



An
Bord
Pleanála

Inspector's Report ABP-305880-19 RL

Question

Whether the erection of a fence across a planned roadway within the Planning Authority's area is or is not development and is or is not exempted development.

Location

Elmfield, Ballyogan/ Castle Court Lands (Clay Farm Loop Road), Co. Dublin.

Declaration

Planning Authority

Dun Laoghaire-Rathdown County Council

Planning Authority Reg. Ref.

93/19

Planning Authority Decision

None

Referral

Referred by

Dun Laoghaire-Rathdown County Council

Owner/ Occupier

Deane Homes/ Killiney Estates Limited

Date of Site Inspection

14th February 2020

Inspector

Paul O'Brien

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1.0 Site Location and Description

- 1.1. The site comprises part of a roadway, grass verge, footpath and cycle path known as Elmfield or Castle Court Road and which is located to the south of the Ballyogan Road, Dublin 18. The Elmfield Road provides an easterly access to the Elmfield apartment development.
- 1.2. A fence consisting of nine metal posts, painted green, which supports a wire mesh fence is in situ placed diagonally across a footpath/ cycle path, grass verge and roadway. This fence is approximately 1.2 m in height and currently prevents vehicular access from the Elmfield Road to the Castle Court Road to the south. Four large concrete blocks are positioned to the north of the fence. These are relatively easy to remove subject to the use of an appropriate crane etc.
- 1.3. The Castle Court Road provides access to the Castle Court development which primarily consists of apartments and is located to the western side of this road. The Castle Court Road connects into the Castle Grove Road and finally the Castle Lawns Road providing access to the Ballyogan Road.
- 1.4. Pedestrian access and limited cycle access are possible from the Elmfield Road onto the Castle Court Road as the fence does not extend the full width between the eastern and western boundaries.

2.0 The Question

- 2.1. A question has arisen pursuant of Section 5 of the Planning and Development Act 2000 as amended as to whether the erection of a fence across a planned roadway within the Planning Authority's area is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

Dun Laoghaire Rathdown County Council have submitted this referral and the Planning Authority have issued no declaration on this question.

4.0 Planning History

4.1. Site History

P.A. Ref. D00A/1256/ ABP Ref. PL06D.125017 refers to a December 2001 decision to grant permission for the development of 178 dwelling units to be the Castle Court development, in the form of 34 number two-storey plus attic, four/five bedroom semi-detached, 12 number two-storey plus attic, four/five bedroom detached, 26 number three bedroom townhouses in three number blocks, two number three bedroom detached bungalows, 42 number three bedroom duplex apartments and 42 number two bedroom duplex apartments in seven number three-storey blocks and 16 number two bedroom apartments and four number three bedroom penthouse apartments in a two-storey plus mansard floor block. The permitted development included all site works and temporary access from the Ballyogan Road through Meadowfields, pending the construction of a new distributor road from a new junction with the Ballyogan Road. Condition No. 3 states:

The proposed temporary construction access to Ballyogan Road (Drawing Number 98364-200A) shall be stopped off and the area reinstated either on completion of the development or when the proposed local distributor loop road serving the site is completed, whichever is first completed. The temporary access shall be used exclusively for construction traffic associated with the proposed development.

Condition No. 4 states:

In the event of any houses being completed and occupied prior to the completion of the local distributor loop road, traffic from the development shall use the connecting link road through the Meadowfield Estate immediately to the west of the proposed development, which link shall be closed on completion of the local distributor road. Any remaining hard paved areas shall be removed and the area reinstated in accordance with the requirements of the planning authority.

Condition 5 required the applicant to submit details of the proposed local distributor loop road on the lands under their control to the Planning Authority prior to the commencement of development.

P.A. Ref. D03A/0411 refers to an April 2004 decision to grant permission for the development of 209 apartment units to form the Elmfield Development.

Condition no. 2 required the construction of a temporary access onto the Ballyogan Road and access to the site prior to the development of any of the apartment blocks. Condition 3 refers to construction traffic and also an existing entrance to Elmfield (a house on site) is to be permanently closed to vehicular traffic.

4.2. Previous Board References/ Referrals

From an examination of the Board's database of references/referrals, I cannot find any similar/ relevant cases.

5.0 Policy Context

5.1. Development Plan

- 5.1.1. Under the Dun Laoghaire-Rathdown County Development Plan 2016 – 2022, the subject site is zoned A 'To protect and/ or improve residential amenity'.

A '6 Year Road Proposal' is indicated here, for the provision of the 'Clay Farm Loop Road'.

5.2. Natural Heritage Designations

None.

6.0 The Referral

6.1. Referrer's Case

Dun Laoghaire-Rathdown County Council, the Planning Authority for the area, are the referrer in this case. The following points are made:

- The fence has been placed across a planned roadway known as the 'Clay Farm Loop Road'. This road has been indicated on a number of County Development Plans and is to facilitate the development of the lands surrounding it.

- The intention was to open this section of the loop road on completion of the Elmfield development. The subject fence prevents the opening/ use of this section of the loop road.
- The Planning Authority have queried if the fence, which has replaced a mound of earth, is development and if so is it exempted development.
- The Planning Authority have referenced Article 9 of the Planning and Development Regulations 2001 as amended and specifically Article 9 (1)(a)(i) which states a restriction on development if such a development would:

‘contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.’

- The Planning Authority contend that the development is contrary to Condition 1 of D03A/0411 requiring the development to be carried out in accordance with the submitted plans and specifications and Condition 2 of D03A/0411 which requires the road/ junction access to be carried out in accordance with the submitted plans following the written agreement of the Planning Authority.
- Drawing No. 023050-210 of D03A/0411 indicates that the road was to be completed to a line to the south of the subject fence and a submitted landscape plan prepared by Ronan MacDiarmada and Associates does not indicate any boundary treatment in this location.

6.2. **Owner/ occupier’s response**

The landowner – Killiney Estates Limited, part of the Park Developments group, have engaged the services of John Spain Associates – Planning and Development Consultants to prepare a response a Section 5 referral made by Dun Laoghaire-Rathdown County Council. The following points are made:

- It is not within the landowner’s control to provide the connection from the lands to the south to the Castle Court/ Elmfield section of the Clay Farm Loop Road due to a third-party land ownership issue. The lands immediately to the west/ south of their sites are owned by Deane Homes.

- The landowner intends to retain the fence in place until such time as the third-party lands are opened up to allow access from Park Developments group phase 1C development to the east of the subject site, to the Ballyogan Road.
- Ransom strip will remain unless a Compulsory Purchase Order (CPO) is initiated or land is transferred by way of the Taking in Charge process.
- The landowner has outlined the previous history of warning letters regarding the erection of a fence/ barrier over these lands.
- The planning applications referred to by the Planning Authority are expired and therefore the unimplemented elements of the permissions can not be carried out.
- The barrier has been erected in accordance with Class 11 exemptions as set out in the Planning and Development Regulations 2001 as amended. The barrier (mound or fence) has been in place for more than seven years and in accordance with Section 157 (4) of the Planning and Development Act 2000 as amended, would mean that no enforcement proceedings may be taken against the landowner as seven years have expired from the date of commencement of the development.
- Opening the road would expose the landowner to risks regarding insurance, trespass and loss of property rights. The fence is in place to ensure the protection of the landowner's property rights.
- In summary, the landowner will consent to the taking in charge of this section of the road, when the Planning Authority resolve landownership issues restricting the development of the Loop Road including access from Phase 1C to the adjacent section of the road.

6.3. Further Responses

The Planning Authority have responded to the landowner's response and the following comments are made:

- Much of the landowner's comments refer to matters outside of the question that is before the Board for consideration, although it does outline the wider context of the issue.
- The landowner does not appear to contest the fact that the fence is development.
- The Planning Authority raise the issue about the duration of a permission and by fact that the erection of the fence contravenes a condition attached to a grant of permission, they do not have the right to avail of the exemption under Class 11 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 as amended.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 as amended

Section 2(1) works '*..includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..*'

Section 3(1) in 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*'.

Section 4 (1) sets out development that is exempt from requiring planning permission.

7.2. Planning and Development Regulations, 2001 as amended

Article 6 (1) 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'.

Article 9 (1)(a) sets out the instances where development, to which Article 6 relates, shall not be exempted development for the purposes of the Act and the following are relevant:

'(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*
- (iii) endanger public safety by reason of traffic hazard or obstruction of road users*
- (xi) obstruct any public right of way*

Schedule 2

Part 1 – Exempted Development – General – Sundry Works

CLASS 11

Description of Development

The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of —

- (a) any fence (not being a hoarding or sheet metal fence), or*
- (b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.*

Conditions and Limitations

- 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.*
- 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.*

8.0 Assessment

It should be stated at the outset of this assessment, that the purpose of the referral is not to determine the acceptability or otherwise of the fence 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. Likewise, planning enforcement is a matter for the Planning Authority and does not fall within the jurisdiction of the Board.

8.1. Is or is not development

- 8.1.1. Having regard to Section 2(1) and Section 3(1) of the Planning and Development Act 2000 as amended, it is considered that the construction of a fence measuring 1.2 m in height, is development. A fence has been erected on this site at Elmfield and this is development within the meaning of the Act.

8.2. Is or is not exempted development

- 8.2.1. Development can be exempt from the requirement for planning permission by either Section 4 of the Planning and Development Act 2000 as amended, or by Article 6 of the Planning and Development Regulations 2001 as amended.
- 8.2.2. The development does not fall into any of the categories of exempted development under Section 4 of the Planning and Development Act 2000 as amended. I have considered each of the cases where development would be exempt, and the subject development does not meet any of the criteria.
- 8.2.3. As for Article 6 of the Planning and Development Regulations 2001 as amended, I consider that Class 11 would be applicable. The subject development is a fence of 1.2 m in height and does not consist of hoarding or sheet metal. The development is on lands that are not within or bounding the curtilage of a house. The development is therefore exempt as it demonstrates compliance with the requirements of Article 6 of the Planning and Development Regulations 2001 as amended.
- 8.2.4. I note from Google Streetview that the current available image is dated June 2018 and clearly displays the fence in situ as per my site visit of 14th February 2020. The history function on Streetview allows for the display of an image dated April 2009 and indicates that a timber post and rail fence with wire mesh, was in situ across the road and extending to the western boundary of the site, thereby preventing access to the lands to the south of the site.

8.3. Restrictions on exempted development

- 8.3.1. Article 9(1)(a) provides situations where an otherwise exempt development would not be exempt due to a stated restriction.

(i) Development would not be exempt when a condition attached to a permission is contravened or the development is inconsistent with any use specified in a permission. The Planning Authority have raised this matter and refer to conditions attached to the grant of permission under D03A/0411. The submitted plans lodged with the application do not clearly indicate what the developer was to construct in that the road layout drawings (023050 – 210 to 217) indicate that part of the road was to be constructed outside of the lands within their ownership whilst some of the Water/ Drainage plans suggest that the development including the road was only to be constructed to within the area of control/ ownership of the applicant. The point where the site boundary is includes a drawing label that states, 'Fence & c/t Hedge'. This suggests that the applicant was to construct the road outside of lands within their control and yet provide a fence across the site.

I cannot therefore state that the applicant has not complied with the conditions of D03A/0411 in that the submitted drawings indicate a fence was to be provided across the road in this location and for which permission was granted.

(iii) Development that would endanger public safety by reason of a traffic hazard or be an obstruction would not be exempted development. Whilst the fence clearly obstructs access over a through road, there is no suggestion that the road was ever open to vehicular traffic. Pedestrian access to the side of the road is available on a footpath thereby creating a pedestrian right of way. It could be argued that drivers of a vehicle may expect this to be a through route and attempt to drive over this point, however that may be an issue requiring additional signage/ markings and the current situation is such that this would not usually endanger public safety. Pedestrian traffic remains separated from vehicular traffic.

(xi) The obstruction of a public right of way removes exemption rights. As stated previously, the current layout allows for pedestrian access between the two sites and it is only vehicular traffic that is obstructed and there is no suggestion that the road was ever open for through traffic.

8.3.2. Having considered the Article 9(1) restrictions, they do not in my opinion remove the exempted development rights of the applicant/ landowner.

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 fence across a planned roadway within the Planning Authority's area is or is not development or is or is not exempted development:

AND WHEREAS Dun Laoghaire- Rathdown County Council referred this declaration for review to An Bord Pleanála on the 8th day of November 2020:

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

- (a) Sections 2(1), 3(1) and 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (b) Article 6(1) and article 9(1) and Class 11 as described in Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (c) the planning history of the site,
- (d) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The erection of a fence on this site is development,
- (b) The development is exempt from development, as it falls within the scope of Class 11 development, of the Planning and Development Regulations 2001 as amended.

and

(c) The development does not contravene a condition of a planning permission. The submitted plans as approved by the Planning Authority indicate that a fence was to be provided in this location which is within the control of the applicant, the development does not endanger public safety by reason of a traffic hazard or by obstruction of road users, and does not obstruct any public row of way.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Planning and Development Act as amended, hereby decides that the erection of a fence on these lands is development and is exempted development.

Paul O'Brien
Planning Inspector

17th February 2020