



An
Bord
Pleanála

Inspector's Report ABP309705-21

Details of Referral

Whether the alteration of the raised stone kerbing and the removal of the gravel finish surround at the base of the war memorial O'Connell Square, Tullamore is or is not development or is or is not exempted development.

Referred by

Mr. Fergal McCabe.

Occupier

Offaly County Council.

Planning Authority Reference

DEC 21/02.

Date of Site Inspection

3rd June, 2021.

Inspector

Paul Caprani.

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1.0 Introduction

A question has arisen pursuant of Section 5 of the Planning and Development Act 2000 as to whether or not the alteration and removal of a raised stone kerb and gravel finish surrounding the base of a war memorial which is a protected structure at O'Connell Square, Tullamore is or is not exempted development. The question was referred to the Board by Fergal McCabe on foot of a determination by Offaly County Council that the works undertaken constituted development which was exempted development. The referral submitted contends that the alterations undertaken by the Planning Authority as part of a Part 8 process constitutes development which is not exempted development.

2.0 Site Location and Description

- 2.1. The memorial in question is located centrally within O'Connell square, the main square in central Tullamore. It comprises of a stone obelisk which tapers to a height of c.4.5 metres. It is set into a double plinth which in turn is set into and surrounded by small square grey granite cobble lock bricks. Four led lights are set into the granite paving on each of the four elevations of the obelisk which provide night-time illumination to the memorial. The memorial commemorates those in the local area who lost their lives during World War I and World War II.
- 2.2. O'Connell Square has recently undergone a civic design enhancement scheme which removed a significant amount of car parking, pedestrianised the northern side of the square and provided a two-way carriageway at the southern side of the square. The urban realm enhancement works were carried out by or on behalf of Offaly County Council under the provisions of Part 8 of the Planning and Development Act. The upgrading of the square included improved street lighting, hard and soft landscaping and upgraded paving. Under the original Part 8 process it was proposed to relocate the war memorial within the square in order to accommodate revised parking arrangements as part of the new layout. However, following objections from national and local bodies, it was directed that the war memorial be retained in its central position within the square.

2.3. According to information contained in the referral on file, it is stated that in order to attain the requisite number of car parking spaces as provided for in the Part 8 scheme within the square and to allow for the safe passage of pedestrians, wheelchairs and buggies, it was decided that in carrying out the works, the raised kerb area surrounding the plinth and the gravel infill around the war memorial would be inverted into the ground and buried flush with the ground level and it was decided to extend the new paving up to the base of the obelisk.

3.0 The Question

3.1. The question currently before the Board is whether or not the alteration of the raised stone kerbing and the removal of the gravel finish which formally surrounded the base of the war memorial which is a protected structure is or is not development or is or is not exempted development.

4.0 Determination by Offaly County Council

4.1. The above question was put to the Planning Authority by the current referrer. In determining the referral, the Planning Authority noted the following:

- It is noted that the public realm improvement works were the subject of a Part 8 proposal. It is noted that there was a procedural omission in the public notices in not referring to the proposed alterations to the war memorial, a protected structure, in the Part 8 public notices. On foot of this, a complaint was made to the Office of the Planning Regulator (OPR). The OPR determined that the procedures adopted by Offaly County Council was a once-off error and was not systematic in nature and as such the complaint was not upheld.
- Reference is made to Section 4(1) of the Act which states that development carried out on behalf of, jointly or in partnership with the local authority shall be exempted development.
- Notwithstanding the above exemption, the local authority is required to obtain Part 8 consent and this consent was duly obtained.

- Reference is also made to Section 4(1)(h) of the Planning and Development Act which notes that 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 neighbouring structures is also deemed to be exempted development.
- Reference is made to Section 57(1) of the Act which states that the carrying out of works to a protected structure, or a proposed protected structure, shall be exempted development only if these works would not materially affect the character of (a) the structure or (b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.
- The local authority report notes that the plinth area has undergone considerable alterations since the 1950s and photos are incorporated into the report attesting to this. It would appear that the war memorial surround which existed prior to the Part 8 works is principally a feature from the 1980s and is not an intrinsic part of the 1950s protected structure.
- It is noted that this 1980s surround presented a trip hazard for pedestrians due to its low profile.

4.2. Therefore, it was concluded that

- The alteration of the surround of the base of the war memorial does not materially affect the character of the structure.
- Furthermore, the base does not form part of the original structure, and dates from the 1980s.
- The original kerbing is still on site but has been inverted into the ground so as to no longer form a trip hazard.

4.3. On the above basis Offaly County Council determined that works undertaken at the memorial constituted development which is exempted development.

5.0 The Referral

- 5.1.1. A referral was submitted to the Board seeking a further determination in respect of the above question by Fergal McCabe. The grounds of the referral are set out below.
- The background to the memorial, O'Connell Square and the Part 8 process undertaken by Offaly County Council is set out in the referral.
 - It is argued that in order to maintain the 34 car parking spaces within the square as per the Part 8 proposals, the Council were required to dig up the raised kerb, invert it and make it flush with the ground in order to facilitate wheelchairs and buggies etc.
 - What now remains is an isolated stub of an obelisk and this has degraded the setting and dignity of the memorial.
- 5.1.2. It is stated that the key question before the Board is whether the raised kerb and the surrounding gravelled area are or are not integral elements of the protected structure. It is the referrer's opinion that they are an integral element of the protected structure and this opinion is supported by two respected Conservation Architects. Letters from the said Conservation Architects are contained on file attesting to this. It also appears that Offaly County Council have never contested that the elements of the structure in question are integral parts of the protected structure.
- 5.1.3. None of the works which materially affect the character of the structure were referred to in the public notices for the Part 8 process. This is a requirement as per Article 81 and Article 83(1) of the Planning and Development Regulations. No such drawings, photographs or images of the works that were proposed to be carried out to the war memorial were made available for public inspection as part of the Part 8 application.
- 5.1.4. No Heritage Impact Assessment as per the a requirement of Ministerial Guidelines was provided.
- 5.1.5. The Council cannot rely on Section 4(1)(f) because the works have materially affected the character of a protected structure and as such the provisions of Section 57(1)(a) and (b) apply.
- 5.1.6. Furthermore, the Planning Authority is specifically prohibited by Section 178(1) of the Act from contravening its own development plan. It is argued that the alterations are

a clear breach of Objectives TTEO-12-01 and TTEO-09-07. It is submitted that the works subject of this referral do not fall within the ambit of Section 4(1)(f) but are governed by Section 57 of the Act and Section 178(1) of the same Act and therefore cannot be considered exempted development.

- 5.1.7. Finally, the referral makes reference to various policies and objectives contained in the development plan which relate to architectural heritage protection, and it is argued that the works carried out are contrary to these policies and objectives and therefore contravene the development plan.

5.2. Response by the Planning Authority

- 5.2.1. Offaly County Council requested An Bord Pleanála support its assertion that the works constitute development that is exempted development under the provisions of Section 4(1)(aa). The Council strongly contest that the works in question impact materially on the protected structure. This view is supported by Offaly County Council's Conservation Officer.

6.0 Relevant Planning Legislation

6.1. Planning and Development Act 2000

6.1.1. Section 2 – *Definitions*

'Structure' means any building, structure, excavation or other thing constructed 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 and*
- (b) in relation to a protected structure or proposed protected structure includes*
 - (i) the interior of the structure,*
 - (ii) the land lying within the curtilage of the structure,*
 - (iii) any other structures lying within the curtilage and their interiors and*
 - (iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in sub-paragraph (i) or (iii).*

6.1.2. Section 3 – ‘Development’

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

6.1.3. Section 4(1)

The following shall be exempted development for the purposes of the Act.

(aa) Development by a local authority in its functional area.

(f) Development carried out on behalf of, jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a Planning Authority or in any other capacity.

6.1.4. Section 57(1)

Notwithstanding Section 4(1)(aa), (h), (i), (ai), (j), (k) or (l) and any regulations made under Section 4(2), the carrying out of works to a protected structure, or proposed protected structures shall be exempted development only if those works would not materially affect the character of (a) the structure or (b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.

6.1.5. Part 11 – *Development by Local and State Authorities etc.* (Section 178(1))

The Council of a county shall not affect any development in its functional area which contravenes materially the development plan.

6.2. Planning and Development Regulations 2001 as amended

6.2.1. Part 8 of the above Regulations set out requirements in respect of a specified development by or on behalf of or in partnership with local authorities.

6.2.2. Article 81(1) states that a *local authority shall, in accordance with this Article*

(a) give notice of a proposed development in an improved newspaper, and

(b) erect or fix a site notice or site notices on the land to which the proposed development be situated.

A notice referred to in this sub-article shall state that the local authority proposes to carry out the development and

- (a) indicate the location, townland or postal address of the proposed development (as may be appropriate),*
- (b) indicate the nature and extent of the proposed development,*
- (c) where the proposed development consists of or comprises the carrying out of works,*
 - (i) which would materially affect the character of a protected structure or proposed protected structure.*

7.0 Assessment

7.1. The question which the Board must determine is whether or not the alteration of the raised stone kerbing and the removal of the gravel finished surround at the base of a war memorial which is a protected structure is or is not development and if it is determined that it is development whether or to it is exempted development under the Planning Acts.

7.2. Questions relating to whether or not proper procedures were adhered to in relation to the requirements of the prescribed public notices under Article 81 or the availability for inspection of public documents under Article 83 of the Planning and Development Regulations as part of the Part 8 planning process are not germane or relevant to the current question before the Board. Therefore, any issues relating to Part 8 procedures can be set aside for the purposes of determining this Section 5 Referral.

7.3. Development

7.3.1. Offaly County Council in undertaking the public realm improvement works took up the raised stone kerbing that surrounded the monument. The ground beneath the memorial was excavated and the raised kerb was inverted and placed beneath the ground and new paving was placed above it up to the base of the obelisk. The activities undertaken in and around the memorial would in my view fall within the definition of works, as the activities undertaken involve the 'excavation', 'repair and renewal' in the vicinity of the base of the memorial. As the activities undertaken fall

within the definition of works, it necessarily follows that the activities undertaken at and in the vicinity of the memorial constitute development as per Section 3 of the Act.

7.4. Whether or not development constitutes exempted development

7.4.1. A key consideration in determining the referral is whether or not the Board consider the works to materially affect the character of the protected structure. The Planning Authority argues that the works undertaken are not material in nature on the basis that:

- (i) The minor nature of the works in the vicinity of the obelisk do not materially affect the setting and character of the structure.
- (ii) The base surrounding the war memorial was radically altered in the 1980s and as such does not form part of the original memorial.
- (iii) The Planning Authority argue that development by a local authority within its functional area and development carried out on behalf of or jointly or in partnership with the local authority are exempted development under the provisions of Section 4(1)(aa) and Section 4(1)(f).
- (iv) The proposed works may qualify as exempted development under the provisions of Section 4(1)(h).
- (v) The raised kerb constitutes a trip hazard.

7.4.2. Each of these issues are dealt with separately below.

7.4.3. I would be inclined to agree with the referrer that the works undertaken at the base of the memorial do form an integral part of the memorial and the alterations undertaken therefore affect the character of the protected structure. The raised kerbing surrounding the obelisk constitutes an inherent part of the overall design of the memorial. It provides an important setting for the obelisk. Notwithstanding the alteration to the kerbing, the raised kerb forms part of the overall design of the memorial and the obelisk and the framing of the obelisk by the granite kerbing should be seen as a whole. The memorial in my view does to merely comprise of the obelisk structure but also comprises of the area in which the obelisk structure is set. The raised kerb defines the extent of the protected structure into which the obelisk was mounted as a central feature. The kerbing provides a surround which both

defines and frames the setting and mounting of the obelisk. The entire memorial therefore must be seen in the context of its setting and its setting in my opinion is defined by the raised kerb.

7.4.4. Therefore, the raised kerb area forms part of and defines the setting of the obelisk and is a constituent part of the memorial design and therefore constitutes part of the curtilage of the protected structure as such its removal would in my view materially affect the character of the structure.

7.4.5. It is acknowledged from the photographic evidence that the raised kerb area has been altered from that originally constructed on site. Indeed if the original memorial was placed in O'Connell Street in the mid-1920s as the NIAH records suggest, it is apparent that the obelisk was also altered in order to commemorate those that died in World War II. Whether or when alterations occurred subsequent to the original laying of the war memorial are not integrally germane to the question before the Board in my opinion. The fact remains that the memorial was added to the list of protected structures subsequent to the alterations having taken place. Any alterations, be they not part of the original structure or not, are nevertheless an integral part of the protected structure. The obelisk and what I consider to be its defined curtilage framed by the raised kerb/plinth are inherently part of the memorial and as such covered by the protected structure designation.

7.4.6. It is also acknowledged that there are exemptions in place under the provisions of Section 4 of the Act for development by a local authority in its functional area (Section 4(1)(aa)) and the development carried out on behalf or jointly in partnership with a local authority (Section 4(1)(f)). It is also acknowledged that due to the nature and scope of the works undertaken, the Planning Authority were obliged to undertake a Part 8 process notifying the public of its plans and inviting comments in relation to the same. However, Section 57(1) of the Planning and Development Act is clear and unambiguous that the carrying out of works to a protected structure or a proposed protected structure shall be exempted development only if those works would not materially affect the character of

(a) the structure, or

- (b) any element of the structure which contributes to its special, architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.

- 7.4.7. It is no exemption under this section of the Act which specifically applies to works being carried out by a local authority. It appears that the Planning Authority's conclusion that the works undertaken are exempted development is predicated on the opinion that the works do not materially affect the character of the structure and as such the exempted status under the provisions of Section 4(1)(aa) and Section 4(1)(f) would apply.
- 7.5. However, if the Board come to the conclusion as set out in this assessment that the works undertaken materially affect the character of the protected structure, I would conclude that the provision of Section 57(1) would apply in this instance and this would de-exempt any works undertaken by a local authority which could claim exempted development status under the provisions of Section 4(1)(aa) or (f).
- 7.6. With regard to the exemption under the provisions of Section 4(1)(h) the Planning Authority argue that this exemption provision may apply in this instance. I note that the structure in question is a protected structure and as such the provisions of Section 57(1) and not Section 4(1)(h) would apply. Furthermore, I have argued above that the alterations undertaken do materially affect the external appearance of the structure.
- 7.7. Finally, any reference to a trip hazard arising from raised kerbs has not exemption status under planning law when the kerb itself forms part of the protected structure. Thus, it cannot be argued that an exemption to the protected structure applies on the basis that it may represent a trip hazard to pedestrians.

8.0 Conclusions

Arising from my assessment above therefore I consider that the alterations of the raised stone kerbing at the base of the war memorial at O'Connell Square is development and is not exempted development and I therefore recommend that the Board issue a determination as follows:

WHEREAS a question has arisen as to whether the alteration of a raised stone kerbing and the removal of gravel finish surrounding the base of the war memorial constitutes development which is exempted development.

AND WHEREAS the question was referred to Offaly County Council on the 21st day of January, 2021.

AND WHEREAS Offaly County Council in considering this declaration request determined that the raised stone kerbing and the removal of the gravel finish surrounding the base of the war memorial is development and is exempted development by reference to Section 2 and Section 3 of the Planning and Development Act 2000, (as amended) and furthermore the works carried out under the Part 8 consent by Offaly County Council and the provisions of Section 4(1)(aa) and (f) of the Planning and Development Act 2000 would also support the view that the works constituted exempted development.

AND WHEREAS Fergal McCabe referred the question to An Bord Pleanála on the 11th day of March, 2021.

AND WHEREAS An Bord Pleanála in considering this referral had particular regard to

- (a) Section 2 and 3 of the Planning and Development Act 2000 (as amended).
- (b) Section 4(1)(aa) and Section 4(1)(f) of the Planning and Development Act 2000.
- (c) The provisions of Section 57(1) of the Act.

AND WHEREAS the Board concluded that the alteration of the raised stone kerbing surrounding the base of the war memorial materially affects the character of the protected structure.

AND NOW THEREFORE An Bord Pleanála in exercise of the powers conferred on it by Section 5(4) of the 2000 Act, hereby decides that the alterations constitute development that is not exempted development.

Paul Caprani,
Senior Planning Inspector.

14th July, 2021.