



An  
Bord  
Pleanála

## Inspector's Report ABP 308254-20

### Question

Whether the following works;

- i) Erection of fencing which blocks habitually open public accesses,
- ii) Erection of vehicular gate on a public footpath,
- iii) Trenching/ Earthworks,

is or is not development or is or is not exempted development

### Location

Howth Castle, aka Deer Park, Howth, Co. Dublin.

### Declaration

Planning Authority

Fingal County Council

Planning Authority Reg. Ref.

FS5/031/20

Applicant for Declaration

Friends of the Irish Environment

Planning Authority Decision

Not Exempted Development.

### Referral

Referred by

Tetrarch Capital Limited

Owner/ Occupier

Tetrarch Capital Limited

**Observer(s)**

None

**Date of Site Inspection**

30<sup>th</sup> May 2021.

**Inspector**

Brendan Coyne

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## 1.0 Site Location and Description

- 1.1. This Referral refers to 3 no. sites, identified as Site Nos. 1, 2 and 3, along the eastern boundary of Howth Castle (aka Deer Park). Howth Castle Demesne lies just outside / to the west of Howth village, on the southern side of the Howth Road. The Demesne includes much of the peninsula of Howth Head, including extensive heathland and woodland. On the grounds to the south of the Castle is Deer Park Golf Club. Howth Castle is listed as a Protected Structure (RPS No. 556) in the Fingal County Development Plan and other Protected Structures within the grounds of the Castle include a ruined church close to the castle (RPS No. 557) and a portal tomb known as 'Aideen's Grave' (RPS No. 582), in grounds of Deer Park Golf Course. Howth Castle and its attendant grounds is designated an Architectural Conservation Area (ACA) in the Development Plan.
- 1.2. The subject 3 no. sites, as outlined in red, are located c. 400 metres to the east of the Castle. The sites are characterised with mature woodland, earthworks, vegetation and fencing defines the eastern boundary of Howth Castle at these sites. The fencing comprises bent arm posts, line wires and chainlink wire netting. Site No.1 includes a public right of way pathway which connects Howth Castle Demesne with a public footpath which runs alongside the eastern boundary of the castle, on its eastern side. Historic maps show that the Sutton to Howth electric tramway ran along this footpath. Tall open gates define the 4.5m wide public right of way entrance at this site. A watercourse flows in a northerly direction through Site No.2 and adjacent / to the east of Site Nos. 1 and 3. Adjacent lands to the east of the site are residential including Evora Park to the east of Site No. 3, Grace O'Malley Road to the east of Site No.1 and Balkill Park adjacent to Site No. 2.

## 2.0 The Question

- 2.1. An application for a Declaration under Section 5 of the Planning and Development Act 2000 (as amended) was lodged with Fingal County Council by the Friends of the Irish Environment on the 31<sup>st</sup> July 2020.
- 2.2. The original question put before Fingal County Council was stated as follows;

'Whether recent works undertaken by Tetrach Capital along the boundary of Old Tramway and Howth Castle Estate is development and whether it is exempted development.

Specifically works in the vicinities of the Old Tramway and Grace O'Malley Road (subject site 1), Balkill Road (subject site 2) and Evora Park (subject site 3).

The works comprise 3 elements:

- 1) Erection of fencing which blocks habitually open access points.
- 2) Erection of a large vehicular access gate across a public footpath.
- 3) Deep trenching and mounding on lands which are / have been habitually open to the public'.

2.3. Documentation submitted included the following: -

- Application Cover Letter
- Location maps showing the sites outlined in red.
- Photographs and aerial photographs of the subject sites.

2.3.1. The Declaration of the Planning Authority has been referred to An Bord Pleanála for review, by the owner of the lands Tetrach Capital Limited.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

On the 27<sup>th</sup> August 2020, Fingal County Council issued a decision declaring that the proposal IS and IS NOT Exempted Development under Section 5(1) of the Planning and Development Act 2000 (as amended), for the following reasons:

#### Schedule 1

1. The earthworks / trenching meets the description of Schedule 2, Part 3, Exempted Development Rural, Class 3 Minor Works and Structures and is considered exempted development.

## Schedule 2

1. The development fails to meet the conditions and limitations for exempt development of the gate under Class 9, Planning and Development Regulations 2001 (as amended) as its height is in excess of 2m. Similarly, the applicant fails to meet the conditions and limitations for exempt development of the fence under Class 11, Planning and Development Regulations 2001 (as amended) as its height is in excess of 2m. It is considered therefore that the gate and fence are considered not to be exempt development under Class 9 and Class 11 respectively relating to Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended).

The earthworks / trenching meets the description of Schedule 2, Part 3, Exempted Development Rural, Class 3 Minor works and Structures and is considered exempted development.

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Report

Basis for the Planning Authority's decision, summarised under the following headings;

##### ***Re. Erection of fencing which blocks habitually open access points:***

- The 'as constructed' fence is in excess of 2 metres and therefore fails to meet the conditions and limitations under Class 11 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended).
- With respect to the issue of the blocking off of habitually open public accesses to Howth Castle lands, other public accesses remain into these lands.

##### ***Re. Erection of a large vehicular access gate on a public footpath:***

- The 'as constructed' gate is in excess of 2 metres and therefore fails to meet the conditions and limitations under Class 9 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended).

##### ***Re. Trenching / Earthworks***

- The works undertaken are substantially related to the widening and deepening of a watercourse in an area with rural zoning, High Amenity.

- Much of the new earthworks relate to the provision of mounds where mounds previously existed.
- The works fall within exempt development provisions under Schedule 2, Part 3 of the Planning and Development Regulations 2001 (as amended).

### 3.2.2. Other Technical Reports

#### Conservation Officer Section:

- The Howth Castle Protected Structure (RPS No. 556), ruined church Protected Structure (RPS No. 557) and 'Aideen's Grave' Portal Tomb (RPS No. 582) are located away from the eastern boundary of Howth Castle and the subject referral sites.
- The Howth Castle Architectural Conservation Area (ACA) does not extend to or include the Deer Park Golf Course and so normal planning considerations and exemptions apply to the referral sites.
- The eastern boundary of Howth Castle comprises in part with a belt of mature trees and planting that is associated with the Castle's historic designed landscape.
- Should the works that are subject to Section 5 Declaration be deemed to be development within the definition of the Planning and Development Act 2000 (as amended), then Objective CH46 of the Fingal County Development Plan 2017-2023 should direct the development works.

## 4.0 Planning History

None for subject sites.

## 5.0 Policy Context

### 5.1. Fingal County Development Plan 2017- 2023

#### Zoning:

**Site Nos. 1 & 3** (as outlined) are zoned 'HA - High Amenity' with the objective to 'Protect and enhance high amenity areas'. Adjoining lands to the east are zoned 'RS

– Residential’ with the objective to ‘Provide for residential development and protect and improve residential amenity’.

**Site No. 2** (as outlined) is zoned ‘OS - Open Space’ along its eastern side which seeks to ‘Preserve and provide for open space and recreational amenities’ and both ‘RS – Residential’ and ‘HA - High Amenity’ along its western side, as detailed above.

**Map Based Local Objective No. 117:** Facilitate the provision of tourist, leisure, craft, artisan and restaurant uses at Howth Castle whilst ensuring the setting and character of the protected structures are maintained

## **Appendix 2 - Record of Protected Structures**

**RPS No. 556** Howth Castle. Description: Castle, Wings, Tower, Stables, Gates, and Chapel Grounds.

**RPS No. 557** Church (ruin) in Grounds of Howth Castle. Description: Chapel ruins in grounds of and close to Howth Castle.

**RPS No. 582** Portal Tomb in Deerpark Golf course, Howth Castle. Description: Known as 'Aideen's Grave', in grounds of Deer Park Golf Course, Howth Castle

**Table 10.1 Architectural Conservation Areas in Fingal** – includes Howth Castle Demesne. The subject 3 no. sites are not located within the Architectural Conservation Area.

**Objective CH46:** Require that proposals for development within historic designed landscapes include an appraisal of the designed landscape (including an ecological assessment) prior to the initial design of any development, in order for this evaluation to inform the design which must be sensitive to and respect the built heritage elements and green space values of the site.

## **5.2. Natural Heritage Designations**

- 5.2.1. The sites are located c. 0.4km to the south-east of Baldoyle Bay SAC (Site Code 000199) and c. 0.6km to the west of the Howth Head SAC (Site Code 000202).



## 6.0 The Referral

### 6.1. Referrer's Case

A 1<sup>st</sup> party referral was received from Tom Phillips & Associates acting on behalf of the owner Tetrarch Capital Limited, in relation to the Section 5 Declaration made by Fingal County Council with regard works undertaken at Howth Castle in Howth, Co. Dublin. The original application for Declaration was lodged by the Friends of the Irish Environment, on the 31<sup>st</sup> July 2020.

The following is a summary of the issues raised in the referral before the Board;

- Fingal County Council did not seek any comment from the landowner Tetrarch Capital Ltd. in respect of works carried out within the landholding. This was further to a request by Tetrarch Capital Ltd. to allow representation be made, in accordance with Section 5(2) of the Planning and Development Act 2000 (as amended). This should have been allowed as a matter of course to provide a right of reply and clarify that these works related to improvement and maintenance works in the vicinity of the property.
- The Classes highlighted in the Planning and Development Regulations 2001 (as amended) do not apply to the works undertaken. They are exempted development as maintenance and improvement works under Section 4(1)(h) of the Planning and Development Act 2000 (as amended). Notwithstanding, the owners address the classes of development as referred to by Fingal County Council.
- The fence surrounding Howth Castle lands was erected c. 1973 by Dublin County Council and carried out in a number of tranches.
- Since the fence was erected there have been minor repair works carried out, but over the last number of years substantial damage has been caused to stretches of the fence where it has been trampled down or holes created to provide access to Howth Castle lands.
- Photographs and drawing submitted showing the existing/original fence, as constructed in 1973 and where it is still intact with heights ranging from 2.7m to 2.95m.

- In areas where the existing fence has been damaged, maintenance works have been carried out to improve the fence and fenceposts have been replaced where necessary.
- The works carried out are in line with the height and extent of the existing / original fence on site and provide a 'bent arm fence post' of between 2.3m-2.7m in height, with the height of the mesh fence element at c. 2m high.
- Photograph submitted of fence improvement and maintenance works carried out.
- Copy of some of the photographs submitted by the Friends of the Irish Environment as part of their referral to Fingal County Council which show the existing fence posts that have been maintained as part of the improvement works to the overall fence.
- Works were undertaken to improve the pedestrian gateway adjoining Grace O'Malley residential estate with a 4.5m wide pedestrian gate provided at this location.
- The gate provided is wider than that previously at this location. This was done to ensure social distancing protocols can be maintained by persons entering or existing the lands.
- The referrer acknowledges that the works undertaken constitute 'development'.
- The proposed works are exempted development under Section 4(1)(h) of the Planning and Development Act 2000 (as amended), are not a class specified in Schedule 2 of the Planning and Development Regulations 2001 (as amended) and Article 6 'de-exemptions' do not apply in this instance.
- The development is relatively minor and comprise improvements and maintenance works along the boundary of the land. Having regard to the nature, scale and location of the proposed development, Appropriate Assessment is not required in this instance.
- An EIA is not required for the development works.
- Fingal County Council in its assessment did not consider whether the works could have been carried out under Section 4 of the Planning and Development Act 2000 (as amended).

- Section 4(1)(h) of the Act outlines that maintenance, improvement or alteration of a structure are exempted development as long as they do not materially affect the external appearance of the structure so that it is inconsistent with its character.
- The improvement of the fence does not affect how the fence looks in external appearance and therefore is exempted development.
- The existing pedestrian gate was replaced by a new wider gate in order to comply with social distancing protocols established in order to allow more room between persons entering / existing.
- The height of the gate as provided is in line with the height of the fencing either side.
- The height of the existing fence, as constructed in the 1970's, is in excess of 2m in height.
- The repairs to the fence are the same height as that of the original fence erected. Limiting the height of the replacement fence to 2m, as provided for under Class 11, would be contradictory.
- De-exemptions under Article 9 of the Regulations do not apply in this instance.
- The works at Howth Castle have been carried out as exempted development under Section 4(1)(h) of the Planning and Development Act 2000 (as amended).

## 6.2. Planning Authority Response

The Planning Authority has no further comment to make. In relation this Referral.

## 6.3. Third Party Response – Friends of the Irish Environment

The response received from Brian Hewson (Agent) representing the Friends of the Irish Environment, is synthesised as follows;

- The replacement of a structure is not covered by Section 4(1)(h) of the Planning and Development Act 2000 (as amended).

- The replacement of a fence is explicitly covered under Article 6 and Schedule 2, Part 1, Class 11 of the Planning and Development Regulations 2001 (as amended).
- It would not be necessary to exempt the replacement of a fence (subject to a 2m height) if all replacement structures were already exempt under Section 4(1)(h) of the Act.
- The Board has considered the meaning of Section 4(1)(h) of the Act under ABP Ref. 303219-18, in which the Inspector advised that

“The works could not in my view be construed as falling within the definition of works for the maintenance, improvement or other alteration of any structure’ in accordance with Section 4(1)(h) of the Act as they constitute the erection of a new structure.

- The consequences for planning would be profound should the Board rule that the replacement of any structure is covered by the exempted development provision under Section 4(1)(h) of the Act.
- Tetrarch Capital Ltd. does not provide evidence who erected the fence in 1973 and whether it had planning permission.
- The planning status of the fence may have a bearing on the question before the Board.
- In many locations along the boundary, fencing has been absent for many years.
- In other places, the fence has been overgrown and provides invisible support for a boundary of brambles, ivy and other vegetation.
- The replacement fence materially affects the appearance of the structure, as the boundary has appeared for many decades. For that period of time, the boundary comprised of brambles, ivy and other growth, with only an occasional fence post visible above or through the vegetation.
- Local residents and public representatives requested Tetrarch Capital Ltd. to replace the fence with a hedge of native species.

- Tetrarch Capital Ltd. have failed to provide information supporting their assertion that they are replacing like with like, and that the development might therefore be exempted development.
- The new vehicular sized gate 'materially affects the external appearance of the structure'. Tetrarch Capital Ltd. acknowledge that it is not a replacement gate. The gate is entirely new and very wide compared to the previous ungated pedestrian entrance, which has existed there for centuries.
- The case put forward by Tetrarch Capital Ltd. for the width of the gate to facilitate social distancing does not form the basis for exempted development.
- A number of access points from the tramway to the lands at Howth Castle / Deer Park have been habitually open to and used by the public for many decades for recreational purposes or as a means of access to places of natural beauty and recreational amenity.
- The fencing, even if it is exempted development under Article 6 and Schedule 2, Part 1, Class 11 of the Regulations, is 'de-exempted' under Article 9(1)(a)(x) of the Planning and Development Regulations 2001 (as amended).
- Tetrarch Capital Ltd. have not commented in their appeal on the issue of whether or not the development consists of 'the fencing of lands habitually open to the public'. The Planning Officer with Fingal County Council suggests that if there is any other access, then Article 9(1)(a)(x) is not relevant.
- Article 9(1)(a)(xi) applies to the obstruction of the footpath marked on the Ordnance survey Map which leads across the Tramway from Grace O'Malley Road and through the woods towards the Castle, as well as to other entrances, now fenced off at Evora Park and Balkill Road.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act 2000 (as amended)

- 7.1.1. **Section 2(1) Interpretation** - defines the terms used within the Act including the following;

*“fence” includes a hoarding or similar structure but excludes any bank, wall or other similar structure composed wholly or mainly of earth or stone;*

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

*“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.*

7.1.2. **Section 3(1)** defines development as follows:

*“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.”*

7.1.3. **Section 4(1) (a) – (l)** sets out what is exempted development for the purposes of this Act and includes;

*(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;*

*(l) development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced F41 [ or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.]*

7.1.4. **Section 4 (4)** states that

*Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.*

7.1.5. **Section 177U(9)** refers to screening for Appropriate Assessment and states that

*In deciding upon a declaration or a referral under section 5 of this Act a planning authority or the Board, as the case may be, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.*

7.2. **Planning and Development Regulations, 2001 (as amended)**

7.2.1. **Part 2** refers to Exempted Development. Relevant articles thereunder include the following;

7.2.2. **Article 6** refers to Exempted Development

**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.*

7.3. **Article 9(1)** sets out restrictions on exemptions for development to which Article 6 relates. In particular the following are relevant

*'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—*

*(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,*

*(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,*

*(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,*

*(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 public right of way*

**Schedule 2, Part 1** of the Planning and Development Regulations 2001 (as amended) sets out **Exempted Development – General**. The following are considered relevant;

<b>Column 1</b> <b>Description of Development</b>	<b>Column 2</b> <b>Conditions and Limitations</b>
<i>Sundry Works</i> <b>Class 9</b> The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway.	The height of any such structure shall not exceed 2 metres.
<b>Class 11</b> The construction, erection, lowering, repair or replacement, other than	1.The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the



<p>within or bounding the curtilage of a house, of –</p> <p>(a) any fence (not being a hoarding or sheet metal fence), or</p> <p>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>greater, and in any event shall not exceed 2 metres.</p> <p>2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.</p>
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**Schedule 2, Part 3** of the Planning and Development Regulations 2001 (as amended) sets out **Exempted Development – Rural**. The following are considered relevant;

<b>Column 1</b> <b>Description of Development</b>	<b>Column 2</b> <b>Conditions and Limitations</b>
<p><i>Minor works and structures</i></p> <p><b>Class 3</b></p> <p>Works relating to the construction or maintenance of any gully, drain, pond, trough, pit or culvert, the widening or deepening of watercourses, the removal of obstructions from watercourses and the making or repairing of embankments in connection with any of the foregoing works.</p>	<p>(None)</p>

## 8.0 Assessment

The question before the Board in this instance can be stated as follows:

*Whether the following works;*

- i) Erection of fencing which blocks habitually open access points,*
- ii) Erection of a vehicular access gate across a public footpath,*
- iii) Trenching and Mounding on lands which are / have been habitually open to the public,*

*is or is not exempted development.*

It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the works undertaken in respect to 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. In assessing the merits of the case, I have reviewed previous relevant declarations made by the Board.

### 8.1. Is or is not development

- 8.1.1. 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”.
- 8.1.2. Having regard to Section 2 of the Act wherein ‘works’ are defined as including ‘*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..*’ it is my view that the said works involve the carrying out of ‘works’ through acts of ‘construction’, ‘excavation’, ‘alteration’, ‘repair’ and ‘renewal’ and, therefore, constitutes development. The Referrer acknowledges in the planning report submitted that the proposal involves the carrying out of works, and therefore constitutes ‘development’. Accordingly, having established that the subject works constitute development within the meaning of the Act, it is necessary to ascertain whether or not they can be considered to be exempted development.

## 8.2. Is or is not exempted development

8.2.1. Section 4(1)(h) of the Planning and Development Act 2000 (as amended) states that the following shall be exempted development

*development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;*

8.2.2. 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.

8.2.3. In the interest of clarity, the three elements of the question before the Board shall be addressed separately below.

### 8.2.4. **Erection of fencing which blocks habitually open access points,**

8.2.5. The development in question comprises the erection of fencing at 3 no. sites along the eastern boundary of Howth Castle Demesne. With this regard, the Referrer details the following in the supporting planning report submitted;

- The fence surrounding Howth Castle lands was erected c. 1973 by Dublin County Council.
- Since the fence was erected minor repair works have been carried out.
- Over the last number of years substantial damage has been caused to stretches of the fence where it has been flattened or holes have been created to provide access to Howth Castle lands.
- In areas where the existing fence has been damaged, maintenance works have been carried out to improve the fence and fenceposts have been replaced where necessary.

- The works carried out on the sites are in line with the height and extent of the existing / original fence.
- The replacement bent arm fence posts range in height between 2.3m-2.7m and the replacement mesh fence element has a height of c. 2m.

8.2.6. Supporting photographs and drawings submitted by Referrer include the following:

- Figure 1 provides 2 no. photographs showing the original 'bent arm fence post' having a height of 2.7m – 2.95m.
- Figure 2 provides a diagram showing the original fence had a height of 2.4m and the bent arm posts had a height of 2.6m
- Figure 3 provides a photograph showing the replacement fence and bent arm fence posts.
- Figure 4 provides 2 no. photographs which the Referrer describes as photographs submitted by the Friends of the Irish Environment as part of their referral to Fingal County Council. This is described as showing the existing / original fence posts that have been maintained as part of the improvement works to the overall fence.

8.2.7. The Referrer contends that the works undertaken are exempted development under Section 4(1)(h) of the Planning and Development Act 2000 (as amended) by reason that it consists of maintenance and improvement works which do not affect the external appearance of the structure such that it is not inconsistent with its character. The Referrer puts forward that Fingal County Council in its assessment did not consider whether the works could have been carried out as exempted development under Section 4(1)(h) of the Planning and Development Act 2000 (as amended). Notwithstanding this, the Referrer contends that the fencing works undertaken are exempted development under the Class 11 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended). The Referrer states that the height of the original fence, as constructed in the 1970', was in excess of 2m in height and that the height of the repairs to the fence are the same height of the original fence. The Referrer contends that limiting the height of the replacement fence to 2m, as provided for under Class 11, would be 'contradictory'. The Friends of the Irish Environment response to this issue is detailed in Section 6.3 above.

8.2.8. Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended) refers to 'Exempted Development – General'. Class 11 refers 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 subject fence structure is not located within or bounding the curtilage of a house. Given that the Referrer confirms that the work undertaken to the fence structure comprises 'repair' works and that 'fence posts have been replaced where necessary', it is my view that the development in question falls clearly and unambiguously within the exempted development provisions under Class 11. I acknowledge that Section 4 (1) of the Act sets out provisions in relation to exempted development and is separate to, and has primacy over the exempted development provisions of the Regulations. However, given the explicit description of exempted development provided under Class 11 and the nature of replacement works under the subject referral which are not explicitly described under Section 4(1)(h) of the Act, it is my view that exempted development provisions under Section 4(1)(h) of the Act do not apply in this instance. There are 2 No. Conditions / Limitation under Class 11 which are addressed as follows;

8.2.9. Condition No. 1 requires the following;

*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.*

8.2.10. The Referrer details in Figure 1 of the planning report submitted that the original 'bent arm fence posts' have a height of 2.7m – 2.95m. Figure 2 details that the original fence has a height of 2.4m and the bent arm posts have a height of 2.6m. The Referrer states in Section 3.5 of the planning report that '*the fence as constructed in the 1970's, which still exists to date, is already in excess of 2m in height*' and that '*the repairs to this fence which have been implemented provide for the same height as the existing fence*'. The Referrer states in Section 2.0 of the planning report that the '*fence posts have been replaced where necessary*'. I observed during site inspection that the wire lines of the fencing structure extend to the upper part of the bent arm fence posts. Given that the height of the replacement fencing structure exceeds 2 metres, as confirmed by the Referrer, it is my view that the replacement fencing structure does

not comply with the terms of Condition No. 1. On this basis, the replacement fencing structure is not exempted development.

8.2.11. Condition No. 2 which refers to *'every wall, other than a dry or natural stone wall'* is not relevant to the subject fencing works.

8.2.12. **Erection of a vehicular access gate across a public footpath,**

8.2.13. The development in question comprises the erection of a gate across a footpath at Site No.1. With this regard, the Referrer details the following in the planning report submitted;

- Works were undertaken to improve the pedestrian gateway adjoining Grace O'Malley residential estate with a 4.5m wide pedestrian gate provided at this location.
- The gate provided is wider than that previously at this location. This was done in order to ensure that social distancing protocols can be maintained by persons entering or existing the lands.
- The height of the gate is in line with the height of the fencing either side.

8.2.14. Under Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended), Class 9 sets out exempted development provisions for *'the construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway'*. The subject sites are not located within or bounding the curtilage of a house. There is 1 no. Condition / Limitation under Class 9 which requires that *'The height of any such structure shall not exceed 2 metres'*.

8.2.15. The Referrer confirms in Section 3.5 of the planning report that *'the fence as constructed in the 1970's, which still exists to date, is already in excess of 2m in height'* and that *'the repairs to this fence which have been implemented provide for the same height as the existing fence'*. Further to this, the Referrer states that *'the height of the gate as provided is in line with the height of the fencing either side'*. Given that the Referrer confirms that the existing fence is in excess of 2 metres in height, and that the height of the new gate is in line with the existing fence, it is my view that the height of the new gate does not comply with the terms of the sole Condition of Class 9. On this basis, the new gate is not exempted development.

8.2.16. **Trenching and Mounding on lands which are / have been habitually open to the public.**

8.2.17. The development in question comprises trenching and mounding on lands which are / have been habitually open to the public.

8.2.18. The documentation submitted by the Referrer does not provide any detail on the trenching and mounding works undertaken on the subject sites. During site inspection, I observed that trenching and mounding has been undertaken at Site No. 3. I was unable to ascertain if trenching and mounding was undertaken at Site No. 2, by reason of the fencing restricting access to the site and a safety warning sign on the fence prohibiting access. I did not observe trenching and mounding at Site No. 1 which provides an unrestricted public right of way into the Howth Castle lands. In the absence of evidence detailing previous and new contour levels, I am unable to accurately determine the scale and extent of trenching and mounding undertaken. I note however the third party's submission to the Planning Authority which states that '*substantial earthmoving including excavations of trenches some over 2m deep and 3m wide, the mounding of excavated earth beside trenches, apparently to increase the difficulty and risk to people attempting to cross the earthworks*'. Further to site inspection, I can concur with the third party's submission that the trenching and mounding undertaken at Site No. 3 impedes easy access to the Howth Castle lands on what appears to be an established pedestrian access route. Google Earth aerial imagery dating back to 2013 indicates an access route runs through Site No. 3.

8.2.19. The Planning Authority in its assessment states that '*the works undertaken are substantially related to the widening and deepening of a watercourse in an area with a rural zoning, High Amenity*'. The Planning Authority report states that '*from a site inspection much of the new earthworks relate to the provision of mounds where mounds previously existed. The works fall within the description of Class 3*'.

8.2.20. Schedule 2, Part 3 of the Planning and Development Regulations 2001 (as amended) refers to Exempted Development – Rural, whereunder Class 3 refers to '*Works relating to the construction or maintenance of any gully, drain, pond, trough, pit or culvert, the widening or deepening of watercourses, the removal of obstructions from watercourses and the making or repairing of embankments in connection with any of the foregoing works*'. Given that Site Nos. 1 & 3 (as outlined) are zoned 'HA - High

Amenity' and Site No. 2 is zoned 'OS - Open Space' along its eastern side and both HA - High Amenity' and 'RS – Residential' along its western side, I do not concur with the Planning Authority that such zoning should be considered 'rural zoning'. The zoning objective of 'HA - High Amenity' zoned lands is to 'Protect and enhance high amenity areas' and the zoning objective of 'OS - Open Space' zoned lands is to 'preserve and provide for open space and recreational amenities'. On this basis, I do not consider the exempted development provisions under Class 3 which relate to 'Exempted Development – Rural' apply in this instance.

8.2.21. Section 4(1) (a) – (l) sets out exempted development for the purposes of the Planning and Development Act 2000 (as amended). Section 4(1)(l) provides for '*development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act*'. Provisions under this Act set out the power of the Minister to carry out work, where such work includes, inter alia, field drainage, land reclamation and the construction and improvement of watercourses. Such exempted development provisions do not apply to the Referrer, Tetrarch Capital Ltd. There are no other exempted development provisions that apply to the development in question under the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended). On this basis, it is my view that the trenching and mounding undertaken on the subject sites is not exempted.

### 8.3. **Appropriate Assessment**

8.3.1. The site is located c. 0.3 km to the south-east of the Baldoyle Bay SAC (Site Code 000199) and c. 0.6 km to the west of the Howth Head SAC (Site Code 000202). Having regard to the nature and scale of the development under consideration and the nature of the receiving environment, it is my opinion that no appropriate assessment issues arise and that the development would not be likely to have a significant effect, either individually or in combination with other plans or projects, on any designated Natura 2000 site.



## 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 following works;

- i) Erection of fencing which blocks habitually open access points,
- ii) Erection of a vehicular access gate across a public footpath,
- iii) Trenching and mounding on lands which are / have been habitually open to the public,

is or is not development or is or is not exempted development:

**AND WHEREAS** the Friends of the Irish Environment requested a declaration on this question from Fingal Council and the Council issued a declaration on the 27<sup>th</sup> day of August, 2020 stating that the matter was development and was not exempted development:

**AND WHEREAS** Tetrarch Capital Ltd. referred this declaration for review to An Bord Pleanála on the 23<sup>rd</sup> day of September, 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(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) Section 177U(9) of the Planning and Development Act, 2000, as amended,

- (e) Article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (f) Parts 1 and 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (g) the planning history of the site,
- (h) the pattern of development in the area:

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

- (a) The erection of replacement fencing at 3 no. sites along the eastern boundary of Howth Castle Demesne is development and does not come within the scope of Condition No. 1 of Class 11, Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended.
- (b) The erection of a gate across a public footpath is development and does not come within the scope of the Condition of Class 9, Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended.
- (c) There are no relevant exempted development provisions for trenching and mounding on the subject zoned lands, which are / have been habitually open to the public.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by Section 5 of the 2000 Act, hereby decides the following works;

- i) Erection of fencing which blocks habitually open access points,
  - ii) Erection of a vehicular access gate across a public footpath,
  - iii) Trenching and mounding on lands which are / have been habitually open to the public,
- is development and is not exempted development.

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Brendan Coyne  
Planning Inspector

02<sup>nd</sup> June 2021