



An
Bord
Pleanála

Inspector's Report ABP-307952-20

Question

Is or is not exempted development: A pedestrian access from the proposed development to Suncroft Avenue, Portmarnock, which is in compliance with Condition No. 4 of the grant of permission ABP PL06F.248412 (P.A. Reg. Ref. No. F16A/0520).

Location

Lands between Carrick Court Housing Estate and Church Lane/Suncroft, Portmarnock, County Dublin.

Declaration

Planning Authority

Fingal County Council.

Planning Authority Reg. Ref.

FS5/027/20.

Applicant for Declaration

Darren Jackson Director of Ballymastone Properties Limited.

Planning Authority Decision

Is not exempted development.

Referral

Referred by

Darren Jackson Director of Ballymastone Properties Limited.

Owner/ Occupier	Ballymastone Properties Limited and managed by a resident's management company.
Observer(s)	None.
Date of Site Inspection	28 th day of October, 2020; and the 19 th day of December, 2020.
Inspector	Patricia-Marie Young.

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1.0 Site Location and Description

- 1.1. The site essentially comprises of a section of the southern boundary of modest in size housing development, that consists of five dwelling houses that have been constructed at the southern most end of a larger housing development called 'Carrick Court' bounding the cul-de-sac of Suncroft Avenue, which contains a mixture of mainly detached residential dwelling in a mature setting. The site is situated c0.1km to the north of Suncroft Avenue's T-junction with Strand Road (R106). The immediate area is characterised by established residential development, though Strand Road contains a mixture of retail and other land uses.

2.0 The Question

- 2.1. The referral has been submitted by Darren Jackson, Director of Ballymastone Properties, Ltd., and the question posed is as follows:

Whether the provision of a pedestrian access from a proposed development to Suncroft Avenue in Portmarnock, County Dublin, in compliance with Condition No. 4 of the grant of permission ABP PL06F.248412 (P.A. Reg. Ref. No. F16A/0520) is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On the 20th day of July, 2020, the Planning Authority decided on foot of a request from the referrer for a declaration under Section 5 that a pedestrian access from a proposed development to Suncroft Avenue, in Portmarnock, which is in compliance with Condition No.4 of the grant of permission ABP PL06F.248412 (P.A. Reg. Ref. No. F16A/0520), is development and is not exempted development under Section 5(1) of the Planning & Development Act, 2000, as amended for the following stated reason:

"The development of a gated pedestrian walkway contravenes a condition attached to a permission, Condition No 4 ABP PL06F.248412 and is contrary to Article 9(1)(a), Planning and Development Regulations 2001 as amended".

4.0 **Planning Authority Reports**

4.1. Planning Reports

4.1.1. The **Planning Officer's report** is the basis of the Planning Authority's decision. I note the following comments from this report:

- Regard was had to the location, the planning history, the zoning of the site and the nature of the development to which this referral question relates.
- Regard was had to Part 1, Section 2, and Part 1 Section 3(1) of the Planning & Development Acts, 2000 to 2020, in relation to the interpretation of 'development'. It is concluded that the construction of a pedestrian walkway and the provision of a pedestrian gate is development.
- Regard was had to Article 9 of the Planning and Development Regulations, 2001, as amended, in relation to the restrictions on exemptions. It was considered that Article 9(1)(a)(i) was of relevance. In this regard it was considered that the provision of a gate with limited and selective access is at variance with Condition No. 4 of the grant of permission.
- This development contravenes Condition No. 4 of ABP Ref. PL06F248412 and is therefore contrary to Article 9(1)(a) of the Planning and Development Regulations, 2001, as amended.
- It concludes that the gated pedestrian walkway is 'development' and is not 'exempted development'.

4.1.2. **Other Technical Reports:** None.

5.0 **Planning History**

5.1. **Site**

5.1.1. Information on files indicates that permission granted under ABP PL06F.248412 relates to a development consisting of the construction of five number detached two-storey private dwelling houses, a new vehicular and pedestrian access from Carrick Court, internal road with turning circle. It also included a number of ancillary works including boundary treatments to facilitate the proposed development on lands with a

given site area of 0.02275ha located between and adjoining Carrick Court housing estate to the north, Church Lane to the west and Suncroft Avenue to the south.

5.1.2. Condition No. 4 reads:

“The developer shall provide a pedestrian only access from the proposed development to Suncroft Avenue generally in accordance with the drawings submitted to the planning authority on the 10th day of February, 2017. Prior to commencement of development, detailed plans and particulars providing for this access shall be submitted to, and agreed in writing with, the planning authority, and pedestrian access shall be provided prior to the making available of the houses for occupation”.

The stated reason for this condition is given as: *“to improve permeability in the area in the interest of residential amenity”.*

5.1.3. Of note, Condition No. 2 of the grant of permission required that the grant of permission be complied with in full.

6.0 Precedent Cases

6.1. Board Precedent Cases

6.1.1. In relation to Board precedent where decisions have been made on other cases related to similar Class 5 referrals, I note the following cases:

- **ABP Ref. No. RL2734:** In this case the Question before the Board was whether the formation of a doorway for private pedestrian access to a public footpath is or is not development or is or is not exempted development at ‘The Walk’, Oldtown Mill, Celbridge, Co. Kildare.

The Board in this case noted the restrictions on exempted development contained in Article 9(1)(a)(ii) of the Planning and Development, Regulations, 2001, do not affect the exemption under Class 5 for a sole pedestrian access onto a public footpath and considered that the formation of the doorway for pedestrian use was therefore exempted development.

It considered that the construction of a concrete step to serve the proposed development was development and as the said step had been constructed outside of the curtilage of the site and does not come within the exempted development provisions of the Planning and Development Act, 2000, or of the Planning and

Development Regulations, 2001, as amended. As such the Board considered that this component of the development is not exempted development.

In this case the Board concluded with a split decision which decided that the formation of a doorway for private access to a public footpath is development which is exempted development; and the construction of a concrete step to serve the said doorway is development and is not exempted development.

- **ABP Ref. No. RL3450:** In this case the Question that was asked was whether the development of a pedestrian access from the back garden of a semi-detached house in a residential estate to a narrow public road to the rear is or is not development, or is or is not exempted development, at 'No. 7 Burr Ridge' (Dennehy's Bohereen), Killarney, County Kerry.

The Board in this case had regard to Sections 2, 3 and 4 of the Planning and Development Act, as amended; Class 5 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended; Articles 6(1) and 9(1)(a)(iii) of the Planning and Development Regulations, 2001, as amended; the planning history of the site and the Roads Act, 1993, as amended.

They concluded that the development in this case would endanger public safety by reason of obstruction to road users and that the scope as well as nature of the works associated with the formation of the access did not meet the conditions and limitations attached to Class 5 of Part 1 of Schedule 2 of the said Regulations and as such did not come within the scope of the exempted development provisions of Class 5.

They therefore decided that the opening of a pedestrian access from the rear garden area to a public road is development and is not exempted development.

- **ABP Ref. No. RL07.RL3236:** On the 3rd day of December, 2014, the Board determined that the erection of front entrance pillars and gates at 'An Pointe', Kerraunbeg, Carraroe, Co. Galway, was development and was not exempted development.
- **ABP Ref. No. RL29S.RL3391:** On the 21st day of December, 2015, the Board determined that the provision of an opening in the rear wall of a garden to provide a pedestrian entrance from the public road/pavement and to provide a 1.95m high

pedestrian timber gate opening into the rear garden at 'No. 78 The Cloisters', Terenure, Dublin, was development and was not exempted development.

- **ABP Ref. No. RL07.RL.3400:** On 19th day of January, 2016, the Board determined that the creation of a pedestrian entrance between the public road and a supermarket car park at 'Tullyvoheen' (Galway Road), Clifden, North Connemara, Co. Galway, was development and was not exempted development.

7.0 Policy & Context

7.1. Development Plan

- 7.1.1. The policies and provisions of the Fingal County Development Plan, 2017 to 2023, are applicable to the site and its setting.
- 7.1.2. The site lies within an area zoned 'RS' which aims to "*provide for residential development and protect and improve residential amenity*".

7.2. Natural Heritage Designations

- 7.2.1. The appeal site is not located within or immediately adjacent to any Natura 2000 site but there are a number of such sites within close vicinity of the site. The nearest are:
 - Circa 0.3km to the south of the site is Special Area of Conservation: Baldoyle Bay SAC (Site Code: 000199);
 - Circa 0.4km to the south of the site is Special Protection Area: Baldoyle Bay SPA (Site Code: 004016).

7.3. EIA Screening

- 7.3.1. Having regard to the nature, scale and scope of the development sought, the sites setting located in the suburban setting of Portmarnock, the nature of the receiving environment, the serviced nature of the site and its surroundings, I consider that there is no real likelihood of significant effects on the environment arising from the proposed development to which the Question relates. The need for Environmental Impact Assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

8.0 The Referral

8.1. Referrer's Case

- 8.1.1. On the 14th day of August, 2020, O'Neill Town Planning, Planning and Development Consultants, submitted this referral on behalf of Darren Jackson the director of Ballymastone Properties Ltd.
- 8.1.2. It sets out that a Section 5 order relating to Condition No. 4 of the Boards grant of permission ABP Ref. No. PL06F.248412 was sought based on the rationale that a disagreement had arisen between the referrer and the Planning Authority with regards to the manner in which they complied with the said condition.
- 8.1.3. They contend that the works associated with the compliance with Condition No. 4 to be exempted development as per the Planning and Development Act, 2000, and the Planning and Development Regulations, 2001.
- 8.1.4. This submission can be summarised as follows:
- Reference is given to the reasoning given by the Planning Authority for their decision.
 - Reference is given to the planning history of the site.
 - Following the Boards decision an amendment to the scheme was submitted to the Planning Authority including the requirements of Condition No. 4 of the grant of permission ABP PL06F.248412.
 - To date the Planning Authority have not specifically responded to the compliance correspondence relating to Condition No. 4 provided to them other than serving a Warning Notice.
 - Following discussions with the Planning Authority they were not willing to take in charge the public areas associated with the subject development so all of the lands have been maintained so that they could be managed by the five residents of the scheme.
 - Reference is made to the applicable Development Plan for the site and the surrounding area.

- Reference is made to the Planning and Development Act, 2000, as amended. In particular Section 2; 3.1; 4; 4(1)(h) and 4.4.
- Reference is made to the Planning and Development Regulations, 2001, as amended. In particular, Article 9.
- Appropriate Assessment screening is provided.
- In their view they have not deviated in any way from the wording of Condition No. 4 and therefore they have fully complied with the requirements of this condition.
- The pedestrian access as provided improves and protects the residential amenities of residents in its vicinity in a manner that an open pedestrian access would not do.
- The lands to which they relate are private and are not in the charge of the Planning Authority.
- These lands did not contain any public rights of way prior to the making of the planning application for which the grant of permission ABP Ref. No. PL06F.248412 or thereafter.
- The estate and the pedestrian access will be managed by the resident's management company which has been set up to manage and maintain all of the lands in their ownership including the access to Suncroft Avenue. The company name is given as 'Carrick Court Close Property Management Company Ltd' (Note: Registration No. 644106).
- A pedestrian access is the only access provided onto Suncroft Avenue and it is gated so that no unauthorised access to and from the lane from persons other than those living in the subject development occurs.
- All of the residents within this estate have keys for this pedestrian gate.
- The Boards condition does not specify the provision of an access for those that would not be living within the subject residential scheme.
- As no Section 47 agreement is in place no public right of way can be created by the Planning Authority in the manner suggested.

- This pedestrian access is located in close proximity to House No. 1 in the scheme and 24-hour pedestrian access at this location would create problems for all in this scheme but particularly this house.
- The absence of gate on this pedestrian access was an issue when the houses were being sold.
- The gate also ensures no trespass from Suncroft Avenue.
- No impact would occur to any Natura 2000 site.
- The works carried out are exempted development by virtue of Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended, and Article 9 of the Planning and Development Regulations, 2001, as amended.

8.2. Planning Authority Response

- 8.2.1. On the 8th day of September, the Board received the Planning Authority's response which indicates that they have no further comments to make.

9.0 Statutory Provisions

9.1. Planning and Development Act, 2000, as amended:

Section 2(1) of the Act defines the following "works" includes 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.

It also provides:

"public road" has the same meaning as in the Roads Act, 1993.

"structure" means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and-

a) where the context so admits, includes the land on, in or under which the structure is situate,

Section 3 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.

Section 4(2) of the Act states that the ‘Minister’ may by Regulation provide for any class of development to be exempted development for the purposes of the Act.

9.2. **Planning and Development Regulations, 2001, as amended:**

Class 5 of Part 1 of Schedule 2 to the Regulations gives the following as exempted development:

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.

Article 6(1) of the Regulations states the following:

‘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) of the Regulations states as follows:

‘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 . . .

Part 1 of Schedule 2: Exempted Development – General:

Class 5:

Column 1 Description of Development	Column 2 Conditions and Limitations
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.	<ol style="list-style-type: none">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.2. Every wall other than a dry or natural stone wall bounding any garden or other space shall be capped and the face of 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.3. No such structure shall be a metal palisade or other security fence.

Class 11 of Part 1 of Schedule 2

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.

The conditions and limitations attached to this Class are as follows:

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.

9.3. Other

9.3.1. Roads Act, 1993:

Section 2(1) of the Act defines the following:

“public road” means a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority

“road” includes-

‘a) any street, lane, footpath, square, court, alley or passage,

b) any bridge, viaduct, underpass, subway, tunnel, overpass, overbridge, flyover, carriageway (whether single or multiple), pavement or footway,

c) any weighbridge or other facility for the weighing or inspection of vehicles, toll plaza or other facility 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, channeliser, roundabout, gantry, pole, ramp, bollard, pipe, wire, cable, sign, signal, or lighting forming part of the road, and

d) any other structure or thing forming part of the road and -

(i) necessary for the safety, convenience, or amenity of road users or for the construction, maintenance, operation, or management of the road or for the protection of the environment, or

(ii) prescribed by the Minister’.

10.0 Assessment

10.1. Introduction

10.1.1. Having carried out a site inspection, having considered the available information on file together with all relevant legislation I propose to assess this subject referral case under the following headings:

- Is the provision of a pedestrian access from a permitted development opening onto Suncroft Avenue in Portmarnock, as part of the developments compliance with a condition attached to the Boards grant of permission under ABP Ref. No. PL06F.248412 on private lands and opening onto a public road is or is not 'development'?
- If it is development is it or is it not 'exempted development'?

10.2. Is or is not development

10.2.1. I am cognisant that Section 3(1) of the Planning and Development Act, 2000, as amended, 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*". In addition, that the term 'works' is defined under Section 2(1) of the said Act as "*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal*".

10.2.2. Therefore, having regard to both of these definitions, I would conclude that the acts referred to under Section 10.1.1 above comprise of 'works' within the meaning of Section 2(1) of the said Act, and thus, it is 'development' within the meaning of Section 3 of the said Act, as a consequence of the works already undertaken and proposed to be undertaken to completion at the subject site.

10.2.3. I note to the Board that this conclusion is not contested by either the referrer or by the Planning Authority in their response received by the Board.

10.2.4. I also note to the Board that there are no observers to this referral case.

10.3. Is or is not exempted development

- 10.3.1. I am cognisant that Section 4(1) of the Planning and Development Act, 2000, as amended, sets out the provisions in relation to exempted development and is separate to and has primacy over the exempted development provisions of the Regulations.
- 10.3.2. I further note that there are no applicable specific exemptions under the said Act for the development the subject matter of the 'Question' posed to the Board under this referral case. But I consider that an examination of the Planning and Development Regulations, 2001, (as amended), will provide sufficient clarity to examine whether or not the subject development and its associated works is or is not exempted development.
- 10.3.3. I therefore now propose to consider this matter under the relevant provisions of the said Regulations, 2001.

10.4. Restrictions on exempted development

- 10.4.1. In relation to whether or not the provision of a pedestrian access from a development permitted under a grant of permission by the Board under ABP Ref. No. PL06F.248412 (P.A. Ref. No. F16A/0520) to Suncroft Avenue in Portmarnock, County Dublin, in compliance with Condition No. 4 of the grant notification is or is not 'development' or is or is not 'exempted development' I note the following factors:
- The pedestrian access, its associated boundary treatments and surfacing between the residential scheme of five dwellings permitted under the Boards grant of permission ABP Ref. No. PL06F.248412 are *in situ*.
 - The works as carried out do not correlate with the drawings submitted to the Board. In particular the height of new boundary wall to the front of dwelling referred to as 'No.5', is shown as being 1.8m in height and that it is lower than the existing neighbours tallest side boundary wall which adjoins this development. This is not the case as the associated wall is taller than the neighbours wall being c2m in height with the associated pier being taller than this at c2.2m. Further, the drawings appear to suggest that there is no change in ground levels between the site and the public carriageway of 'Suncroft' Avenue. This is not the case. With the difference between the two being evident in the drawings submitted with the scheme for which ABP. Ref. No. PL06F.248412 relates and since the scheme was

completed the ground levels along the southernmost boundary are higher than the public carriageway of Suncroft Avenue. This is reflected in the slope present in the hard surface pathway that terminates to the south of the pedestrian gate now in situ. Moreover, the area to the south of the pedestrian access into the scheme permitted under the Boards grant of permission ABP Ref. No. PL06F.248412 is inaccurately presented. This can be clearly seen in the photographs attached.

- If the Board accepts that the drawings presented with this referral are correct in good faith, in addition to the concerns raised above works outside of the redline area of the site have occurred with no consent provided from the Roads Authority for such works.
- The five dwelling houses permitted under the Boards grant of permission ABP Ref. No. PL06F.248412 are completed and occupied.
- The subject lands associated with the grant of permission ABP Ref. No. PL06F.248412 are in private ownership and managed by 'Carrick Court Close Property Management Company Ltd'.
- The original Carrick Court housing scheme which adjoins the northern boundary of the site to which the grant of permission ABP Ref. No. PL06F.248412 relates was taken in charge on the 15th day of December, 1985.
- There is no evidence to support that there is any public right of way or otherwise existing between the lands to which ABP Ref. No. PL06F.248412 relates and any other adjoining land.
- During the determination of planning application P.A. Reg. Ref. No. F16A/0520, which was later subject of appeal case ABP Ref. No. PL06F.248412 the Transport Section requested that there be a pedestrian access provided via Suncroft Avenue to Strand Road(R106). As part of the revisions made to the original scheme the applicant amended the site layout showing a suggested pedestrian connection from the proposed scheme of five houses on its southern boundary that could provide such a linkage. This provision was not fully resolved in terms of the overall design of the scheme.
- Suncroft Avenue in its current form is a cul-de-sac restricted in width shared access carriageway. I observed that this carriageway has irregular alignment, contains no

pedestrian footpaths, has changing widths along its length but generally is in excess of 2m through to it also accommodates *ad hoc* car parking on the carriageway for some of the c25 dwelling houses that bound it.

- During the course of the Boards determination of ABP Ref. No. PL06F.248412 the Boards Inspector observed that there was an entrance present to the application site at the northernmost end of Suncroft Avenue but that this was boarded up by a security fence as well as was blocked by a parked car.
- The Boards Inspector as part of their consideration of the proposed residential scheme concurred with the Planning Authority in that a pedestrian link through the application site in order to provide connection to community facilities on Strand Road would in their view add significantly to the amenity of not just the five houses sought under this scheme but also other houses by way of providing a shorter pedestrian link to the Strand Road.
- The Boards Inspector referred to the Sustainable Residential Development in Urban Areas Guidelines for Planning Authorities, 2009, on the matter of connectivity and permeability. They noted that making convenient access within and between areas is one of the key design principles that should inform good urban design.
- The Boards Inspector considered that this could be best achieved in the case of this development by way of a pedestrian access onto Suncroft Avenue.
- It would appear that these considerations gave rise to Condition No. 4 of the Boards grant of permission under ABP Ref. No. PL06F.248412.
- Condition No. 4 of ABP Ref. No. PL06F.248412 essentially requires the developer to provide a pedestrian access only from this development to Suncroft Avenue with this provision to be generally in accordance with the drawings submitted with the Planning Authority on the 10th day of February, 2017. Crucially it seeks that prior to the commencement of development that detailed plans and particulars for this provision shall be submitted and agreed 'in writing' with the Planning Authority. Furthermore, it requires that this pedestrian access be provided prior to making available the houses for occupation.

- The drawings provided to the Planning Authority on the 10th day of February, 2020, only provided a general indication of where the pedestrian access would be provided relative to the southern boundary of the site. It did not provide details on its overall design, including the design of its associated features such as boundaries, pathway treatments through to associated ground modulation.
- There is no evidence to support that any plans and particulars for the provision of the pedestrian access was submitted to and agreed 'in writing' with the Planning Authority prior to the commencement of the development.

10.4.2. As previously set out in this report Article 6(1) of the Planning and Development Regulations, 2001, as amended, states that 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.

10.4.3. Column 1 of Class 5 of Part 1 of Schedule 2: 'Exempted Development – General' of the Regulations refers to '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' and, therefore, it is necessary to determine whether or not the subject access accords with the conditions and limitations set out in Column 2 of Class 5.

10.4.4. The first condition and limitation sets out that 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.

10.4.5. In relation to my inspection of the site and as set out in my observations above that the pedestrian gate and its associated boundary wall treatment is situated to the front of the principal elevation and adjoins the front garden area of house referred to in the accompanying documentation as 'No. 5' and the gate and the main boundary wall that aligns with the public carriageway of Suncroft Avenue and extends to where it adjoins the boundary wall of the neighbouring property exceeds 1.2m. The walls lower that taper down to a height of 1.2m and 750mm are setback from the redline area of the site. I am therefore not satisfied that the pedestrian access, its associated gateway through to boundary walls accords with this aforementioned requirement.

- 10.4.6. The second condition and limitation sets out that every wall other than a dry or natural stone wall bounding any garden or other space shall be capped and the face of 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.
- 10.4.7. In relation to my inspection of the site while I observed that the works were carried out in a good manner and are sympathetic to the palette of materials that characterise the modest scheme of five dwellings to which the Boards grant of permission ABP Ref. No. PL06F.248412 relates to the works are nonetheless visible from the public domain of Suncroft Avenue. The predominant finish is coloured rendered with brick capping, brick pier and with the brick pier having a granite stone cap. It would also appear that this treatment is consistent at both sides of this boundary treatment. I am satisfied that the pedestrian access, its associated gateway through to boundary walls generally accords with this aforementioned requirement
- 10.4.8. The third condition and limitation sets out that no such structure shall be a metal palisade or other security fence. In this case whilst the gate that is present and the main components of its locking system are metal it could not be considered that they are a metal palisade. However, arguably the locking system provided which only allows for access to be achieved by the five house holders of the scheme to which the grant of permission ABP Ref. No. PL06F.248412 relates acts as a security mechanism which in turn means that the gate fences off access for all others so that in reality the connectivity and permeability envisaged at this location for not just the dwellings of this scheme but for other dwellings beyond it to the north is not achieved. Equally no access from Suncroft Avenue or indeed from Strand Road via Suncroft Avenue is achieved.
- 10.4.9. Whilst I accept that this is a security measure for the five dwellings it nonetheless effectively ensures that the pedestrian access provided functions as a security fence for all except the five dwellings to which the grant of permission ABP. Ref. No. PL06F.248412 relates and therefore provides limited connectivity and permeability within its urban context.
- 10.4.10. I note that Class 9(1)(a)(i) de-exempts development that contravenes a condition attached to a permission and that Class 9(1)(a)(viii) of the Regulations

indicates that development to which Article 6 relates shall not be exempted development for the purposes of the Act, if the carrying out of such development, would consist of or comprise the extension, alteration, repair, or renewal of an unauthorised structure a structure the use of which is an unauthorised use.

10.4.11. As set out above Condition No. 4 required that the developer provide a pedestrian only access from the proposed development in accordance with the drawings submitted with the Planning Authority on the 10th day of February, 2017, with the developer being required to submit and agree in writing the details relating to this provision prior to the commencement of development.

10.4.12. I have examined these and I consider that in relation to the pedestrian access they are too general to inform the actual design, nature, layout, and other physical attributes of its provision and its associated works.

10.4.13. I therefore consider that it was reasonable for the Planning Authority to require these to be agreed prior to construction not just to ensure orderly development but also to ensure that the provision of this pedestrian access was suitably integrated with the domain outside of each of the dwelling houses proposed. In particular the accompanying road, footpath and green spaces given also that there was evident variability in ground levels between the site and also Suncroft Avenue.

10.4.14. There is no evidence to suggest any agreement was reached and it would appear that there has been some disagreement on this matter with the Planning Authority to date. The details and timeline of this disagreement on the provision of this accompanying pieced of infrastructure is not clear.

10.4.15. What is clear is that these details were not agreed, and the developer continued with the construction of the five dwelling houses and all of associated works to the point that they were able to sell the dwelling houses which I observed are now occupied with the ancillary spaces outside the curtilage managed by a private management company set up between the owners of the five dwellings.

10.4.16. Of further note is that the given reason for Condition No. 4 of the grant of permission PL06F.248412 is given as: "*to improve permeability in the area in the interest of residential amenity*".

10.4.17. I consider that this reason considered that the provision of the pedestrian access was not just for the benefit of the five dwelling houses but in manner consistent

with national planning guidance on the matter of such developments to ensure that high quality connectivity and permeability is achieved as part of the overall design process.

10.4.18. I therefore consider that not only is the pedestrian access from the development permitted by the Board under ABP Ref. No. PL06F.248412 not in compliance with the requirements of Condition No. 4 and that the manner in which it has been carried out in my view is at odds with from the reasoning for this condition. By virtue of this it is also not in compliance with Condition No. 2 of the aforementioned grant of permission which essentially requires that the grant of permission be complied with in full.

10.4.19. Thus, having regard to the provisions of Class 9(1)(a)(i) the development in this case conflicts with Condition No. 2 and 4 of the grant of permission ABP Ref. No. PL06F.248412 and in so doing having regards to Class 9(1)(a)(viii) which indicates that development to which Article 6 relates shall not be exempted development for the purposes of the Act, if the carrying out of such development, would consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure a structure the use of which is an unauthorised use. In this instance as both the structure and the use are unauthorised, they cannot be considered to be exempt.

10.4.20. This adds to the developments failure to comply with the conditions and limitations set out under Column 2 of Class 5 as previously discussed above.

10.4.21. Of further concern, I note that Article 9(1)(a)(ii) of the Regulations states that development to which Article 6 relates shall not be exempted development if it consists of or comprises 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.

10.4.22. Having carried out an inspection which included Suncroft Avenue the adjoining carriageway does exceed the 4meters. Also having regard to the history of the site there is no evidence to suggest that there was an access through the lands to which the grant of permission by the Board under PL06F.248412 relates and moreover, the drawings submitted with this case fail to clarify the existence of a pedestrian entrance or otherwise opening onto the northern end of Suncroft Avenue. I also observed that the carriageway of Suncroft Avenue was mainly hard surfaced. Evidence would suggest that it is public ownership along its length. Further the referrer indicates that

there was no public right of way or otherwise from the lands to which PL06F.248412 relates onto northern end of Suncroft Avenue.

10.4.23. I therefore consider that this further supports that the development in this referral case is not exempted development.

10.4.24. In relation to Article 9(1)(a)(iii) of the Regulations which serves to 'de-exempt' any development to which Article 6 relates where it would endanger public safety by reason of traffic hazard or obstruction of road users. In this instance the pedestrian access is recessed back from Suncroft Avenues cul-de-sac end and though there is a vehicular driveway located immediately to one side of it, serving a detached dwelling house as well as that Suncroft Avenue consists of a shared carriageway, I observed that a low volume of traffic with this traffic travelling at a low speed and with caution. It is my opinion that the pedestrian access in the form provided would not endanger public safety by reason of traffic hazard or would it result in the obstruction of road users and due to the limited number of dwellings that it serves it would not result in a significant addition of pedestrian or cyclists using Suncroft Avenue to gain access to or egress from the Strand Road.

10.4.25. I do not consider that any other aspects of Article 9 of the Regulations are of relevance to the determination of the subject referral.

10.4.26. My final comment relates to Class 11 of Part 1 of Schedule 2 of the Regulations. Should the Board not consider that the development subject to this application relates to Class 5 development I note that the aforementioned Class 11 relates to 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.

The first condition and limitation attached to this Class sets out that 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.

10.4.27. As previously discussed, the development in this referral case whilst bounding in part the curtilage of a dwelling house to which the grant of permission ABP Ref. No.

PL06F.248412 relates where at this point it exceeds 1.2m and it is not a replacement structure. I am therefore not satisfied that the development accords with the exemptions provided relating to Class 11 development.

10.4.28. On the basis of the above considerations in relation to the question as to whether the provision of a pedestrian access from a development permitted by the Board under ABP PL06F.248412 (P.A. Ref. No. F16A/0520), in compliance with conditions of this notification to grant permission, in particular Condition No. 4, at lands between Carrick Court Housing Estate and Suncroft Avenue, Portmarnock, Co. Dublin, is development and is not exempted development.

10.5. **Appropriate Assessment**

10.5.1. The referral site is not within or adjoining any European sites. It is a development that is already *in situ* and forms part of the serviced lands of suburban Portmarnock, in north County Dublin. Having regard to the modest nature and extent of the development; the serviced location of the site in a mature suburban setting; and the lateral separation distance between the site and nearest European site, I consider that no Appropriate Assessment issues arise, and that the proposed development would not be likely to have a significant effect individually or in combination with other plans or projects on a European site.

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 provision of a pedestrian access from a development permitted by the Board under ABP PL06F.248412 (P.A. Ref. No. F16A/0520), in compliance with conditions of this notification to grant permission, including Condition No. 4, at lands between Carrick Court Housing Estate and Suncroft Avenue, Portmarnock, Co. Dublin, is development and is not exempted development:

AND WHEREAS a Darren Jackson of Ballymastone Properties Ltd., requested a declaration on this question from Fingal County Council and the

Council issued a declaration on the 20th day of July, 2020, stating that the matter was development and was not exempted development:

AND WHEREAS a Darren Jackson of Ballymastone Properties Ltd., referred this declaration for review to An Bord Pleanála on the 14th day of August, 2020:

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

- (a) The planning history of the site.
- (b) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (c) Section 3(1) of the Planning and Development Act, 2000,
- (d) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (e) Class 5, Part 1 of Schedule 2 to the Planning and Development Regulations, 2001,
- (f) Article 6(1) and Article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (g) the Roads Act, 1993,
- (h) an examination of the nature and use of the adjoining public road onto which the pedestrian access provides access and egress, &
- (i) the pattern of development in the area.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The work in question is development for the purposes of Section 3 of the Planning and Development Act 2000, as amended.

- (b) The structural elements forming the pedestrian access, which include boundary walls, hard surfacing, the modulation of ground levels in order for pedestrian pathway from the housing scheme permitted under PL06F.248412, the works outside of the redline area of the site and on/adjoining public lands associated with the public carriageway of Suncroft Avenue, through to the security measures to limit access and egress, are interdependent and constitute one overall entity for the purposes of Class 5 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001,
- (c) Given that the pedestrian access components, in particular the boundary wall and pedestrian gate, exceeds 1.2m and the locked pedestrian gate is essentially a security fence limiting through access between the housing scheme and Suncroft Avenue, as well as the original Carrick Court housing scheme beyond. As such it does not come under the scope of exempted development provisions as provided for under the Conditions and Limitations attaching to Class 5 of Part 1 of Schedule 2 to the Planning & Development Regulations, 2001, as amended. Therefore, it is not exempted development under the provisions of said Class 5.
- (d) The Planning & Development Regulations, 2001, as amended, also provides for sundry works. Given that the boundary exceeds the 1.2m height and it is not a replacement structure it does not come under the scope of the exempted development provisions as provided for under the Conditions and Limitations attached to Class 11 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended. Therefore, it is not exempted development under the provisions of said Class 11.
- (e) The development would not comprise of exempted development having regard to Article (9)(1)(a)(i) as it relates to a development which by virtue of its failure to be compliant with Condition No. 2 and Condition No. 4 of the grant of permission ABP Ref. No. PL06F.248412, is both an unauthorised structure and an unauthorised use. Therefore, it is not exempted development under these provisions.

- (f) The development would not comprise of exempted development having regard to Article (9)(1)(a)(ii) as it would consist of the formation of a means of access to a public road where the surface carriageway exceeds 4metres in width.

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 provision of a pedestrian access from a development permitted by the Board under ABP PL06F.248412 (P.A. Ref. No. F16A/0520), in compliance with conditions of this notification to grant permission, including Condition No. 4, at lands between Carrick Court Housing Estate and Suncroft Avenue, Portmarnock, Co. Dublin, is development and is not exempted development.

Patricia-Marie Young
Planning Inspector

21st day of December, 2020.