



An
Bord
Pleanála

Inspector's Report ABP-305239-19

Question

Whether the erection of a 1.2m high boundary wall at Grange, Kilmallock, Co. Limerick is or is not development or is or is not exempted development.

Location

Grange, Kilmallock, Co. Limerick

Declaration

Planning Authority

Limerick City & County Council

Planning Authority Reg. Ref.

EC2219

Applicant for Declaration

Claudia Reidy

Planning Authority Decision

Development, which is not exempted development

Referral

Referred by

Claudia Reidy

Owner/ Occupier

Disputed

Observer(s)

None

Date of Site Inspection

30th January 2020

Inspector

Hugh D. Morrison

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1.0 Site Location and Description

- 1.1. The site is located in Grange a hamlet, which is skirted to the NW by the R512 and which comprises a cluster of buildings around the “T” junction formed between the L-8010 and the L-5075. This site lies in the NE corner of this junction. It comprises a cleared area, which is open to the said local roads along its southern and western boundaries. Its northern boundary abuts the gabled end of a row of buildings, which run on a N/S axis to the north of the site, and its eastern boundary is denoted by a walled garden with a pedestrian gate in it.
- 1.2. During my site visit, I observed that the site’s open sides to the said junction have been recently kerbed and the site itself is in use for the storage of wrapped cylindrical bales of animal fodder.

2.0 The Question

- 2.1. The question asked by the referrer in this case is as follows:

Whether the erection of a 1.2m high boundary wall at Grange, Kilmallock, Co. Limerick is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The boundary wall is development and, under Class 11 of Part 1 of Schedule 2 to Article 6 of the Planning and Development Regulations, 2001 – 2019, it would be exempted development, but, under Article 9(1)(a)(iii), (x) & (xi) of these Regulations, it is de-exempted and so the boundary wall would not be exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

See declaration

3.2.2. Other Technical Reports

None

4.0 Planning History

The site was the subject of an enforcement enquiry in late 2018 concerning the erection of a 2m high fence around it.

5.0 Policy Context

5.1. Development Plan

The Limerick County Development Plan 2010 – 2016 (CDP) does not identify Grange in its settlement strategy.

5.2. Natural Heritage Designations

Lough Gur pNHA (000437)

6.0 The Referral

6.1. Referrer's Case

Under Section 5(2)(b) of the Planning and Development Act, 2000 – 2019, once the Planning Authority requested further information, it should have issued a declaration within 3 weeks of the reception of such information; this it failed to do and so its declaration should be considered to be void.

Alternatively, the request for a declaration should be considered to be withdrawn.

In the event that neither of the two courses of action can proceed, the referrer makes the following submissions:

- The referrer accepts that the boundary wall is not exempted by virtue of Item (iii) of Article 9(1)(a) of the Planning and Development Regulations, 2001 – 2019.
- The referrer contests the citation of Item (x) on the following grounds:
 - The referrer created a garden on the footprint of a demolished building on the site, which came to maturity in 2012.

- Goggle Street Views of the site from 2009 show a car and 2 lorries parked on the site. These vehicles were parked on the site with the consent of the referrer.
- In late 2018, the referrer's garden was dismantled/removed and quarry stone up to 2 inches in size was laid on the site and a dropped/flatten kerb was installed at the edge of the carriageway. The referrer responded by erecting the 2m high fence, which was then the subject of an enforcement enquiry.
- A letter from the referrer's solicitor advises that she has good possessory title to the site. Notwithstanding this letter, the referrer is entitled to seek a declaration on the subject boundary wall regardless of whether or not she is the owner of the site.
- In early 2019, the referrer sought the advice of the Planning Authority on the enclosure of the site. The ensuing declaration request is an attempt to ensure that any development cannot subsequently be challenged.
- The referrer contests the citation of Item (xi) on the following grounds:
 - The boundary wall would not obstruct any public right of way.
 - As cited above, historic parking on the site was with the referrer's consent.

The Board is requested to make a declaration that is not based on Items (x) and (xi).

6.2. Planning Authority Response

- There is no planning history pertaining to the site.
- John Ludovick Swinnerton Dyer is the registered owner of the site.
- It is understood that the site has been open to the public for over 60 years.
- A public utilities box is in-situ on the site and, formerly, for over 30 years, a telephone box was in-situ, too: its concrete slab continues to bear testimony to its former presence.

6.3. Owner/occupier's response

Attempts to contact the owner identified by the Planning Authority have been unsuccessful.

6.4. Further Responses

The referrer has responded to the Planning Authority's response. The following points are made:

- While John Ludovick Swinnerton Dyer is the registered owner of the site according to Folio FK10003 registered on the 28th May 1935, Breda Bulfin, the local postmistress, was the beneficial occupier and possessor of this site for c. 60 years. Following her death, the site passed to her nephews who sold it, in 2009, to Claudia Reidy.
- The Planning Authority has not provided any evidence to support its claim that the site was open to the public.
- The presence of a public utilities box on private property is not uncommon and the concrete slab cited is explained by the traditional practice in rural areas of siting telephone boxes on the same property as post offices.
- The absence of a public right of way is evidenced by the fact that the site does not lead to anywhere other than the referrer's own private property.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 3: Development

(1) In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

Section 2: Interpretation

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...

Section 5: Declaration and referral on development and exempted development

- (1) *If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.*
- (2) (a) *Subject paragraphs (b) and (ba), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.*
- (b) *A planning authority may require any person who made a request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question and, where further information is received under this paragraph, the planning authority shall issue the declaration within 3 weeks of the date of the receipt of the further information.*
- (ba) (i) *Subject to subparagraph (ii), a planning authority shall not be required to comply with paragraph (a) within the period referred to in that paragraph where it appears to the planning authority that it would not be possible or appropriate, because of the exceptional circumstances of the development or proposed development (including in relation to the nature, complexity, location or size of such development) identified in the request under subsection (1) to do so.*
- (ii) *Where subparagraph (i) applies, the planning authority shall, by notice in writing served on —*
- (I) *the person who made the request under subsection (1), and*
 - (II) *each person to whom a request has been made under paragraph (c),*

before the expiration of the period referred to in paragraph (a), inform him or her of the reasons why it would not be possible or appropriate to comply with that paragraph within that period and shall specify the date before which the authority intends that the declaration concerned shall be made.

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

(3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

(b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

Section 140: Withdrawal of appeals, applications and referrals

(1) (a) A person who has made –

(iii) a referral,

may withdraw, in writing, the...referral at any time before that...referral is determined by the Board.

7.2. Planning and Development Regulations, 2001

Article 6: Exempted Development

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

Part 1 of Schedule 2 to Article 6

<i>Column 1</i>	<i>Column 2</i>
<i>Description of development</i>	<i>Conditions and Limitations</i>
<i>Sundry Works</i>	
CLASS 11	
<i>The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –</i>	
<i>(a) any fence (not being a hoarding or sheet metal fence), or</i>	<i>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.</i>
<i>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</i>	<i>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.</i>

Article 9: Restrictions of exemption

(i) 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 –

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

(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,

(xi) obstruct any right of way,

8.0 Assessment

8.1. Preliminaries

- 8.8.1. The referrer, as applicant, made an application for a declaration on the subject question from the Planning Authority on 2nd May 2019. Further information was subsequently sought on 21st May 2019 and received on 3rd July 2019. A declaration was then made on 26th July 2019.
- 8.8.2. The said declaration was referred to the Board on 22nd August 2019. In doing so, the referrer sought to have this declaration withdrawn, but was advised that under Section 140(1) of the Planning and Development Act, 2000 – 2019, (hereafter referred to as the Act) the right to withdraw a referral exists, but not the original request for a declaration. Accordingly, the Planning Authority's declaration *prima facie* still stands and so the Board has advised the referrer that its review of this declaration will proceed.
- 8.8.3. The referrer challenges the Planning Authority's declaration on the basis that it was made outside the 3-week period sanctioned by Section 5(2)(b) of the Act. In these circumstances, she considers that it should be regarded as void.
- 8.8.4. The Act appears to be silent on the effect that lateness has on the standing of a declaration. If it were a planning application, then an unconditional permission would be deemed to have been granted. No parallel would be applicable to a declaration, which is essentially the answer, in the light of current planning legislation, to a question asked. In these circumstances, I consider that the Board should proceed to review the Planning Authority's declaration in this case.

8.2. Is or is not development

- 8.2.1. The question refers to the erection of a 1.2m high boundary wall on the subject site. A site layout plan shows that this wall would be erected around the open portions of the perimeter to this site so as to achieve its complete enclosure in connection with its use as a private garden. (Access would be by means of an existing pedestrian gate in the existing wall along the eastern boundary). The proposed wall would be either 1.1m or 1.2m in height, i.e. the wall elevation on the site layout plan shows the former height and the submitted application form cites the latter height. For the purpose of my assessment, I will work to the higher of these two heights. This wall would be formed from concrete blockwork and it would be capped and plastered.
- 8.2.2. In the light of the description of the wall, I consider that its erection would involve “works” as defined by Section 2(1) of the Act to include construction and so, under Section 3(1) of the Act, it would be development.

8.3. Is or is not exempted development

- 8.3.1. Article 6(1) of the Planning and Development Regulations, 2001 – 2019, (hereafter referred to as the Regulations) addresses exempted development and it refers, in this respect to, the Classes set out in Part 1 of Schedule 2 of these Regulations. One such Class, Class 11, states that the erection of a wall of concrete blocks on land other than within or bounding the curtilage of a house is exempted development, provided, in the case of a new, as distinct from replacement, structure, it does not exceed 1.2m and, where concrete blocks are used, they are capped and elevations visible from any road are rendered or plastered.
- 8.3.2. The proposed wall would be a maximum of 1.2m in height and, as a concrete blockwork structure, it would be capped, and its elevations would be plastered. Accordingly, this wall would be exempted development under the said Class 11.

8.4. Restrictions on exempted development

- 8.4.1. The Planning Authority’s declaration cites 3 items under Article 9(1) of the Regulations, whereby in its view the proposed boundary wall, would be de-

exempted, i.e. Items (iii), (x), and (xi). While the referrer has contested the second and third of these items, she has not contested the first. I will review each in turn.

- 8.4.2. **Item (iii)** development would “endanger public safety by reason of traffic hazard or obstruction of road users.” At present the site is open on its roadside southern and western boundaries. Such openness is returned for a distance of 2m along the eastern boundary and 5m along the northern before an existing wall and the gable end to a row of buildings, respectively, feature.
- 8.4.3. The site layout plan indicates that the wall would abut the back of the recently constructed kerb lines to the adjoining carriageways and so the proposed wall would effectively introduce upright structures that would be immediately adjacent to these carriageways. The presence of such structures would have the effect of prompting drivers to allow a greater clearance between them and their vehicles. Such “lying over” at a junction would add to the inherent hazard of vehicular movements at this junction and so it would “endanger public safety by reason of traffic hazard.” I, therefore, consider that Item (iii) is applicable.
- 8.4.4. **Item (x)** development would “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.”
- 8.4.5. The referrer and the Planning Authority are unable to agree on the question as to who owns the subject site. The Board is not in a position to arbitrate on this disputed question. For the purposes of the current referral, a definitive answer to this question is not necessary.
- 8.4.6. The referrer provides a history of the usage of the subject site. Historic map extracts and photographs show that there was formerly a building on this site. The referrer recounts how she purchased it in 2009 and laid out a garden in the footprint of the demolished building. She also states that she consented to the parking of vehicles on the site.
- 8.4.7. The referrer reports that in 2018 the aforementioned garden was cleared, stone was laid on the site, and a dropped/flattened kerb line was installed on its roadside frontages. The Planning Authority, as Roads Authority, appears to have been

responsible for these works, which are consistent with its position that the site has been open to the public for the last 60 years.

- 8.4.8. By way of support for its position, the Planning Authority draws attention to the presence of the concrete slab to a former telephone kiosk and to a public utility manhole, both of which are on the site.
- 8.4.9. The referrer has responded by drawing attention to the general absence of evidence to support the Planning Authority's position. In relation to the first specific item cited, she states that, as the former building was used as a post office, it was normal in the past that such uses be accompanied by a telephone kiosk. In relation to the second item cited, the observation is made that the presence of a public utility manhole on private land is not uncommon.
- 8.4.10. I note that Item (x) refers to land that has not only been habitually open to or used by the public during the preceding 10 years, but which has been so open or used for either recreational purposes or as a means of access to any seashore, mountain, lakeside, riverbank or other place of natural beauty or recreational utility. I note, too, that the Planning Authority has not indicated that the subject site was either in use by the public for recreational purposes or as a means of access to any of the destination types cited. I, therefore, consider that there is an absence of evidence to support the Planning Authority's reliance upon Item (x).
- 8.4.11. **Item (xi)** development would obstruct any public right of way. The Planning Authority asserts that such a right of way exists, in the light of the longevity of public usage of the site, i.e. in excess of 70 years. No documentary evidence has been submitted to support this assertion.
- 8.4.12. The referrer states that no public right of way can exist as the site does not lead to a public destination, i.e. the pedestrian gate in the eastern boundary wall leads only to a private garden. While I understand this point, I am conscious, too, that a public right of way could conceivably exist over the western portion of the site in conjunction with the setback layout of the row of buildings to the north, and so the said point is insufficient in itself to preclude the possibility.
- 8.4.13. I, therefore, consider that insufficient information is available to support the Planning Authority's reliance upon Item (xi).

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 erection of a 1.2m high boundary wall at Grange, Kilmallock, Co. Limerick is or is not development or is or is not exempted development:

AND WHEREAS Claudia Reidy requested a declaration on this question from Limerick City & County Council and the Council issued a declaration on the 26th day of July, 2019, stating that the matter was development and was not exempted development:

AND WHEREAS Claudia Reidy referred this declaration for review to An Bord Pleanála on the 22nd day of August, 2019:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 5(2)(b) 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 11 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the history of the site,
- (g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) Under Section 3(1) of the Planning and Development Act, 2000 – 2019, the erection of the proposed boundary wall is development,
- (b) Under Class 11 of Part 1 of Schedule 2 to Article 6(1) of the Planning and Development Regulations, 2001 – 2019, the erection of the proposed boundary wall is exempted development, and
- (c) Under Article 9(1)(a)(iii) of the Planning and Development Regulations, 2001 – 2019, the erection of the proposed boundary wall is de-exempted development and so it is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the erection of a 1.2m high boundary wall at Grange, Kilmallock, Co. Limerick is development that is not exempted development.

Hugh D. Morrison
Planning Inspector

7th February 2020