



An
Bord
Pleanála

Inspector's Report ABP-308493-20

Question

Whether the opening of a pedestrian gateway from the rear of the house into a public open space is or is not development or is or is not exempted development.

Location

31 The Maples, Dr. Mannix Road,
Salthill, Galway.

Declaration

Planning Authority

Galway City Council

Planning Authority Reg. Ref.

P/DC/3/13/20

Applicant for Declaration

Tom Barry

Planning Authority Decision

Is not exempted development

Referral

Referred by

Tom Barry

Owner/ Occupier

Tom Barry

Observer(s)

None

Date of Site Inspection

26th of January 2021

Inspector

Adrian Ormsby

1.0 Site Location and Description

- 1.1. The subject site is a rear boundary wall of an area of private open space to the rear of a detached house located at 31 The Maples, on the Dr. Mannix Road in Salthill Galway. The site is c. 2.1km to the south west of Galway City centre (Eyre Square).
- 1.2. The boundary wall divides the site boundaries of the house from a large area of public open space for the residential housing estate known as the Maples.
- 1.3. The area of open space is generally rectangular in shape and c. 45 m wide by c. 62m long. The southern, western and northern boundary of the open space all adjoin a road that serves c. 19 detached houses. The houses and road wrap around the open space in a 'C' Shape.
- 1.4. The open space is generally flat in nature but does fall towards its eastern boundary with the subject site. The ground levels appear higher than the levels of the back gardens to the houses on the east side of the boundary wall.
- 1.5. On inspection of the site a small door and pedestrian entrance has been installed in the boundary wall and is enclosed with a door frame. Including the frame this development is c1.4m high and c. 0.96m wide and there was an evident step up from the back garden to the open space when using the entrance.

2.0 The Question

- 2.1. Whether the opening of a pedestrian gateway from the rear of the house into an area of public open space at No. 31 The Maples, Dr. Mannix Road, Salthill, Galway City, is or is not development or is or is not exempted development.
- 2.2. In the interest of clarity, I consider it appropriate to reword the question as follows-

Whether the opening of a pedestrian gateway in the boundary wall between the rear private amenity space and an area of public open space, both to the rear of No. 31, The Maples, Dr. Mannix Road, Salthill, Galway City is development and is exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

A declaration of exempted development was refused for the following reasons-

- *In this instance, the insertion of a gateway in the rear boundary wall, which is a structure, and the works which have occurred, namely the insertion of a gate, are material changes in the rear boundary wall, therefore these works are considered to be “development” as defined in the Act.*
- *Having regard to the above, the Planning and Development Regulations, 2001, as amended, Article 9, 1 (a) (i) states:-*
 - *“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 contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act”*
- *In this instance Condition No. 11 of Pl.Ref.No. 57/97 (ABP Ref.61.094183) relates to this site and states:-*
 - *(a) Screen walls in stone, brick or similar materials not less than two metres high and suitably capped and rendered shall be provided at the necessary location so as to screen rear gardens from public view. Details of the specific type, location and extent of walling shall be submitted to and agreed with the Planning Authority prior to the commencement of development*
 - *(b) Rear boundary walls between rear gardens shall be 1.8 metres high and of concrete block construction.*
 - *(c) A screen wall 1.80 metres high and extending for a minimum of three metres from the rear wall of the house towards the rear of the site shall be erected between all semi-detached dwelling houses.*
- *Having regards to the above as it is established that the works are considered ‘development’ the condition does not mention the insertion of a gate as part of*

the permitted development and specifies the rear boundary wall to be 2.0 metres high and of concrete block construction. In this instance the insertion of the gateway would contravene the attached condition which directs the form of development to occur along the rear boundaries of the dwelling, and in this instance would not be an exempted development.

- *In addition to the above, it is noted under S.4 (1) (h) of the Planning and Development Act 2001, as amended, states ‘Development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affects 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 neighbouring structures’. The insertion of the gateway in the rear boundary wall, which as outlined above is development, has materially affected the external appearance of the structure (rear boundary wall) and has rendered the appearance inconsistent with the character of the neighbouring structures (adjacent boundary walls) and in this instance would not be an example development.*

4.0 Planning Authority Reports

4.1. Planning Reports

The planning report reflects the decision above and can be summarised as follows-

- The gateway forming part of this application has been constructed. It would appear that an area of planting has been cleared to the front of this gateway.
- The insertion of a gateway in the rear boundary wall, which is a structure, and the works which have occurred, namely the insertion of a gate, are a material change in the rear boundary wall, therefore these works are considered to be “*development*” as defined in the act.
- Condition number 11 of planning reference number 57/97 relates to this site.

- The insertion of the gateway would contravene the condition 11 which directs the form of development to occur along the rear boundaries of the dwelling, and in this instance would not be an exempted development.
- The insertion of the gateway in the rear boundary wall, which as outlined above is development, has materially affected the external appearance of the structure (rear boundary wall) and has rendered the appearance inconsistent with the character of the neighbouring structures, adjacent boundary walls, as there are no other similar developments accessing onto the area of communal open space, and in this instance would not be an exempted development

4.2. Other Technical Reports

- None on file

5.0 Planning History

- 04661, a first floor extension to the side and conservatory to the rear, grant 21/10/2004
- PL61.094183, 57/94, construction of a housing development of 60 houses, grant subject to 15 conditions, 14/12/1994

Conditions are generally standard in nature but the following is noted-

- Condition 11 states
 - (a) *Screen walls in stone, brick or similar materials not less than two metres high and suitably capped and rendered shall be provided at the necessary location so as to screen rear gardens from public view. Details of the specific type, location and extent of walling shall be submitted to and agreed with the Planning Authority prior to the commencement of development*
 - (b) *Rear boundary walls between rear gardens shall be 1.8 metres high and of concrete block construction.*

(c) A screen wall 1.80 metres high and extending for a minimum of three metres from the rear wall of the house towards the rear of the site shall be erected between all semi-detached dwelling houses.

Reason: In the interest of visual amenity.

6.0 Policy Context

6.1. Galway City Development Plan 2017-2023

6.1.1. The site is a wall that also appears to form the boundary of lands between two zonings-

- On the eastern side the lands are zoned as residential, R, where it is an objective-

“To provide for residential development and for associated support development, which will ensure the protection of existing residential amenity and will contribute to sustainable residential neighbourhoods”.

- On the western side the lands are zoned recreational and amenity, RA, where it is an objective to-

“To provide for and protect recreational uses, open space, amenity uses and natural heritage.”

6.2. Natural Heritage Designations

- None relevant

7.0 The Referral

7.1. Referrer’s Case

The issues raised by the referrer can be summarised as follows-

- The subject gateway is development and is exempted development
- The Councils declaration and reference to Condition 11 of PL61.094183 and Article 9 (1) (a) of the Planning and Development Regulations (PDR) nullifies

and renders the function of exempted development regulations under 4 (2) of the Planning and Development Act 2000 as amended (PDA) meaningless.

- The citing of section 4 (1) (h) of the Act of 2000 in the Declaration was not cited by the Planning Authority in its initial letter concerning the gateway dated 10/08/20. This suggests and displays inconsistency and uncertainty on the matter.
- The Board did not consider section 4 (1) (h) applicable in its deliberations on ABP-302804-18, RL3380 and RL2711. Notwithstanding this section the provisions of section 4 (2) and the regulations must be considered.
- In reference to section titled 'Legal Interest' in the declaration, this is of no relevance to the specific of the question before the board.
- The referrer has also attached the documentation submitted to Galway City Council and requests the Board considers same in its review.
- The gateway was constructed to facilitate direct pedestrian access from the garden to the area of public open space at the rear of the dwelling.
- The gateway is 1.3m high and 0.87m wide. The height of the wall remains unaltered.
- With reference to Article 6 (1) and Schedule 2, Part 1, Class 5 of the PDR the development is exempted development. The conditions and limitations are fully met in this instance.
- The referrer refers to planning precedent and in particular ABP decision 302804 where the question raised is very similar to the subject case. In this instance both the Council and the Board considered the referral to be development and exempted development.
- Noting the provisions of section 9.10 of the 2007 Development Management Guidelines for Planning Authorities Planning Authorities must have regard to the decisions on this record in making decisions on future declarations.
- Condition 11 of PL61.094183 is a standard condition that is applied to all multi-unit schemes granted permission. There is nothing specific in it to the Maples development. If the Council holds this condition in this instance can be

grounds to de-exempt development then such de-exemptions must be applied to all housing schemes that are subject to such conditions.

- If it was the intention of the consenting authority to de-exempt development by way of condition 11 they would clearly have stated so in the condition.
- In section 7.2.2 of the Inspectors Report of 302804 the Inspector considers the restriction set out in Article 9 (1) (a) but did not consider it as grounds to de-exempt the gate in that case. In its Order the Board clearly stated it had regard to Article 9 (1) (a) and the planning history of the site.
- PL73.096426 is the parent permission for the housing estate to which 302804 applies. Condition 5 of this permission imposed a similar condition in terms of boundary walls as Condition 11 that Galway City Council now refer to.

7.2. Planning Authority Response

- None received

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000-20 as amended (henceforth referred to as PDA's)

Section 2, provides the following interpretations-

“public road” has the same meaning as in the Roads Act, 1993

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

Section 3 (1), states the following:

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

Section 4 (1) sets out what is exempted development for the purpose of the 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 affects 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 neighbouring structures

.....

(j) development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such”

Section 4 (2) (a) states-

“The Minister may by regulations provide for any class of development to be exempted development for the purpose of the Act”

Section 4 (3) states-

A reference in this Act to exempted development shall be construed as a reference to development which is—

(a) any of the developments specified in subsection (1), or

(b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.

8.2. Planning and Development Regulations, 2001-20 as amended (henceforth referred to as PDR's)

Article 6(1) of the PDR's states as follows:-

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

Article 9(1) details development to which article 6 relates and shall not be exempted development for the purposes of the Act. In particular the following are relevant-

- 9. (1) 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,*
- (xi) obstruct any public right of way*

Schedule 2, Part 1 of the PDR's deal with Exempted Development – General.

Class 5 is considered relevant-

| <p style="text-align: center;">Column 1</p> <p style="text-align: center;">Description of Development</p> | <p style="text-align: center;">Column 2</p> <p style="text-align: center;">Conditions and Limitations</p> |
|--|--|
| <p>CLASS 5</p> <p>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.</p> | <p>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.</p> <p>2. Every wall other than a dry or natural stone wall bounding any garden or other space shall be capped and the face of</p> |

| | |
|--|--|
| | <p>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.</p> <p>3. No such structure shall be a metal palisade or other security fence.</p> |
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8.3. Roads Act, 1993-20 (as amended).

Section 2 provides the following Interpretations-

“Public Road” means a road over which a public right of way exists and the responsibility for the maintenance of which lies with the authority;

“road” includes -

- (a) Any street, lane, footpath, square, court, alley or passage,*
- (b) Any bridge, viaduct, underpass, subway, tunnel, overpass, overbridge, flyover, carriageway (either single or multiple), pavement or footway,*
- (c) Any weighbridge or other facility for the weighing or inspection of vehicles, toll plaza or other facilities 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, channelliser, 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;*

8.4. Referrals Database

- 8.4.1. I have searched and examined the Board's database of referrals and note the following declarations of relevance to this case-
- 8.4.2. ABP-302804-18- In this referral the Board considered the opening of a pedestrian gate from the rear of a house into an area of public open space is development and is exempted development, at 8 Millbridge Avenue, Naas, Co. Kildare.
- 8.4.3. RL3380- In this referral the Board considered an opening in the rear wall of a garden to provide pedestrian entrance from the public road/pavement and to provide 1.95 metres high pedestrian timber gate opening into the rear garden is development and is not exempted development by reason of Article 9 (1)(a)(ii) of the Planning and Development Regulations, 2001, because Maple Drive (the road to which it opened), including its footpath, is a public road within the meaning of the Roads Act, 1993 and its surfaced carriageway exceeds four metres in width.

9.0 Assessment

9.1. Is or is not development

- 9.1.1. Section 2(1) of the PDA's defines 'works' as including "any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...". I am satisfied that, in accordance with this definition, the subject referral relates to 'works'.
- 9.1.2. Section 3 (1) of the PDA's refers to the meaning of "development", except where the context otherwise requires, as the carrying out of any works on, in, over or under land. Accordingly, I am satisfied that the proposal i.e. pedestrian gateway 'is development' within the meaning of the PDA's.

9.2. Is or is not exempted development

- 9.2.1. Galway City Councils determination on this case refers to Section 4 (1) (h) of the PDA's. It is their view that the insertion of the gateway in the rear boundary wall, is development and has materially affected the external appearance of the structure (rear boundary wall) and has rendered the appearance inconsistent with the

character of the neighbouring structures (adjacent boundary walls) and in this instance would not be exempted development.

9.2.2. I also note the provisions of section 4 (1) (j) of the PDA's which states the following to be exempted development "*development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such*).

9.2.3. Having considered the two points above, I refer to section 4 (2) of the PDA's which details that the 'Minister' may by regulations provide for any class of development to be exempted development. In this regard Article 6 of the PDR's details specific classes for this purpose in column 1 of Part 1 of Schedule 2 subject to conditions and limitations specified in column 2 of the said Part 1.

Part 1 of Schedule 2 Class 5 provides a class of development for the construction, erection or alteration, within or bounding the curtilage of a house, of a gate and/or gateway amongst other things.

Accordingly, the 'pedestrian gateway' proposed for referral in this instance is considered to fall under Schedule 2, Part 1 Exempted Development – General Class 5 of the PDR's. In my opinion the works should not be considered under Section 4 (1) (h) or (j) of the PDA's when the 'Minister' has specifically provided for a class of development to include a gate and/or gateway under the PDR's and therefore the PDA's.

9.2.4. Class 5 details that the construction, erection or alteration, within or bounding the curtilage of a house, of a gate or gateway is exempted development subject to certain conditions and limitations, which in this case are-

- the height of any such structure shall not exceed 2 metres, and
- No such structure shall be a metal palisade or other security fence.

The pedestrian gateway subject to this referral has been placed within the existing rear boundary wall between the curtilage of the house and the adjoining public open space.

9.2.5. I am satisfied that the subject gateway does not contravene any of the conditions or limitations and as such 'is exempted development' within the meaning of the PDR's and the PDA's.

9.3. Restrictions on exempted development

- 9.3.1. Article 9 of the PDR's details development to which article 6 relates and shall not be exempted development for the purposes of the Act.
- 9.3.2. Galway City Council's determination on this matter refers to restrictions set out under Article 9, (1) of the PDR's which details scenarios/development to which article 6 developments shall not be exempted development for the purposes of the Act. The Council's declaration cites Article 9, (1) (a) (i)- if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.
- 9.3.3. The Council then refer to condition 11 of the parent permission for the overall housing estate. Condition 11 (a) is considered of relevance and details that

'Screen walls in stone, brick or similar materials not less than two metres high and suitably capped and rendered shall be provided at the necessary location so as to screen rear gardens from public view. Details of the specific type, location and extent of walling shall be submitted to and agreed with the Planning Authority prior to the commencement of development'.

Having carried out a site inspection and reviewed all documentation on file including the Council's planning report there is nothing to suggest that condition 11 (a) had not been complied with in full prior to the works carried out subject to this referral.

Therefore, it appears to me that the rear boundary wall between 31 The Maples and the area of public open space has been constructed in accordance with PL61.094183.

- 9.3.4. I have reviewed all 15 conditions of PL61.094183 and it is clear to me that there is no condition that states exempted development (whatever it may be) cannot be carried out once the original permission has been completed in accordance with the permission.
- 9.3.5. In this regard in my opinion a person may built a small domestic extension, garage or porch etc subject to the conditions, limitations and restrictions on exemptions as set out in the PDR's. To conclude that the development subject to this referral contravenes condition 11 of PL61.094183 is in my opinion unreasonable.

9.3.6. Notwithstanding this, there are other restrictions to exemptions under Article 9 (1) (a) that warrant further consideration, including 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,

(xi) obstruct any public right of way

9.3.7. The development to which the subject referral relates, comprises the formation of a pedestrian gateway with a door between the rear private amenity space of No. 31 The Maples and the area of public open space of the Maples housing estate. The definitions of ‘public road’ and ‘road’ as set out in the Roads Act of 1993 does not include for areas of public open space. In this regard I draw the Boards attention to ABP-302804-18 where the Board determined a gate/door to a similar area of public open space *“does not affect a public road within the meaning of the Roads Act, 1993.”*

The subject pedestrian gateway opens in towards the private amenity space of No. 31 The Maples. I am satisfied it does not endanger public safety by reason of traffic hazard or obstruction of road users. I am also satisfied the subject pedestrian gateway does not interfere with or obstruct any public right of way.

As such, I do not consider that the restrictions associated with Article 9(1)(a) (ii) (iii) and (xi) apply to the subject pedestrian gateway.

9.4. Other Matters

- Galway City Council’s determination on this case refers to matters titled ‘Legal Interest’. It is considered that matters relating to consent, ownership/title of property, legal rights of way and also possible damage to public property (i.e. removal of shrubbery etc) are not matters to concern the Board. As the

Council have pointed out in their declaration this is a matter to be resolved between the parties, having regard to the provisions of s.34(13) of the PDA's.

9.5. **Conclusion**

Having regard to all of the above, I am satisfied that the provision of the pedestrian gateway is development and is exempted development.

10.0 **Recommendation**

10.1. 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 opening of a pedestrian gateway in the boundary wall between the rear private amenity space and an area of public open space, both to the rear of No. 31, The Maples, Dr. Mannix Road, Salthill, Galway City is or is not development and is or is not exempted development:

AND WHEREAS Tom Barry requested a declaration on this question from Galway City Council and the Council issued a declaration on the 24th day of September 2020 stating that the matter was development and was not exempted development:

AND WHEREAS Tom Barry referred this declaration for review to An Bord Pleanála on the 20th day of October 2020:

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

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,

- (b) Article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Class 5, Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (d) The planning history of the site, including all the conditions of PL61.094183 where no such condition restricts the carrying out of exempted development in accordance with the provisions of the Act and Regulations,
- (e) The Roads Act, 1993,
- (f) The Board's declaration under ABP-302804-18, and
- (g) The Inspectors Report

AND WHEREAS An Bord Pleanála has concluded that that the opening of a pedestrian gateway in a boundary wall between the rear private amenity space of a house into an area of public open space:

- (a) Would constitute the carrying out of works which comes within the meaning of development in Section 3(1) of the Planning and Development Act, 2000
- (b) Would come within the scope of Class 5, Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, and
- (c) Would be exempted development as Article 9 (1) (a) (ii) of the Planning and Development Regulations 2001 does not restrict the opening of a pedestrian gateway onto an area of public open space within the interpretation of 'public road' and 'road' within the meaning of the Roads Act, 1993;

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 opening of a pedestrian gateway in the boundary wall between the rear private

amenity space and an area of public open space, both to the rear of No. 31, The Maples, Dr. Mannix Road, Salthill, Galway City is development and is exempted development.

Adrian Ormsby
Planning Inspector

02nd February 2021.