



An  
Bord  
Pleanála

## Inspector's Report ABP-307913-20

### Question

Whether the construction of a mesh fence is or is not development or is or is not exempted development.

### Location

Millbourne Drive, Ashbourne, Co. Meath.

### Declaration

Planning Authority

Meath County Council

Planning Authority Reg. Ref.

AAS52038

Applicant for Declaration

Beata Smyl

Planning Authority Decision

No declaration

### Referral

Referred by

Beata Smyl.

Owner/ Occupier

Rybo Partnership

Date of Site Inspection

13<sup>th</sup> October 2020

Inspector

Dolores McCague

## 1.0 Site Location and Description

- 1.1.1. The site is located to the south west of Ashbourne town centre within the Millbourne residential area, a housing development on the western outskirts of Ashbourne. Millbourne is accessed from the R135 (former N2) to the north, along a local distributor road. The road serves a number of other residential estates to the north including St. John's Wood and Brindley Park and terminates in a cul-de-sac in the Millbourne estate. There is a recently constructed local distributor road and an education campus to the south of the site and the lands to the east are undeveloped.
- 1.1.2. The appeal site comprises a grassed area. There is a drainage ditch bounding the site to the south and a hedgerow separates the grassed area from the drainage ditch. Millbourne Drive runs along the northern boundary of the site and on the opposite side of the road are two-storey dwellings. The northern side is bounded by the footpath at Millbourne Drive and the side garden of house no 87; the eastern side by a field; the southern side by the river; and the western side by a road.
- 1.1.3. The subject site is a linear green space, currently in recreational use, running in an east west orientation along the river. This area is enclosed by a fence comprising circular timber posts, a timber rail along the top, and a mesh screen attached to the outer side. At the south western corner there is a small gap in the fence.
- 1.1.4. The site is some 0.5 hectares in area.

## 2.0 The Question

- 2.1. The question refers to the fencing off, by a 1.2m high mesh fence, of open space. Meath County Council discussed this fence with the landowner, who agreed to cut an opening in the fence to allow people on the green. The referrer states that the opening in the fence does not allow the green to be properly maintained and is located in a very dangerous spot leading onto the busy road and junction where the motorists would not expect any people, especially kids, who can run in front of the moving vehicles.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

The planning authority did not issue a declaration.

They stated, in a letter to the referrer, that any declaration could prejudice the current appeal to An Bord Pleanála: 307457; since determined.

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Reports

The planning authority have supplied a list of planning histories, and the name and address of the landowner, in response to the referral.

No planning report was submitted.

## 4.0 Planning History

**ABP307457**, Planning authority reg ref **AA 190862** in an appeal against the planning authority's decision to refuse permission, the Board granted permission for the construction of 3 no. apartment blocks, each block of three-storeys high plus a penthouse (four-storeys) and containing 9 no. two-bed and 1 no. three bed apartments, total number 30, also the provision of 30 no. car parking spaces, external bicycle shelter, storage area, along with all associated site works.

The inspector's report quoted the inspectors assessment under PL17.248899, which states that "the development approved under Reg. Ref. DA/30422 and as amended by subsequent permissions has a relatively compact built form and did not incorporate any permanent area of public open space. The Planner's Report under Reg. Ref. DA/30422 stated that "*the application is dependent on the open space to be provided as indicated in the Action Area Plan<sup>1</sup> in the form of the linear park along the Broadmeadow river as no area of major public open space is provided within the scheme. This accords with the layout as indicated in the AAP*". The appeal site was identified in the original application as '*temporary open space until strategic open space lands become available or (the site is) acquired by the Department of Education or other as a school site*'".

**PL17.248899 (AA161470):** Split decision, permission granted for an extension to Millbourne Avenue and permission refused for construction of 12 no. houses.

Refused based on one reason:

The proposed residential development on the subject site would, in the absence of conveniently located alternative public open space, result in a lack of any significant area of public open space within the permitted residential development (planning register reference number DA03/0422 and subsequent applications) which would seriously injure the residential amenities of existing and future residents of the area and would contravene the stated objectives in the Meath County Development Plan 2013-2019 which seek a minimum rate of public open space of 15 per cent of total site area. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area and, if permitted, would set an undesirable precedent for other similar-type development in the area.

**PL17.245994 (AA/151074):** Permission refused for 14 no. two storey semi-detached houses on the appeal site. Permission refused based on one reason:

The lack of any significant area of public open space within the permitted residential development which would seriously detract from the residential amenities of existing and future residents and would contravene the stated objectives of the Meath County Development Plan.

**AA/150040:** Application for 14 no. two storey semi-detached houses on the appeal site. Permission was refused by the Planning Authority for three reasons relating to:

1. Contravention of policies of the Development Plan and Local Area Plan that seek to resist the loss of public open space.
2. Development would be detrimental to the residential amenities of the area due to the absence of any significant area of open space to serve the residential development of Millbourne.
3. Contrary to public open space standards set out in the Development Plan and Local Area Plan.

### **Millbourne Development**

**DA03/0422:** Development comprising 409 dwellings and two retail units on a site of 6.38 hectares. A site of 0.26 hectares was reserved for a primary school at the location of the subject appeal. Permission Granted. 19/11/2004. (The use of the subject site as a temporary open space is referred to on file 307457 with reference to this development).

**DA/091249:** Application for 14 no. dwellings in place of apartment / duplex block approved under Ref. Ref. DA3042 (reduction of 11 no. units). Permission granted.

**DA/10171:** Application for 165 no. dwellings in place of 215 no. dwellings approved under Ref. Ref. DA30422 on lands to the north and west of the appeal site (reduction of 50 no. units). Permission Granted.

**DA/101334:** Application for 15 no. dwellings in place of 17 no. dwellings previously approved under Reg. Ref. DA/100171 (reduction of 2 no. units). Permission granted.

**DA/120594:** Application for 23 no. dwellings in place of 29 no. dwellings previously approved under Reg. Ref. DA/901249 and DA/100171 (reduction of 6 no. units). Permission granted.

**DA/130728:** Application for construction of 117 no. dwellings in place of 143 no. dwellings previously permitted under Reg. Ref. DA/10171 and Reg. Ref. DA/70424 (reduction of 26 no. units). Permission granted.

**DA/140046:** Application for 4 no. dwellings at end of Millbourne Avenue. Permission granted.

**AA/160251:** Application for 13 no. dwellings in place of 14 no. dwellings previously approved under DA/130728 and DA/140425 (reduction of 1 no. unit). Permission Granted.

Meath County Council granted permission for other minor alterations under the following planning applications: Reg. Ref. DA/140425, Reg. Ref. DA/801798, Reg. Ref. DA/70424, Reg. Ref. DA/70354, Reg. Ref. DA/70331 and Reg. Ref. DA/60382.

### **Education and Sports Campus to the South**

**Reg. Ref. AA/140734:** Application for post primary school and two primary schools on sites to the south of the appeal site. Permission Granted.

**Ashbourne Linear Park Phase 1**

**Ref. P8/16007:** Part 8 consent for upgrade of existing recreational area (c. 1.2-hectares) on lands c. 500 metres to the east of the appeal site. Adopted by resolution of Meath County Council on 13<sup>th</sup> March 2017.

## 5.0 Policy Context

### 5.1. Development Plan

- 5.1.1. The relevant plan is the Meath County Development Plan 2013-2019. The appeal site is zoned A2, Residential (Phase 1) with an objective “To provide for new residential communities with ancillary community facilities, neighbourhood facilities and employment uses as considered appropriate for the status of the centre in the Settlement Hierarchy”.

### 5.2. Natural Heritage Designations

- 5.2.1. The Rogerstown Estuary SAC (000208) and SPA (004015), and Malahide Estuary SAC (000205) and SPA (004025) are within a 15 km radius of the site

## 6.0 The Referral

### 6.1. Referrer’s Case

The referrers case is that this 1.2m high mesh fence encloses open space.

### 6.2. Planning Authority Response

- 6.2.1. The planning authority has not responded to the referral

### 6.3. **Owner/ occupier's response**

6.3.1. Future Analytics have responded on behalf of the owner to the referral. The response includes:

- The fence was erected in early 2020 to protect these privately owned lands and to reduce the risk of liability should unauthorised access occur.
- The fence is exempted under Class 11 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001. The specific Conditions/Limitations that apply are
  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.

## 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:

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:

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 (2) of the Planning and Development Act provides that the Minister, by regulations, provide for any class of development to be exempted development, where he or she is of the opinion that—

- (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or

## 7.2. **Planning and Development Regulations, 2001**

7.2.1. Article 6(1) states:

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) provides a number of scenarios whereby development to which article 6 relates shall not be exempted development for the purposes of the Act, including:

- (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



Schedule 2 Part 1 of the Regulations sets out — General Exempted Development which includes at item 11:

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.

Subject to the conditions:

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.

#### CLASS 16

The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant or machinery needed temporarily in connection with that development during the period in which it is being carried out.

Subject to the condition:

Such structures, works, plant or machinery shall be removed at the expiration of the period and the land shall be reinstated save to such extent as may be authorised or required by a permission under the Act.

## **8.0 Assessment**

### **8.1. Is or is not development**

- 8.1.1. The definition of development in Section 3 (1) of the 2000 Planning and Development Act includes works, and there is no dispute that the proposed fence is development.

### **8.2. Is or is not exempted development**

The erection of a fence of this type is provided for as exempted development under general exemption class 11,

The erection of structures including a fence is provided for as exempted development under general exemption class 16

### **8.3. Is exempted development**

- 8.3.1. The erection of the fence is covered by class 11.
- 8.3.2. The exemption under class 16 only applies to development where construction is to take place on foot of a permission. The erection of the fence preceded the permission for development of this land.

### **8.4. Restrictions on exempted development**

- 8.4.1. The restrictions on exemption include those under article 9(1)(a)(x) of the Planning and Development Regulations, 2001:

if it were to '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', it would not be exempt.

The question of whether or not it was habitually open to or used by the public during the 10 preceding years must be considered. It is stated that the area has been used as open space, but no information has been provided in relation to the period of use. The Osi.ie orthophoto for 2005 shows that development had not begun in this general area at the date of survey. The orthophoto '2005 – 2012' does not have a date, but at the survey date, development was underway, and the subject site would have been unsuitable for amenity use. The orthophoto '2011 – 2013' does not have a date, but at the survey date, development had not commenced on the residential development to the north, although housing to the west was nearing completion, and development of the school site to the south had not commenced. The site is largely a green area, but with some rough areas, and would have been unsuitable for amenity use. The use as amenity space could not have commenced until construction work on this part of the development had been completed, in order that no conflict between construction activities and use as outdoor space could occur.

It does not appear to me, from the information available, that this land was used as open space for 10 years prior to the erection of the fence, in early 2020 and therefore the restriction on exemption in article 9(1)(a)(x) of the Planning and Development Regulations, 2001, does not apply.

## 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 fencing off, by a 1.2m high mesh fence, of open space is or is not development or is or is not exempted development:

**AND WHEREAS** Beata Smyl requested a declaration on this question from Council and the Council did not issue a declaration on the matter.

**AND WHEREAS** Beata Smyl referred this question to An Bord Pleanála on the 12th day of July, 2020:

**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 4 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) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the pattern of development in the area:

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) the erection of the fence constitutes “works” that comes within the meaning of development as set out in section 3(1) of the Planning and Development Act 2000,
- (b) the works fall within a class of exempted development under article 6, namely Class 11 of Part 1 of Schedule 2, as amended, of the Planning and Development Regulations, 2001, and
- (c) the works do not come within the scope of the restrictions on exemption under article 9(1)(a)(x) of the Planning and Development Regulations, 2001:

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (b) of the 2000 Act, hereby decides that the fencing off, by a 1.2m high mesh fence, of open space is development and is exempted development.

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Planning Inspector

5<sup>th</sup> November 2020

## **Appendices**

Appendix 1 Photographs

Appendix 2 OSi.ie orthophotos