



An  
Bord  
Pleanála

## Inspector's Report ABP-314098-22

### Question

Whether the erection of a 1.2 metre high fence and the provision of edge kerbing along the northern boundary of Seamount Road, Malahide is or is not development or is or is not exempted development.

### Location

Seamount Road, Malahide, County Dublin.

### Declaration

Planning Authority

Fingal County Council

Planning Authority Reg. Ref.

FS5/029/22

Applicant for Declaration

Thomas Condron.

Planning Authority Decision

Is not exempted development

### Referral

Referred by

Thomas Condron.

Owner/ Occupier

Thomas Condron.

Observer(s)

None.

**Date of Site Inspection**

5<sup>th</sup> 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 southern side of Seamount Road in Malahide, just west of the entrance to the residential development of Jameson Orchard. The lands are in residential use and comprise a row of three detached dwellings, the most westerly of which is of recent construction (FCC PL. Ref: F13A/0010 as amended under F14A/0014). The lands benefit from c100m of road frontage along Seamount Road and are served by three vehicular and one pedestrian entrances. The roadside boundary comprises mixed hedgerow interspersed with trees that is setback between c1.3 and 2.4m from the tarmac carriageway. A c15m stretch of footpath has been constructed to the front of the dwelling permitted under FCC PL. Ref: F13A/0010 (as amended).
- 1.2. The neighbouring property to the north (on the opposite side of Seamount Road) is occupied by Rosenallis, a detached two storey dwelling and its curtilage. This property is the subject of a separate referral to the Board, ABP314044-22.

## 2.0 The Question

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.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

- 3.1.1. On the 30<sup>th</sup> 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. The request was made by IMG Planning Limited on behalf of Mr. Thomas Condron.
- 3.1.2. On the 20<sup>th</sup> 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 kerb 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 17<sup>th</sup> 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 come within the scope of 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), regard is had to the issues raised in the report of the Transportation 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:

- The proposed development is located within a 30km/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 30 km/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 will reduce the available sightlines further. In addition, the ground levels at the western access are below the road level and the proposed boundary treatment would further add to the issue of reduced sightlines. 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:

### 4.1. Subject site:

F13A/0010 Permission granted for a detached storey and a half house with new entrance and ancillaries.

F14A/0014 Permission granted for alterations to previously approved F13A/0010

#### 4.2. Neighbouring sites:

ABP314044 Current Referral on the question 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.

ABP PL 06F.235190 Permission granted (2010) for 159 dwellings with ancillary works including upgrading works to Seamount Road.

#### 5.0 Relevant Legal and Referral Cases:

##### 5.1. Legal Cases:

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 17<sup>th</sup> 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 30<sup>th</sup> 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. Thomas Condron of Seamount Road, Malahide, Co. Dublin. The points raised in the referral submission can be summarised as follows:

- The referrer's property is located on the southern side of Seamount Road and comprises three houses – one occupied by the applicant the other two by family members. The applicant's ownership extends to the centre of Seamount Road.
- The extent of Seamount Road along the northern boundary of the property is not formally defined. There is hedge planting parallel to but set back from the tarmacadam carriageway – there is no physical demarcation in the space between the hedge and the edge of the carriageway.
- The applicant wishes to erect a 1.2m high metal mesh fence along sections of the northern boundary of the property, approximately 45m in total. The fence

will be positioned on the applicant's property behind a 150mm high concrete kerb along the southern edge of the existing edge of the tarmac carriageway.

- The fence and edge kerbing will not be placed along the northern boundary of the dwelling permitted under FCC Planning Ref: 13A/0010 as amended under 14A/0014 as the conditions of this permission require the front boundary to be set back 4m from the edge of the road in order to provide for a 1.8m footpath and grass verge.
- 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 applicants do not accept that the provisions of Article 9(1)(a)(iii) 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.
- As shown on the attached figure (separate, unlabelled, drawing submitted with referral) it is the case that a 2.0m x 23m Visibility Splay is achieved at each entrance. The proposed fence is located within limited parts of the splays; however, it is submitted that notwithstanding the general advice in DMURS that visibility splays should be kept clear of obstructions, the design of the proposed fence and its height (1.2m above the level of the carriageway, are such that its presence will not wholly obscure a vehicle, pedestrian or cyclist using Seamount Road.

- The proposed development is positioned only where there is no planning condition attached to 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 tarmacadam 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.

## 7.2. Planning Authority Response

The Planning Authority's response to the issues raised in the grounds of appeal is set out in correspondence received on 15<sup>th</sup> August 2022 and can be summarised as follows:

- This Section 5 was assessed against Articles and Sections contained within the Planning and Development Act 2000 as amended and the Planning and Development Regulations 2001 as amended.
- The sightline drawing provided is incorrect and does not comply with the requirements of the relevant standards. DMURS is the appropriate standard, and the sightline requirements take cognisance of the urbanised area. The safe stopping distances are the minimum required sightlines – no further reductions can be applied.
- The hedgerow along the southern boundary will impede the sightlines in both directions along Seamount Road and this is not properly represented on the drawing provided.
- There is significant additional pedestrian /cyclist activity that did not exist before the Jamestown's Orchard development. Issues of sightlines and in particular pedestrian safety needs to be addressed comprehensively through a planning application.
- The appeal submission does not address the safety issues raised and the traffic hazard associated with the proposed development remains.

## 8.0 Statutory Provisions

### 8.1. Planning and Development Act, 2000 (as amended)

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 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 (as amended)

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:

<b>Column 1:</b> <b>Description of Development</b>	<b>Column 2:</b> <b>Conditions and Limitations</b>
<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"> <li>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.</li> <li>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.</li> <li>3. No such structure shall be a metal palisade or other security fence.</li> </ol>
<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</p>	<ol style="list-style-type: none"> <li>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.</li> <li>2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road</li> </ol>

(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.	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.
Part 3 Exempted Development - Rural	
<p><b>CLASS 4</b></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 Thomas Condron (Referrer)



- Fingal County Council

9.1.3. Mr Thomas Condrón 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 northern 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. Richard Nolan (ABP Ref: 314044-22) 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.

## 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.

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, that 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. Class 5 provides an exemption for development within or bounding the curtilage of a house, whereas Classes 11 and 4 provide an exemption for 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. Thomas Condron) is seeking to erect a fence along sections of the northern boundary of the property fronting onto Seamount Road. In accordance with the details on file, the lands in question are owned by the referrer and I note that the ownership of the land has not been disputed. As the property in question is in residential use, comprising three houses, I am satisfied that the erection of a fence along the property's northern boundary 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.

<b>Column 1:</b> <b>Description of Development</b>	<b>Column 2:</b> <b>Conditions and Limitations</b>
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	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>brick, stone, 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>
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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 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 (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

northern 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 20<sup>th</sup> of June 2022, to consider 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) “...*endanger public safety by reason of traffic hazard and obstruction of road users*” as highlighted by Fingal County Council to be the most relevant. Sub-article (xi) “...*obstruct any public right of way*” is also noted.
- 9.4.3. In their determination of the application, Fingal County Council concluded that the fence and edge kerbing came within the scope of Class 5 of Part 1 of Schedule 2, Planning and Development Regulations 2001 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.
- 9.4.4. 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 entrances 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.

- 9.4.5. Having inspected the site I agree with the opinion of the Transportation Planning Section that existing boundary hedge impedes sightline distances at entrances 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 any works proposed improve sightlines. The question of relevance is whether the works (fence and kerbing) would, in themselves, endanger public safety by reason of traffic hazard or obstruction of road users.
- 9.4.6. The fence is to be located on the southern boundary of Seamount Road, a residential cul-de-sac which culminates at the entrance to Jameson Orchard, a residential development of 150+ units. 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.
- 9.4.7. The documentation submitted in support of the referral includes an untitled drawing which shows visibility splays of 2.0m x 23m at two of three vehicular entrances serving the referrers holding. The newly constructed entrance serving the dwelling permitted under FCC Ref: F13A/0010, has not been detailed.
- 9.4.8. The proposed fence is to be erected along the southern edge of the existing edge of the tarmacadam carriageway of Seamount Road. As detailed in the submitted drawing, the proposed fence is located partially within the visibility splays of existing entrances. The case is made in the referral that, notwithstanding the general advice in DMURS that visibility splays should be kept clear of obstructions, the design of the proposed fence (mesh rather than solid panels) and its height (1.2m above the level of the carriageway), are such that its presence will not wholly obscure a vehicle, pedestrian or cyclist using Seamount Road.

9.4.9. While I note the height and design of the proposed fence and the case made by the referrer, having reviewed the plans submitted and inspected the site it is my opinion that the proposed fence would, due to its location on the edge of the tarmac carriageway and within the visibility splays of existing entrances, further reduce visibility for vehicles existing onto Seamount Road. Sightline distances at the entrance are already impeded by roadside vegetation, and I am concerned that the proposed fence would restrict access to the land and vegetation for maintenance and landscaping purposes. In light of the above and having regard to the level of traffic and in particular the level of pedestrian and cyclist activity on Seamount Road and to the lack of adequate pedestrian facilities in the vicinity, I consider that the erection of the fence as proposed would endanger public safety by reason of traffic hazard.

9.4.10. Further to the above, the proposed fence if erected would I consider result in the enclosure of land, i.e., the space between the hedge and the tarmac carriageway, which was previously accessible and which would have acted as a refuge zone for pedestrians / vulnerable road users allowing them to step on and off the carriageway to let vehicles pass safely. Similarly, it would have provided additional space for passing vehicles, reducing the need for vehicles to reverse to the nearest entrance /pull-in point. I therefore consider that the erection of the fence as proposed would endanger public safety by reason of traffic hazard given the obstruction of road users due to the elimination of the verge and the reduction in the space available to road users.

9.4.11. The provision of edge kerbing 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.

9.4.12. Regarding Article 9(1)(a)(xi), I refer to the Board to the legal judgments summarised in Section 5.1 of this report, in particular the position held by the Court on the issue of whether a right of way existed over the grass verge i.e. That there was no evidence that the disputed grass verge was ever actually part of a public road. On

this basis, do not think that it would be reasonable to conclude that the proposed works would result in the obstruction of a public right of way.

#### 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 developed nature of the landscape between the site and European sites and the separation distances 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 northern boundary of the property fronting onto Seamount Road is or is not development or is or is not exempted development

**AND WHEREAS** Thomas Condrón requested a declaration on this question from Fingal County Council and the Council issued a declaration on the 20th day of June 2022 stating that the matter was development and was not exempted development:

**AND WHEREAS** Thomas Condrón referred this declaration for review to An Bord Pleanála on the 15<sup>th</sup> 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 planning history of the site,
- (f) 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 northern 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 northern 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.*

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Lucy Roche  
Planning Inspector

28<sup>th</sup> August 2023