreation' uses, where it is a stated objective 'to conserve and enhance lands solely for formal and informal open spaces and amenity areas and to make provision for new recreation facilities'. The referral site, including the subject boundary wall, is located outside the Area of Special Townscape Character (ASTC).

6.0 Statutory Provisions

6.1. Planning and Development Act 2000, as amended

6.1.1. Section 2(1) of the Act states the following:

- ‘development’ has the meaning assigned to it by Section 3 of the Act;
- ‘works’ includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal’

6.1.2. Section 3(1) of the Act states that:

- ‘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 over land’.

6.1.3. Section 4(1) of the Act sets out various forms and circumstances in which development is exempted development for the purposes of the Act.

6.1.4. Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations 2001-2019.

6.2. Planning and Development Regulations 2001-2019

6.2.1. Article 6(1) of the Planning and Development Regulations 2001-2019 (hereinafter ‘the Regulations’) provide that ‘subject to article 9, development of a class specified in column 1 of Schedule 2 to Part 1 of the Regulations 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’. Schedule 2 to Part 1 of the Regulations sets out classes of exempted development comprising ‘general development within the curtilage of a house’ and ‘sundry works’, including Classes 5 and 11, which are considered relevant to this referral and state the following:

Column 1 - Description of	Column 2 - Conditions and Limitations
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Development	
<p>Class 5 - The construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or wooden fence or a wall of brick, stone blocks with decorative finish, or 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 in the face of any wall of concrete or concrete block (other than blocks with decorative finish) which would 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 metal, palisade or other security fence.</p>
<p>Class 11 - The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of</p> <p>(a) any fence (not being a hoarding or sheet metal fence), or</p> <p>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres.</p> <p>2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.</p>

6.2.2. As provided for in Article 9(1)(a), the following development to which article 6 relates, shall not be exempted development, if the carrying out of such development would, inter alia:

- (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 or comprise the formation, laying out or material widening of the means of access to a public road the surface carriageway of which exceeds 4 metres in width;

(iii) endanger public safety by reason of a traffic hazard or obstruction to road users;

(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,

(x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility.

7.0 The Referral

7.1. Referrer's Case

7.1.1. The referrer's submission received on the 7th day of August 2019 can be summarised as follows:

- planning permission for a house on the referral site was refused under DCC Ref. 17/50147;
- the construction of the subject wall entailed works and, therefore, constitutes development. Planning permission has not been granted for this wall;

- while the planning authority considered that the wall could be considered exempted development under the provisions of Class 11 of Part 1 to Schedule 2 of the Regulations, the restrictions under Articles 9(1)(vi), (viiB) and (x) of the Regulations apply;
- the building of a wall on lands zoned for amenity and recreation uses would be contrary to the preservation of this amenity space and as a result would interfere with the character of the landscape;
- the enclosing of land habitually open to the public during the ten years preceding the construction of the subject wall has occurred;
- the site is beside a river that connects with the Lough Swilly Special Area of Conservation (SAC) (Site Code: 002287) and the Lough Swilly Special Protection Area (SPA) (Site Code: 004075), and in the absence of an appropriate assessment of the development, the Regulatory restrictions on exempted development apply in this case.

7.2. Owner's Response

7.2.1. The owner's response to the referrer's submission can be summarised as follows:

- planning permission for St. Oran's Park was initially granted under planning ref. P.02/49 and following this only nine of the ten permitted houses were constructed;
- the subject site was used as a storage yard and builders' compound during the construction of the estate between 2007 and 2013, as is identifiable from third-party satellite imagery for the area. The referrer does not address the historical use of the land;
- planning applications under DCC refs. 14/51107 and 17/50147 for a house on the southeast side of the referral site were withdrawn and not refused permission;
- the site is now being used as an extension to the owner's front garden and the wall is used for privacy and to physically define the residential property;
- the wall does not infringe upon the open space serving St. Oran's Park;

- the wall has been plastered and capped and is less than 1.2m in height;
- the wall does not infringe on access to the riverside walk, which can be accessed on either side of the referral site from St. Oran's Park and St. Oran's Drive;
- the planning authority concluded that a Stage 2 appropriate assessment of the development would not be required. The previous construction compound that was situated on site was initially tidied up and no work was undertaken beyond the original boundaries to plot no.10, St. Oran's Park. Furthermore, the site is separated from the river by a 4m to 5m buffer that features mature planting and no physical disturbance took place along the riverbank.

7.3. Planning Authority's Response

- 7.3.1. The planning authority's response to the referrer's case states that they have no further comments to make.

8.0 Assessment

8.1. Introduction

- 8.1.1. The purpose of this referral is not to determine the acceptability or otherwise of the existing boundary wall, in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so falls within the scope of exempted development within the meaning of the relevant legislation.
- 8.1.2. The boundary wall structure features two elements; a red-brick pier on the northwest end and a plastered and capped wall extending from this pier to a timber-panel fence and planting along the Mill riverside walk. I have no information that would disprove that the pier element was constructed in isolation of the lower wall element.

8.2. Is or is not development

- 8.2.1. The initial question that arises is, whether the proposals would or would not constitute development. Section 3 of the Act defines development as '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'. As defined in section 2(1) of the Act, works include 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal'. I am satisfied that the act of constructing the boundary wall structure would have comprised works on land that constitute development. This is not contested by any party to the referral and would conform to the declarations issued by An Bord Pleanála under the relevant referrals listed in Section 4.2 of this report. Consequently, I am satisfied that it can be reasonably concluded that the act of constructing the subject wall involved works and, therefore, constituted development.

8.3. Is or is not exempted development

- 8.3.1. The primary issue that arises is whether the development would or would not constitute exempt development. The planning authority assert that the construction of the wall would constitute exempted development, as the wall comes within the scope of Class 11 to Part 1 of Schedule 2 to the Regulations and as the Article 9 restrictions on exempted development do not apply. Furthermore, the referrer's submission does not contest that the boundary wall comes within the scope of Class 11 to Part 1 of Schedule 2 to the Regulations, as they consider that the boundary wall does not constitute exempted development by virtue of several restrictions under Article 9 of the Regulations, as discussed further below.
- 8.3.2. Class 5 to Part 1 of Schedule 2 to the Regulations refers to development within the curtilage of a house, whereas Class 11 refers to sundry works other than within or bounding the curtilage of a house. The owner has stated that the wall bounds the front garden of their residential property. Consequently, I am satisfied that Class 5 is the appropriate class under which to consider whether the wall would or would not constitute exempt development.

Exempted Development

- 8.3.3. The construction of the wall, which is situated to the front of the house on site and is visible from the public open space and the public road serving St. Oran's Park, would be exempted development under Class 5 to Part 1 of Schedule 2 to the Regulations, provided that the height of the wall does not exceed 1.2m and provided that it is capped and features a render or a plaster finish or blocks with a decorative finish.
- 8.3.4. The wall is capped and rendered and the attached pier is finished with a red-brick that is consistent with the decorative finish to other piers bounding the entrances to the neighbouring house curtilages in St. Oran's Park. Scaled drawings of the wall have not been provided by parties to the referral. During my site visit I measured the capped and rendered wall element of the structure from the immediate ground level and established that at no point did this element of the wall exceed a height of 1.2m. I also established that when measured from the immediate ground level to the apex of the pyramidal concrete-capping stone, the height of the red-brick pier element of the wall structure was 2.1m. Therefore, the red-brick pier element of the wall would not be exempted development under Class 5 to Part 1 of Schedule 2 to the Regulations.

Restrictions on Exempted Development

- 8.3.5. While I have concluded that the wall would not constitute exempted development, for comprehensiveness I briefly address the restrictions on exempted development under Article 9 of the Regulations, as referenced in the referrer's submission.
- 8.3.6. The boundary wall is not located within an area, which is of landscape character or where there is a view or prospect of special amenity value or interest, that is identified to be preserved by an objective of the Donegal County Development Plan 2018-2024. Accordingly, the restrictions on exempted development under Article 9(1)(a)(vi) of the Regulations do not apply in this situation.
- 8.3.7. The potential for a restriction under Article 9(1)(a)(viiB), based on the need for an appropriate assessment of the development to be undertaken, is addressed in section 10 below.
- 8.3.8. The information presented in the submissions to the referral and the information available via third-party imagery does not confirm that the part of the referral site subject of the boundary was habitually open to or used by the public during the ten

years preceding the construction of the wall. Accordingly, I am satisfied that the restrictions on exempted development under Article 9(1)(a)(x) of the Regulations do not apply.

9.0 Environmental Impact Assessment - Preliminary Examination

- 9.1.1. Having regard to the nature and scale of the development, as referenced in the question above, it is considered that the issues arising from the proximity and connectivity to European Sites can be adequately dealt with under the Habitats Directive (Appropriate Assessment), as there is no likelihood of other significant effects on the environment. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

10.0 Appropriate Assessment

- 10.1. Having regard to the minor nature of the development, which is set back from the Mill River, to and the separation distance to the nearest European site, no Appropriate Assessment issues arise, and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site. In such circumstances, the restrictions under Article 9(1)(a)(viiB) of the Regulations do not apply.

11.0 Recommendation

- 11.1. 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 construction of a front boundary wall to a house at St. Oran's Park, Buncrana, County Donegal, is or is not development or is or is not exempted development:

AND WHEREAS Marie and Peter Carey of No.3 St. Oran's Park, Buncrana, County Donegal requested a declaration on this question from Donegal County Council and the Council issued a declaration on 24th day of

July, 2019 stating that the matter is development and is exempted development:

AND WHEREAS Marie and Peter Carey referred this declaration for review to An Bord Pleanála on the 7th day of August, 2019:

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

- (a) Sections 2 (1) and 3 (1) of the Planning and Development Act, 2000, as amended;
- (b) Articles 6 and 9 of the Planning and Development Regulations 2001, as amended, and Class 5 of Part 1 of Schedule 2 to those Regulations;
- (c) the planning history of the site;
- (d) the nature and the height of the boundary wall, including the attached brick pier.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the construction of the wall would involve the carrying out of works and would, therefore, constitute development;
- (b) the development, involving the construction of a front boundary wall bounding the curtilage of the house on site, with a pier exceeding 1.2m in height, would not come within the scope of Class 5 of Part 1 of the Second Schedule to the Planning and Development Regulations 2001, as amended.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the Planning and Development Act 2000, as amended, hereby decides that the construction of a front boundary wall to a

house at St. Oran's Park, Buncrana, County Donegal, is development and is not exempted development.

Colm McLoughlin
Planning Inspector

13th November 2019