



An
Bord
Pleanála

Inspector's Report ABP-314044-22

Question

Whether the erection of a 1.2 metre high fence and the provision of edge kerbing along the southern boundary of the property fronting onto Seamount Road is or is not development or is or is not exempted development

Location

Rosenallis, Seamount Road,
Malahide, Co. Dunlin

Declaration

Planning Authority	Fingal County Council
Planning Authority Reg. Ref.	FS5/025/22
Applicant for Declaration	Richard Nolan.
Planning Authority Decision	Is not exempted development

Referral

Referred by	Richard Nolan.
Owner/ Occupier	Richard Nolan.
Observer(s)	None

Date of Site Inspection

5th March 2023.

Inspector

Lucy Roche

1.0 Site Location and Description

- 1.1. The lands, the subject of this Section 5 Referral, are located on the northern side of Seamount Road in Malahide, c25m west of the entrance to the residential development of Jameson Orchard. The referral site is bounded by the residential development of Knockdara to the west and north and Jameson Orchard to the east. The neighbouring lands to the south, on the opposite side of Seamount Road, also are in residential use and are subject to a separate Section 5 referral, reference: ABP314098-22.
- 1.2. The lands in question comprise Rosenallis, a detached two-storey house and its curtilage. The lands benefit from c70m of road frontage along Seamount Road commencing at the junction of Seamount Road and Knockdara and culminating at the entrance to Rosenallis at the sites southeast corner. The lands rise above the level of the public road. An existing hedgerow runs parallel to the tarmacadam carriage, above and behind which is a chain link fence with a line of mature trees beyond.

2.0 The Question

- 2.1. Whether the erection of a 1.2-metre-high fence and the provision of edge kerbing along the southern boundary of the property fronting onto Seamount Road is or is not development or is or is not exempted development

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On the 16th of May 2022, a request for a Declaration in accordance with Section 5 of the Planning and Development Act, 2000, as amended, on the above question was received by Fingal County Council from IMG Planning Limited on behalf of Richard Nolan.
- 3.1.2. On the 9th of June 2022 a declaration was issued by Fingal County Council stating that:

‘...the works comprising of the provision of a fence and kerb is development and is considered not to be exempt development under the Planning and Development Act 2000 as amended and the Planning and Development Regulations 2001 Article 9(i)(a)(iii) by reason of the location of the fence and curb being directly adjacent to the road carriageway which constitutes a traffic hazard.’

3.2. Planning Authority Reports

3.2.1. Planning Reports

The assessment of the Planning Officer in their report dated 9th June 2022 can be summarised as follows:

- The erection of fencing and provision of a kerb is development.
- The proposed metal fence to a height of 1.2m not being a metal palisade or other security fence, would appear to be exempt in relation to Class 5 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended). However, regard is had to the restrictions on exempted development listed under Article 9 of the Planning and Development Regulations 2001 (as amended) – in particular, Article 9(i)(a)(iii) which provides that a development would no longer be considered exempt if it would *‘endanger public safety by reason of traffic hazard or obstruction of road users.’*
- In considering Article 9(i) (a)(iii), the case planner has regard to the issues raised in the report of the Transportation Planning Section (set out in Section 3.2.2 below).
- The provision of a kerb at this location could lead to ponding of water on the public road thereby leading to additional issues which could potentially result in a traffic hazard.
- The proposed project individually or in combination with other plans or projects will not have a significant effect on any European site.

- The proposed works are not listed in Schedule 5 (Part 1 or Part 2) of the Planning and Development Regulations 2001 (as amended), nor does the proposed development meet the requirements for subthreshold EIA outlined in Section 103 of the Planning and Development Regulations 2001 (as amended). No environmental impact assessment EIA is therefore required.
- The proposed development of a fence directly adjacent to the road carriageway constitutes a traffic hazard to road users and as such the development of this fence and kerb would not be considered exempted development.

3.2.2. Other Technical Reports

Transportation Planning Section:

- The proposed development is located within a 50km/hr speed limit.
- The existing boundary hedge restricts sight lines at the entrance to below the required standards. Sightlines of 23m in each direction from a 2m setback of the road edge are required in accordance with the Design Manual for Urban Roads and Streets for a 30km/hr speed limit. Any proposed works to the boundary treatment should take account of the sightline requirements and should improve them, bringing them in line with current standards. As the proposed works do not address the substandard sightlines at the existing entrance and may reduce the available sightlines further. Consequently, in its current format the proposed development is a traffic hazard.
- The Transportation Planning Section recommends that the proposed development is refused as a traffic hazard.

4.0 Planning History

ABP314098: Current Referral on the question of Whether the erection of a 1.2-metre-high fence and the provision of edge kerbing along the Northern boundary of the property fronting onto Seamount Road is or is not development or is or is not exempted development.

5.0 Relevant Legal Referral Cases

5.1. Legal Cases:

The following cases concerns lands to the south of the appeal site on the opposite side of Seamount Road. These lands are the subject of referral case ABP314098.

Thomas Condron (Plaintiff) -v- Galway Holding Company Limited & ors, (Defendant) [2018] IEHC 233

On foot of the development permitted under ABP PL 06F.235190 the defendants constructed a footpath installed on the southern side of Seamount Road. This precipitated in an application for interlocutory relief by Mr. Thomas Condron, the Plaintiff and referrer in this case, who claimed that the lands on which the footpath was built question comprised part of his property.

The High Court Judgement delivered on the 17th of April 2018 found in favour of the Plaintiff ordering the Defendants to restore the disputed grass verge, and to reverse any changes which they had affected to same, and to pay damages.

The decision was appealed.

Thomas Condron (Respondent) -v- Galway Holding Company Limited & ors, (Appellants) [2021] IECA 216

The judgement, delivered by Whelan J on 30th of July 2021 found in favour of the Respondent. Whelan J in her judgement gave details consideration of the law regarding public rights of way, citing two common law presumptions:

1. *usque ad medium filum viae*; where landowners adjoining a public highway are each presumed to have contributed a portion of the land to the formation of the highway.
2. the “hedge-to-hedge” presumption:

Whelan J summarised that where it is contended that a public right of way over land has arisen under the doctrine of dedication and acceptance at common law, it will be generally presumed that, where a fence or hedge has been erected by the landowner in order to separate the lands enjoyed by him from the lands over which

the public are exercising rights of way, the land between the hedge and the made up or metalled surface of the road has been dedicated to public use as a highway and accepted by the public as such. This was a rebuttable presumption, with the burden of proof shifting to the Respondent to demonstrate that dedication and acceptance of the disputed grass verge could be inferred in all the circumstances of the case.

In this instance, the Court found that the imputed dedication of the disputed grass verge as part of a public right of way created at common law was not proven and the fundamental constituent element of acceptance by actual user by members of the public as a right of way was not proven in evidence. The Court held there was no evidence that the disputed grass verge was ever actually part of or used as part of a public road in the first place. Therefore, the issue of extinguishment of a public right of way had no relevance.

5.2. **Relevant Referrals:**

RL3499 On the question of whether the erection of a post and wire fence along a road is or is not development or is or is not exempted development, the Board decided (2017) that the erection of a post and wire fence along a road was development and was not exempted development, as follows:

- the erection of the fence comprised works, which constitutes development.
- the fence came within the scope of Class 11(a) of Part 1 of Schedule 2 of the Regulations
- the fence, as constructed, does not provide adequate width for passing vehicles, or adequate passing bays, and entrance splays are excessively narrow, which constrains access and results in additional and conflicting manoeuvring movements by large vehicles, and
- the fence, therefore, endangers public safety for vehicles and pedestrians by reason of traffic hazard and obstruction of road users.

RL3357 On the question of whether the erection of fencing, double gate and fencing off of open space of land is or is not development or is or is not exempted development. The Board decided (2015) that the erection of fencing, double gate and fencing off of open space of land was development and was not exempted development, as follows:

- the erection of the fencing and double gate constituted “works” that was development per S.2 and 3 of PDA, 2000
- the fencing was not exempt under Class 5 of Part 1 of Schedule 2 as it did not comprise a wooden fence and comprised a security fence
- the gateway was not exempt under Class 9 of Part 1 of Schedule 2 as the height exceeded two metres
- the fencing was not exempt under Class 11 of Part 1 of Schedule 2 as it exceeded 1.2 metres and was not a replacement fence.

6.0 Policy Context

6.1. Development Plan

6.1.1. Operative Plan: Fingal County Development Plan 2023- 2029

6.1.2. Zoning:

Zoning Objective: RS - Residential

Description Provide for residential development and protect and improve residential amenity.

Vision: Ensure that any new development in existing areas would have a minimal impact on and enhance existing residential amenity

6.2. Design Manual for Urban Roads and Streets, May 2019

Section 4.4.4 Forward Visibility –

Forward visibility is the distance along the street ahead which a driver of a vehicle can see. The minimum level of forward visibility required along a street for a driver to stop safely, should an object enter its path, is based on the Stopping Sight Distances (SSD). The SSD for roads with a design speed of 30km/hr is 23m.

Section 4.4.5 Visibility Splays.

Visibility splays are included at junctions to provide sight lines along the intersected street to ensure that drivers have sufficient reaction time should a vehicle enter their path. Visibility splays are applied to priority junctions where drivers must use their own judgement as to when it is safe to enter the junction.

Junction visibility splays are composed of two elements: the X distance and the Y distance.

- The X distance is the distance along the minor arm from which visibility is measured. It is normally measured from the continuation of the line of the nearside edge of the major arm, including all hard strips or shoulders. priority junctions in urban areas should be designed as Stop junctions, and a maximum X distance of 2.4 metres should be used. In difficult circumstances this may be reduced to 2.0 metres where vehicle speeds are slow and flows on the minor arm are low.
- The Y distance is the distance a driver exiting from the minor road can see to the left and right along the major arm. It is normally measured from the nearside kerb or edge of roadway where no kerb is provided. The Y distance along the visibility splay should correspond to the SSD for the design speed of the major arm.

In general, junction visibility splays should be kept clear of obstructions, however, objects that would not be large enough to wholly obscure a vehicle, pedestrian or cyclist may be acceptable providing their impact on the overall visibility envelope is not significant. Slim objects such as signs, public lighting columns and street trees may be provided, but designers should be aware of their cumulative impact.

6.3. Natural Heritage Designations

The lands, the subject of this referral, are not within or directly adjacent to any designated Natura 2000 site. The Malahide Estuary which is designated an SPA (Site Code:004025), SAC and proposed NHA (Site Code: 000205), is located to the north and east, at a distance of c750m at it's the closest point. The North-West Irish Sea SPA (Site Code004236) is located c1.3km to the east.

7.0 The Referral

7.1. Referrer's Case

The referral to the Board has been submitted by IMG Planning on behalf of Mr. Richard Nolan of Rosenallis, Seamount Road, Malahide, Co. Dublin. The points raised in the referral submission can be summarised as follows:

- The referrer's property, Rosenallis is a detached residential property located to the north of Seamount Road. The ownership extends to the centre of Seamount Road.
- The extent of the carriageway of Seamount Road along the southern boundary of the property is not formally defined at present. There is hedge planting parallel to the tarmacadam carriageway but there is no physical demarcation in the space between the hedge and the edge of the tarmacadam.
- The applicant wishes to erect a 1.2m high metal mesh fence along the southern boundary of the property, to the south of the existing hedge, a length of some 70m. The fence will be positioned on the applicant's property behind a 150mm high concrete kerb along the northern edge of the existing edge of the tarmacadam carriageway.
- In making its decision, the County Council agreed that:
 - The proposed fence and kerb are 'works' and thus 'development' as defined in Section 3(1) of the Planning and Development Act 2000, as amended.

- By reason of its height, the proposed fence constitutes ‘exempted development’ under Class 5 in Part 1 of Schedule 2 of the Planning and Development Regulations 2001, as amended.
- The applicant does not accept that the provisions of Article 9(1)(a)(iii) apply and contend that the proposed development is exempted development.
- The proposed development would not contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act. – the restriction on exemption under Article 9(1)(a)(i) of the regulations does not apply.
- As the proposed location is positioned beyond the existing edge of the tarmac carriageway it will not obstruct any right of way. The restriction on exemption under Article 9(1)(a)(xi) of the regulations does not apply.
- The Transportation Department has taken a wholly absolute position in respect of DMURS. It does not have regard to the nature of the entrances in question or their immediate context and conditions in the vicinity, nor the precise details of the proposed development.
- The standards for forward visibility and visibility splays in DMURS (Section 4.4.4 and 4.4.5) are noted.
- The entrance to Seamount Road in this instance is a well-established entrance to a residential property, which inherently has a low intensity of usage whose gates are set back 5.9m from the edge of the carriageway. A vehicle existing the property therefore has the space to stop and look for vehicles before entering the carriageway.
- There is well established hedge planting parallel to the carriageway along the southern boundary to the west of the entrance. Save for removing or severely reducing the height of the hedge, with the consequential loss of privacy, which would be unacceptable to the applicant, a stopping sight distance (SSD) of 23 metres will not be achieved irrespective of whether the proposed development is carried out or not.
- At 1.2m above the level of the carriageway, the height of the proposed fence is less than the existing hedge so its presence would not impact on the overall

visibility envelope as it current exists to any significant extent. Even if the hedge was cut down or removed entirely, the presence of the fence would not significantly obstruct the view of the road to the west by a person in a vehicle leaving the entrance, particularly as it is of a mesh type design.

- It is therefore submitted that the placing of a fence of the proposed design along the southern boundary of the subject property will not result in a traffic hazard to vehicles on Seamount Road or the applicant. Accordingly, the provisions of Article 9(1)(a)(iii) of the regulations does not apply.

7.2. Planning Authority Response

The planning authority had no comment to make in respect of this referral.

7.3. Further Responses

None

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000

Section 2 (1) of the Act provides the following definitions:

“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...
“structure”	means any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined.” and- (a) Where the context so admits, includes the land on, in or under which the structure is situate,”

Section 3(1) of the Act states the following in respect of ‘development’:

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

Section 4 (1) sets out various forms and circumstances in which development is exempted development for the purposes of the Act.

Section 4(2)(a)(i) “The Minister may by regulations provide any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that – (i) By reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or”

8.2. Planning and Development Regulations, 2001

Article 6(1) “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.”

Schedule 2, Part 1- (Exempted Development General)

The relevant section of the Regulations which is referred to herein is Class 5. Class 5 and its conditions and limitations are as follows:

Column 1: Description of Development	Column 2: Conditions and Limitations
CLASS 5 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,	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>blocks with decorative finish, other concrete blocks or mass concrete.</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 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>
<p>CLASS 11</p> <p>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.</p>	<p>1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres.</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>
<p>Part 3 Exempted Development - Rural</p>	
<p>CLASS 4</p> <p>The construction, erection or maintenance of any wall or fence, other than a fence of sheet metal, or a wall or fence within or bounding the curtilage of a house.</p>	<p>1. The height of the wall or fence, other than a fence referred to in paragraph 2, shall not exceed 2 metres.</p> <p>2. The height of any fence for the purposes of deer farming or conservation shall not exceed 3 metres.</p>

Article 9(1) Restrictions on Exemption

“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-
 - (iii) endanger public safety by reason of traffic hazard or obstruction of road users,
 - (xi) obstruct any public right of way

8.3. **Roads Act, 1993**

Section 2(1)

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

“” road” includes-

- (a) any street, lane, footpath, square, court, alley, or passage,
- (b) any bridge, viaduct, underpass, subway, tunnel, overpass, overbridge, flyover, carriageway (whether single or multiple), pavement or footway,
- (c) any weighbridge or other facility for the weighing or inspection of vehicles, toll plaza or other facility for the collection of tolls, service area, emergency telephone, first aid post, culvert, arch, gully, railing, fence, wall, barrier, guardrail, margin, kerb, lay-by, hard shoulder, island, pedestrian refuge, median, central reserve, 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 for the protection of the environment, or

(ii) prescribed by the Minister;"

9.0 **Assessment**

9.1. **Introduction:**

9.1.1. It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the fence or edge kerbing in respect of the proper planning and sustainable development of the area, but rather whether the matter in question constitutes development, and if so, whether it falls within the scope of exempted development.

9.1.2. The main parties to this referral are as follows:

- Mr Richard Nolan (Referrer)
- Fingal County Council

9.1.3. Mr Richard Nolan has sought declaration from An Bord Pleanála in respect of whether the erection of a 1.2-metre-high fence and the provision of edge kerbing along the southern boundary of the property fronting onto Seamount Road is or is not development or is or is not exempted development. It is of relevance to note that a separate declaration has been sought by Mr. Thomas Condrón (ABP Ref: 314098-22) in respect of whether the erection of a 1.2-metre-high fence and the provision of

edge kerbing along the northern boundary of the property fronting onto Seamount Road is or is not development or is or is not exempted development.

9.2. Is or is not development:

- 9.2.1. The first question before the Board relates to whether or not the proposal comprises development. As Per Section 3(1) of the Planning and Development Act 2000 (as amended), “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.
- 9.2.2. The erection of a fence and the provision of edge kerbing would I consider constitute “works”, as defined by Section 2 of the Planning and Development Act, as it would involve acts of excavation and the construction. Therefore, the erection of the fence and the provision of edge kerbing constitutes “development”.

9.3. Is or is not exempted development:

- 9.3.1. The next element of the question is whether the development is or is not exempted development. Development can be exempted from the requirement for planning permission by either Section 4 of the Planning and Development Act, 2000 (the Act), or Article 6(1) and 9(1) of the planning and Development Regulations 2001 (as amended) (the Regulations).
- 9.3.2. Section 4(1) of the Act sets out provisions in relation to exempted development. There is no relevant exemption under Section 4 of the Planning and Development Act, 2000.
- 9.3.3. Article 6 of the Regulations provides that development of a class specified in Schedule 2 to the Regulations shall be exempted provided that the conditions and limitations attached to those various classes are met. In order to qualify for exemption under a particular class, the development must meet the definitions set out in Column 1 and the conditions and limitations set out in Column 2. These classes of development can, however, be de-exempt under the restrictions set out in article 9. This evaluation will first consider if the works fall within the said classes of exempt development, and second whether they would be de-exempted by virtue of article 9.

- 9.3.4. The first step is, therefore, to consider into which Class, if any, the development in question falls. I have reviewed Schedule 2 of the regulations and I note that Classes 5 and 11 of Schedule 2, Part 1 and Class 4 of Schedule 2, Part 3 of the Regulations provide exemptions for fencing / boundary treatment. The exemption provided under Class 5 relates to development within or bounding the curtilage of a house, whereas the exemptions under Classes 11 and 4 relate to development other than within or bounding the curtilage of a house, Class 4 applying specifically to rural development.
- 9.3.5. In this instance, the referrer (Mr. Richard Nolan) is seeking to erect a fence along the southern boundary of his property, Rosenallis, a detached house on a large plot that is bounded by Seamount Road to the south and the road serving Knockdara to the west. In accordance with the details on file, Mr. Nolans ownership extends to the centre of Seamount Road, and I note that the ownership of the land has not been disputed. On the basis of the information available I am satisfied that the erection of a fence as proposed would comprise development within or bounding the curtilage of a house(s) and therefore Class 5 of Schedule 2, Part 1 of the Regulations is the relevant class. I note that both parties in this case (the referrer and planning authority) consider that the development falls within Class 5.

Column 1: Description of Development	Column 2: Conditions and Limitations
<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>	<ol style="list-style-type: none"> 1. The height of any such structure shall not exceed 2 metres or, in the case of a wall or fence within or bounding any garden or other space in front of a house, 1.2 metres. 2. Every wall other than a dry or natural stone wall bounding any garden or other space shall be capped and the face of any wall of concrete or concrete block (other than blocks with decorative finish) which will be visible from any road, path or public area, including public open space, shall be rendered or plastered. 3. No such structure shall be a metal palisade or other security fence.

- 9.3.6. The exemption provided in Class 5 includes for a broad range of boundary types/treatment; however, in my opinion the exemption does not extend to the boundary type proposed i.e., a 1.2m high metal mesh fence to the rear of a 150mm high concrete kerb. Class 5 specifies a 'wooden' fence while the fence in question comprises a metal mesh fence. The Oxford English Dictionary defines railing as '*a rail fence, esp. one of metal; a fence or barrier constructed of rail*'; rail being '*a horizontal bar, usually of wood or metal, fixed on upright supports as part of a fence or barrier; a piece of wood, metal, etc., used for this...*'. As the proposed fence is of a wire mesh construction rather than rail, it does not in my opinion constitute a railing. It follows, therefore, that the proposed fencing being a metal mesh fence and not a "railing or wooden fence or a wall" would not come within the scope of Class 5 of Part 1, Schedule 2 of the Planning and Development Regulations 2001 (as amended).
- 9.3.7. Further to the above, I note that Class 5 includes the following condition/limitation: 3. *No such structure shall be a metal palisade or other security fence.* I note the phrasing '*No such structure*' which I consider includes all the structures set out under Class 5, including a gate or gateway. Therefore, I am satisfied that the inclusion of this condition / limitation does not imply that the exemption provided under Class 5 extends to other forms of metal fencing.
- 9.3.8. Having reviewed Section 4 of the Act and Article 6 and associated schedules of the Regulations, I do not consider there is any provision which would allow for the erection of a 1.2-metre-high fence and the provision of edge kerbing along the southern boundary of the property fronting onto Seamount Road, to constitute exempted development.

9.4. **Restrictions on exempted development**

- 9.4.1. Notwithstanding the conclusion reached in Section 8.3 that the erection of a 1.2-metre-high fence and the provision of edge kerbing along the northern boundary of the property fronting onto Seamount Road is development but is not exempted development, I consider it reasonable, in light of conclusions reached by Fingal County Council in their declaration of the 9th of June 2022, to have regard to Article 9(1) of the Regulations.

- 9.4.2. Article 9(1) states that 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 meet one or more of a series of matters arising. While Article 9(1)(a) includes a number of considerations, I consider sub-article (iii) as highlighted by Fingal County Council to be the most relevant. In their determination of the application, Fingal County Council concluded that the fence and edge kerbing, the subject of the referral, came within the scope of Class 5 of Part 1 of Schedule 2, Planning and Development Regulations 2001 (as amended) but was not exempted development having regard to Article 9(1)(a)(iii) as it would endanger public safety by reason of traffic hazard and obstruction of road users.
- 9.4.3. On consideration of this issue the Planning Authority had regard to the report received from the Transportation Planning Section which states that the existing boundary hedge restricts sight lines at the entrance to below the required standards and that any proposed works to the boundary treatment should take account of the sightline requirements and improve them, bringing them in line with current standards. The report goes on to state that the proposed works do not address the substandard sightlines at the existing entrance and will reduce the available sightlines further and that in its current format the proposed development is a traffic hazard.
- 9.4.4. Having inspected the site I agree with the opinion of the Transportation Planning Section that existing boundary hedge impedes sightline distances at the entrance to the referrer's property; however, I do not agree that in the context of determining whether a development is or is not exempted development, that there is a requirement that the works proposed at the boundary improve sightline distances. The question of relevance is whether the proposed works (fence and kerbing) would, in themselves, endanger public safety by reason of traffic hazard or obstruction of road users.
- 9.4.5. The fence in question is to be located on the northern boundary of Seamount Road, parallel to the tarmac edge of the road. The fence as shown on the plans submitted, extends over a distance of c70m, commencing at the eastern side of the junction of Seamount Road and Knockdara and culminating at the entrance to

Rosenallis. Seamount Road, at the location of the proposed works, is narrow (between c3.5 and c4.5m) and is devoid of footpaths. A 30km/hr speed limit applies. In accordance with current standards (DMURS 2019) sightlines of 23m in each direction from a 2m setback of the road edge are required for a 30 km/hr. speed limit.

9.4.6. As previously noted, existing hedgerow planting along the referral sites southern / roadside boundary currently restricts sightline distances to the west of the entrance. The referrer makes the case that at a height of 1.2m the fence is lower than the existing hedge so its presence would not impact on the overall visibility envelope, and that even if the hedge was cut down or removed entirely the presence of the fence would not significantly obstruct the view of the road to the west particularly given its mesh type design. Having considered the plans submitted and inspected the site I am satisfied that the proposed fence would fall partially within the visibility splay at the entrance. While I note the height and design of the proposed fence and the case made by the referrer, I consider that it would, due to its location on the edge of the tarmac road carriageway, to the front of the existing hedge and within the visibility splays of existing entrance, reduce visibility at the entrance where sightlines are already impeded by roadside vegetation. I also consider that it has the potential to restrict access to the land and vegetation to the rear of the proposed fence line, for maintenance and landscaping purposes.

9.4.7. Further to the above, I am concerned that the erection of the fence as proposed, would reduce the available sightline distances to the east of the junction of Seamount Road and Knockdara. The lands to the east of the junction rise above level of the public road, they are landscaped with trees and low-level planting and include signage and nameplates for Knockdara. Sightlines to the east of the junction are currently restricted by the existing hedge / roadside vegetation along Seamount Road. The proposed fence, which is shown to wrap around the curvature of the junction, would in my opinion further obstruct the visibility envelope to the east of the junction.

9.4.8. The provision of edge kerbing along the edge of the existing roadside carriageway as proposed would I consider, alter the profile of the verge thereby interfering with the free flow of surface water off the road. As noted by the planning authority in their

assessment, this could lead to the ponding of surface water on the road which could result in a traffic hazard.

9.5. **Appropriate Assessment – Screening**

- 9.5.1. Having regard to the nature and limited scale of the works which are the subject of this referral, the separation distances between the site and European sites and the developed nature of the landscape between the site and European sites, it is considered that no Appropriate Assessment issues arise and that the works which are the subject of this referral would not be likely to have a significant effect either individually or in combination with other plans or projects on any European site.

9.6. **EIA - Screening**

- 9.6.1. The works which are the subject of this referral do not fall within a class of development set out in Part 1 or Part 2 of Schedule 5 of the Planning and Development Regulations, 2001, as amended, and therefore are not subject to EIA requirements.

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 erection of a 1.2-metre-high fence and the provision of edge kerbing along the southern boundary of the property fronting onto Seamount Road is or is not development or is or is not exempted development

AND WHEREAS Richard Nolan requested a declaration on this question from Fingal County Council and the Council issued a declaration on the 9th day of June 2022 stating that the matter was development and was not exempted development:

AND WHEREAS Richard Nolan referred this declaration for review to An Bord Pleanála on the 6th day of July 2016:

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) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (d) Classes 5 and 6 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001, as amended,
- (e) The pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The erection of a 1.2-metre-high fence and the provision of edge kerbing along the southern boundary of the property fronting onto Seamount Road constitutes the carrying out of works which comes within the meaning of development in section 3(1) of the Planning and Development Act 2000,
- (b) The fencing being a metal mesh fence and not a “railing or wooden fence or a wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete” would not come within the scope of Class 5 of Part 1, Schedule 2 of the Planning and Development Regulations 2001 and is therefore not exempted development.
- (c) In any event, the development would not be exempted development having regard to Article 9(1)(a)(iii) as it would endanger public safety by reason of traffic hazard and obstruction of road users.

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 erection of a 1.2-metre-high fence and the provision of edge kerbing along the southern boundary of the property fronting onto Seamount Road is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Lucy Roche
Planning Inspector

28th August 2023