



An
Bord
Pleanála

Inspector's Report ABP-309852-21

Question

Whether (1) the making of a small opening in the wall between Belmont Lawn and Ardagh Crescent, and (2) the construction of a short section of pathway across the lawn to link to the existing pathways across Belmont Lawn, is or is not development or is or is not exempted development.

Location

Boundary wall between Belmont Lawn and Ardagh Crescent, Blackrock, Dublin.

Declaration

Planning Authority

Dún Laoghaire Rathdown County Council

Planning Authority Reg. Ref.

Ref10520

Applicant for Declaration

Ruadhán Kenny

Planning Authority Decision

No decision can be issued in respect of the request.

Referral

Referred by

Ruadhán Kenny

Owner / Occupier

Durkan Homes Ltd.

Observer(s)

None.

Date of Site Inspection

22nd November, 2021

Inspector

Robert Speer

1.0 Site Location and Description

- 1.1. The site in question is located in an established residential area characterised by conventional suburban housing development, approximately 400m north-northwest of the junction of the R113 Leopardstown Road with the N11 Stillorgan Road. It comprises an area of public open space situated within the Belmont Lawn housing development and the adjacent boundary wall which divides it from the neighbouring estate / cul-de-sac of Ardagh Crescent. At present, there is no direct link between the two housing schemes with the dividing wall situated alongside the turning bay and footpath at the end of Ardagh Crescent. The wall itself is of a blockwork construction with expansion joints, a dash render & concrete band capping. Its height varies along the footpath and roadside.

2.0 The Question

- 2.1. On 3rd November, 2020 Mr. Ruadhán Kenny, 16 Belmont Lawn, Stillorgan Road, Co. Dublin, A94 FW53, submitted a request to Dún Laoghaire Rathdown County Council for a declaration in accordance with Section 5 of the Planning and Development Act, 2000, as amended, to determine whether (1) the making of a small opening in the wall between Belmont Lawn and Ardagh Crescent, and (2) the construction of a short section of pathway across the lawn to link to the existing pathways across Belmont Lawn, is or is not development or is or is not exempted development.
- 2.2. Having conducted a site inspection, and following a review of the submitted information, in my opinion, the question before the Board can be formulated as follows

‘Whether (1) the making of a small opening in the boundary wall between Belmont Lawn and Ardagh Crescent, Blackrock, Dublin and (2) the construction of a short section of pathway across the lawn to link to the existing pathways across Belmont Lawn, is or is not development or is or is not exempted development’.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On 9th March, 2021 the Planning Authority issued a declaration which stated that as the works in question were to be undertaken by the Local Authority, and as the provisions of Section 5 of the Planning and Development Act, 2000, as amended, do not apply to specified development by, on behalf of, or in partnership with a local authority, as prescribed in Part 8 of the Planning and Development Regulations, 2001, as amended, a decision cannot be issued on the Section 5 request.

3.2. Planning Authority Reports

3.2.1. Planning Reports

An initial report details the site context before concluding that the making of a small opening in the boundary wall between Belmont Lawn and Ardagh Crescent, and the construction of a section of pathway to link to the existing pathways across Belmont Lawn, would involve the carrying out of works as defined in Section 2(1) of the Planning and Development Act, 2000, as amended, and constitutes development pursuant to Section 3(1) of the Act. It proceeds to consider the proposed opening in the boundary wall by reference to the exempted development provisions set out in Class 9 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, and states that in order to determine whether the construction / erection of the new 'gate or gateway' would comply with the conditions / limitations attached to that class (i.e. that the height of the structure would not exceed 2m) further information would be required as regards the height of the boundary wall.

With respect to the proposed pathway, it is stated that in the absence of any provision in the Regulations by which a private individual would be allowed to carry out such works (outside the curtilage of a dwelling house) without the need for planning permission, the construction of the new pathway would not constitute exempted development. However, it is subsequently acknowledged that the works in question have been included as part of draft proposals published by the Council with respect to its '*Active School Travel, New Safe Walking and Cycling Routes*'. In this regard, it is stated that if the works were to be undertaken by the Local Authority,

then they could constitute exempted development should they fall within the scope of Article 80(1)(k) of the Regulations i.e. the estimated cost of the works would not exceed €126,000.

The report concludes by recommending that scaled and dimensioned elevations of the boundary wall be sought by way of further information in order to permit a full assessment of the application.

Following the receipt of a response to a request for further information, a second report was prepared which noted that while the scaled drawings supplied by the applicant had detailed the height of the boundary wall, no indication had been provided of the location of the wall opening itself. Given the variance in the height of the wall, it was stated that the Planning Authority is unable to make a determination on the matter. Therefore, it was recommended that clarification be sought as regards the location of the pedestrian connection through the boundary wall.

Upon consideration of the response to a request for clarification of further information, a final report was prepared which noted that the applicant had indicated that the works in question were to be carried out by the Local Authority and thus he was not in a position to provide any more detailed drawings (despite requests for same from the Council's Infrastructure and Climate Change Dept.). In this respect, the case planner has sought to correct earlier commentary in that the description of the works as potentially comprising exempted development by reference to Article 80(1)(k) of the Regulations was in error and should have instead referred to the works as being exempt from the Part VIII planning process. The report concludes by stating that the provisions of Section 5 of the Planning and Development Act, 2000, as amended, do not apply to specified development by, on behalf of, or in partnership with local authorities, as prescribed in Part VIII of the Regulations, and therefore a decision cannot be issued on the question posed in the Section 5 application.

3.2.2. Other Technical Reports

None.

4.0 Planning History

None.

5.0 Policy Context

5.1. Dún Laoghaire Rathdown County Development Plan, 2016-2022:

5.1.1. Land Use Zoning:

The subject lands are zoned as 'F' with the stated land use zoning objective 'To preserve and provide for open space with ancillary active recreational amenities'.

5.1.2. Other Relevant Sections / Policies:

Chapter 2: Sustainable Communities Strategy:

Section 2.2: Sustainable Travel and Transportation:

Policy ST5: Walking and Cycling:

It is Council Policy to secure the development of a high quality walking and cycling network across the County in accordance with relevant Council and National policy and guidelines.

Policy ST6: Footways and Pedestrian Routes:

The Council will continue to maintain and expand the footway and pedestrian route network to provide for accessible pedestrian routes within the County in accordance with best accessibility practice.

Policy ST7: County Cycle Network:

It is Council policy to secure improvements to the County Cycle Network in accordance with the Dún Laoghaire-Rathdown Cycle Network Review whilst supporting the NTA on the development and implementation of the Cycle Network Plan for the Greater Dublin Area.

Chapter 8: Principles of Development:

Section 8.2.4: Sustainable Travel and Transport

5.2. Natural Heritage Designations

5.2.1. The following natural heritage designations are located in the general vicinity of the proposed development site:

- The South Dublin Bay Special Area of Conservation (Site Code: 000210), approximately 2.5km northeast of the site.
- The South Dublin Bay Proposed Natural Heritage Area (Site Code: 000210), approximately 2.5km northeast of the site.
- The South Dublin Bay and River Tolka Estuary Special Protection Area (Site Code: 004024), approximately 2.5km northeast of the site.

6.0 The Referral

6.1. Referrer's Case

- There is no reference in Section 5 of the Planning and Development Act, 2000, as amended, to Part 8 of the Planning and Development Regulations, 2001, as amended. A determination must be made as to whether the development described in the initial Section 5 application is or is not exempted development. Furthermore, should the development be held to constitute exempted development, the basis for any such determination must be set out.

6.2. Planning Authority Response

None received.

6.3. Owner / Occupier's Response:

None received.

6.4. Further Responses

None received.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. Section 2(1) of the Act defines “works” as follows:

“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) of the Planning and Development Act, 2000, as amended, states the following:

“Development” in this Act 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 use of any structures or other land.

7.1.3. Section 4(1) states that the following shall be exempted development for the purposes of the Act:

- (aa) development by a local authority in its functional area;*
- (e) development consisting of the carrying out by a local authority of any works required for the construction of a new road or the maintenance or improvement of a road;*
- (f) development carried out on behalf of, or 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;*

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

7.1.5. Section 179 of the Act details the mechanisms applicable as regards Local Authority own development.

7.2. Planning and Development Regulations, 2001

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

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

7.2.2. Part 8 of the Regulations sets out the requirements in respect of specified development by, on behalf of, or in partnership with local authorities and Article 80(1) states the following as regards development prescribed for purposes of Section 179 of Act:

‘Subject to sub-article (2) and sub-section (6) of section 179 of the Act, the following classes of development, hereafter in this Part referred to as “proposed development”, are hereby prescribed for the purposes of section 179 of the Act —

(k) any development other than those specified in paragraphs (a) to (j), the estimated cost of which exceeds €126,000, not being development consisting of the laying underground of sewers, mains, pipes or other apparatus’.

7.2.3. Part 1 of Schedule 2: Exempted Development – General:

Class 9:

<i>Column 1</i> <i>Description of Development</i>	<i>Column 2</i> <i>Conditions and Limitations</i>
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.

8.0 Assessment

8.1. Is or is not development

- 8.1.1. Regrettably, the plans and particulars submitted in support of the subject application do not provide sufficiently clear detail as to the exact nature, dimension, or location of the works proposed, however, notwithstanding these deficiencies, I would refer the Board to Section 3 of the Planning and Development Act, 2000, as amended, which 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. In my opinion, the making of a small opening in the boundary wall between Belmont Lawn & Ardagh Crescent and the construction of a section of pathway would involve an act of development having regard to Section 2 of the Act where “*works*” are defined as:

“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 to exterior of a structure.

- 8.1.3. Accordingly, having established that the making of a small opening in the boundary wall and the construction of a section of pathway would constitute development, the question arises as to whether these works would constitute exempted development.

8.2. Is or is not exempted development

- 8.2.1. By way of summation, it can be ascertained from the various plans and particulars lodged in support of the initial Section 5 application and the subject referral that the works in question are not intended to be carried out by the applicant but rather are to be undertaken by the Local Authority as part of the implementation of its wider ‘Active School Travel’ programme. In this regard, the Dún Laoghaire Rathdown County Council ‘*Active School Travel, New Safe Walking and Cycling Routes*’ project aims to connect quiet residential streets with existing safe walking and cycling infrastructure to create a joined-up network. It involves the piloting of three dedicated routes aimed at upgrading and connecting the existing walking and cycling network

in the County with a view to encouraging increased walking and cycling to school. The 'Mountains to Metals' route (of which the subject works form part) will link east-west across the County starting at the Sandyford Cycle Route (and linking to the 'Sea to Mountains' Route as well as the 'Park to Park' route) and will extend northwards through existing residential areas and new developments on to 'The Metals'. In developing this route through Belmont Lawn where it will link into Ardagh Crescent, it has been acknowledged that the link will require an opening in the wall within Ardagh Crescent.

- 8.2.2. Following a public engagement process, a 'Project Update' was issued in September, 2021 which included a recommendation (Page No. 8) that the proposals at Belmont Lawn and Ardagh Crescent be implemented along with additional safety measures. It was further stated that the ownership of the green area in Belmont had been clarified as part of the project and that in order to proceed with the works, land acquisition would be required which was being progressed separately.
- 8.2.3. A subsequent 'Project Update' provided in December, 2021 indicated that the design for the 'Mountains to Metals' and 'Park to Park' routes (which pass through the Deansgrange area) had been completed, although further consultations in relation to the Deansgrange route elements of the Active School Travel Project had resulted in a revised route option ('Option 6': Providing segregated cycle facilities along Deansgrange Road and utilising the Cemetery) which would require a Part 8 procedure (because the works through the Cemetery would not be covered under the normal exemption when providing cycle facilities). It was therefore recommended by the Council Executive that the 'Park to Park' and 'Mountains to Metals' routes proceed to construction for all works except the Deansgrange Road elements with a Section 138 notice to be issued to the elected members with an application for funding to be made to the National Transport Authority (NTA) to carry out the works as part of the 2022 programme (it was envisaged that the Section 138 notice would be issued to the elected members in advance of the January Council meeting, subject to a final review of the design and engagement with the NTA). A Part 8 application is to be prepared for the Deansgrange Road section from Clonkeen Park to Springhill Avenue in line with the aforementioned Option 6.

- 8.2.4. Therefore, the subject matter of the referral before the Board would seem to concern works intended to be carried out by the Local Authority as part of its 'Active School Travel' project.
- 8.2.5. In light of the foregoing, the subject referral is unusual in that it has been lodged by an applicant who is not in a position to undertake the works and, more specifically, it relates to works which are to be carried out by the Local Authority itself. In effect, the applicant has sought a declaration from the Local Authority with respect to works that are to be carried by the same Authority (I am not aware of any cases involving similar issues having previously been determined by the Board).
- 8.2.6. With a view to providing some degree of clarity on the matter, Section 4(1) of the Planning and Development Act, 2000, as amended, states that '*development by a local authority in its functional area*' and '*development carried out on behalf of, or 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*' shall be exempted development for the purposes of the Act. It is further stated that development consisting of the carrying out by a local authority of any works required for the construction of a new road or the maintenance or improvement of a road (such as that envisioned in the Active Travel Scheme) would be exempted development. However, local authority own development is also subject to the provisions of Section 179 of the Act which allow the Minister to prescribe a development or a class of development for the purposes of that section where he or she is of the opinion that '*by reason of the likely size, nature or effect on the surroundings of such development or class of development there should, in relation to any such development or development belonging to such class of development, be compliance with the provisions of this section and regulations under this section*' (Section 179 then sets out the procedures to be followed by local authorities as regards prescribed development, including the making available for inspection, by members of the public, of any specified documents, particulars, plans or other information with respect to proposed development; the making of submissions or observations to a local authority with respect to the proposed development; and the submission of a chief executive's report in relation to the proposed development for consideration by the elected members of the local authority). Article 80 of the Planning and Development Regulations, 2001, as

amended, thus prescribes a number of classes of development for the purposes of Section 179 of the Act with subsection (1)(k) referring to *'any development other than those specified in paragraphs (a) to (j), the estimated cost of which exceeds €126,000, not being development consisting of the laying underground of sewers, mains, pipes or other apparatus'* (at this point I would emphasise that Article 80(1) serves to prescribe development for the purposes of Section 179 of the Act and does not in itself refer to exempted development).

8.2.7. Having considered the limited nature of the development in question, and assuming the estimated cost of the works does not exceed €126,000 (noting that no costings have been provided with the application documentation), it would appear that the subject works do not involve a prescribed form of development and would likely constitute exempted development by reference to Section 4(1) of the Act were they to be carried out by the local authority (or its agents). However, given the lacunae in the information provided, most notably, the absence of any detailed drawings showing the exact location, positioning, dimensions, and particulars of the works proposed (and noting that the applicant is not in a position to provide said details), in my opinion, it would be inappropriate to make a determination in this instance and the referral should be dismissed (similar concerns would arise if the works were proposed to be carried out by a private individual).

8.2.8. In the event the Board is of the opinion that a determination of the referral is warranted, cognisance should be had to Section 4(1) of the Planning and Development Act, 2000.

8.3. **Appropriate Assessment:**

8.3.1. Having regard to the minor nature and scale of the development under consideration, the site location within an existing built-up area outside of any protected site, the nature of the receiving environment, and the proximity of the lands in question to the nearest European site, 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 Natura 2000 site.

9.0 Recommendation

- 9.1. I recommend that the Board should dismiss this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether (1) the making of a small opening in the boundary wall between Belmont Lawn and Ardagh Crescent, Blackrock, Dublin and (2) the construction of a short section of pathway across the lawn to link to the existing pathways across Belmont Lawn, is or is not development or is or is not exempted development:

AND WHEREAS Mr. Ruadhán Kenny, 16 Belmont Lawn, Stillorgan Road, Co. Dublin, A94 FW53, requested a declaration on the question from Dún Laoghaire Rathdown County Council and no declaration on said question was issued by the planning authority:

AND WHEREAS Mr. Ruadhán Kenny, 16 Belmont Lawn, Stillorgan Road, Co. Dublin, A94 FW53, referred the question for decision to An Bord Pleanála on the 22nd day of March, 2021:

AND WHEREAS An Bord Pleanála, having considered the nature of the question, is satisfied that the referral should not be further considered by it:

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 138 (1) of the Planning and Development Act, 2000, as amended, hereby dismisses the referral under subsection (1)(b)(i) of section 138 of the Act, based on the reasons and considerations set out below.

REASONS AND CONSIDERATIONS

The Board has decided to dismiss this referral having regard to the nature of the referral. It is considered that the question put by the referrer does not relate to a particular case, as is required under section 5(1) of the Planning and Development

Act, 2000, as amended. Insufficient detail has been provided in the documentation submitted to the Board of the location, positioning, dimensions, and particulars of the works proposed. In the circumstances, it is, therefore, considered that the referral should not be further considered by the Board.

Robert Speer
Planning Inspector

14th January, 2022