



An
Bord
Pleanála

Inspector's Report ABP-314225-22

Question

Whether the gateway means of access to a public road that was formed in the shared boundary wall between Dosel Drive and the rear of No. 11 Arbour Court, Grange, Cork, is or is not development or is or is not exempted development.

Location

11 Arbour Court, Grange, Douglas, Cork.

Declaration

Planning Authority

Cork City Council

Planning Authority Reg. Ref.

R72422

Applicant for Declaration

Alan Duggan.

Planning Authority Decision

Is development and is exempted development.

Referral

Referred by

Alan Duggan.

Owner/ Occupier

Daragh Gosnell

Observer(s)

None.

Date of Site Inspection

24.05.2023

Inspector

Fiona Fair

1.0 Site Location and Description

- 1.1. The subject site comprises a bungalow dwelling located at 11 Arbour Court, Grange, to the south of Cork city centre. The site is located within an established suburban residential area south of the N40 Kinsale Road and west of Douglas.
- 1.2. The subject referral relates to the rear boundary wall of the dwelling at No. 11 Arbour Court where the site abuts Dorsel Drive. The rear boundary of the subject property comprises a brick wall with wooden fencing along the top of the wall to increase its height. There is an existing wooden door with glazing in the rear boundary wall, of No. 11, which adjoins / opens onto a wide, tree lined grass verge within Dorsel Drive.

2.0 The Question

- 2.1. Whether the gateway means of access to a public road that was formed in the shared boundary wall between Dorsel Drive and the rear of No. 11 Arbour Court, Grange Cork, is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

It is considered that the construction of a pedestrian access gate in an existing rear boundary wall is development and is exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

- It is considered that the construction of a pedestrian access gate in an existing rear boundary wall is development and is exempted development.

3.2.2. Other Technical Reports

- None on file.

4.0 Planning History

Reg. Ref. 18/04149 Permission Granted for extensions and alterations to No. 11 Arbour Court. Works include the raising of the roof, 5 no. roof lights, 1st floor bedroom, conversion of existing front window to a bay window, new porch, additional high level window and conversion of existing car – port to a bedroom.

5.0 Policy Context

None Relevant.

5.1. Natural Heritage Designations

None Relevant

6.0 The Referral

6.1. Referrer's Case

A referral has been submitted by Mr. Alan Duggan

- Asserts that in assessing the subject development and reporting on the Section 5 Declaration Ref R668/21 the planning authority has somehow overlooked the provisions of article 9(1)(A)(i) (ii) and (iii) of part 2 of the Planning and Development Regulations, 2001. Article 9 of the Planning and Development Regulations, 2001 set out certain circumstances in which developments to which Article 6 of the regulations relates shall not be exempt development.
- Of the view that the subject gateway means of access to a public road constitutes development that is not exempted development for the purposes of the Planning and Development Act, 2000.
- The planning authority executive planner in her report dated 17th of June 2021 and the Section 5 declaration makes no reference to the enforcement case file E8320 relating to the subject site at No. 11 Arbour court or to the concerns of the residents of Dosel drive.

- In the subject case the surfaced carriageway of the public road, Dosel Drive, measures approximately 9.2 meters in width.
- The formation of any new means of access to a public road the surfaced carriageway of which exceeds 4 metres in width should always be subject to careful consideration by the responsible PA.
- Any new access to public road, in excess of 4m, may serve to endangered public safety by reason of traffic hazard or obstruction of road users.
- The potential for traversing across and an established section of shared residential amenity space creates the issue of public liability in the event of any unforeseen incident.
- The formation of a means of access onto the public road at Dosel drive, as per the subject gateway, serves to change the nature of the use of the established shared residential amenity space and creates the potential for associated traffic hazard, parking of vehicles, noise disturbance, anti social activity, and overall detriment to the residential amenity of the area.
- The declaration of exempted development by the planning authority as per the Section 5 declaration reference R724/22 - 11 Arbour Court, Grange, Douglas amounts to a misinterpretation of the Planning and Development Act 2000, as amended.
- The subject development creates a dangerous precedent for the formation of other means of access onto the public road at Dosal Drive by similar breaches and the established boundary wall.
- Condition number 7 and 8 of the governing planning permission P. 2266/77, relating to tree planting and screening, are applicable.
- Photos attached of pedestrian gate in the boundary wall.

6.2. Planning Authority Response

- A response was received from Cork City Council on the 15th August 2022. It states both reports contain all the relevant details and specifics that informed the decision.

- The only other additional information that may be of relevance is the term 'Public Road'. The legislation refers to access being made onto a 'Public Road'. The road in this instance is an estate road (albeit quiet a wide one) and there is no evidence that this has ever been declared a public Rd. (Which requires it to go through certain legislation itself).
- It is stated: 'In this instance I could not be fully satisfy that the road in question is a 'public road', as defined in legislation'.
- It is confirmed that the planner did have did not have any telephone conversation with any parties in relation to with Section 5 referral.

6.3. **Owner/ occupier's response**

A response was received from the owner of the property at No. 11 Arbour Court, Daragh Gosnell, to the referral submitted. It is summarized as follows:

- The boundary wall is within the curtilage of 11 Arbour Court. It is not a party wall with shared ownership. If it blew down in the morning it would not be the council or the residents of Dosal Drive. responsible for it or even half of it. It won't be the owner of 11 Arbour Court.
- Mr. Duggan states that the gateway accesses are public road, but the planner clearly states that there is 5 metre to cross before a person reaches the edge of the estate road. To add to this:
 - You can walk along the length of the public amenity space and reach a footpath without ever having to cross the carriageway.
 - There are nearly always cars parked on the side of the road and therefore there are never cars driving along the edge of the road.
 - Whether or not the gate was in existence prior to submitting any question to the planning authority is irrelevant.
 - There are numerous precedents set to put a gate in a boundary wall in the manner the subject of this referral.

- The submission is accompanied by a map image of the Arbour Court and Kingsford park estates with a number of new and old pedestrian access gates highlighted all:
 - entering out to public community space.
 - some with less than 3 meters of public road.
- Planning permissions have also been granted for similar development (pedestrian gates within boundary walls) on other surrounding sites e.g. within 100 meters of 11 Arbour Court - Planning Reg. Ref. 116459
- The raising of conditions (6 & 7) attached to the original planning permission for the estate, date back to some 45 years ago. Would question their relevance.
- The pedestrian gate has been in existence for over 15 months, it does not cause a traffic hazard, the owners of No. 11 have never parked a car on Dosel Dive. The gate does not give rise to noise disturbance or antisocial behavior. Fail to see how this gate is causing any detriment to the residents of Dosel Drive.
- The pedestrian gate is used by the owners' children and their friends to visit grandparents in Grange Heights – it is a marginally faster but a much safer route rather than using main roads.
- Guidance should be issued to the council in relation to Section 5 applications where the applicant has asked a question about one address declaring themselves the owner at that address but provides a different address for communication to be sent.
- The council should be obliged to always furnish a copy of the request and subsequent declaration to the postal address for which the question is being asked.
- Sincerely hope that after two successful Section 5 Declarations by Cork City Council, that the matter can be finally resolved.

6.4. Further Responses

A further observation was submitted by Alan Dggan, new issues only are summarised as follows:

- A review of historical planning precedent in relation to section 5 Declarations has exposed an inconsistency in the pattern of decision – making by the relevant Planning Authority, Cork City Council.
- Previous pedestrian access between the houses at 14 and 15 Arbour Court giving access to Doseil Drive, as purported by Daragh Gosling, never actually physically existed and does not currently exist.
- There was never a right of way or easement across the subject section of land.
- Party walls on the boundary between two land parcels are jointly owned by the adjoining landowners.
- Respectfully submit that any new means of access to a public road the surface carriageway which exceeds 4 meters in width should always be subject to careful consideration by the responsible planning authority. Any new access to a public road may serve to endanger public safety by reason of traffic hazard or obstruction of road users.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000(as amended)

In order to assess whether or not the proposal is or is not development or is or is not exempted development, regard must be had to the following legislation:

Planning and Development Act, 2000 (as amended):

Part 1, S.2 (1) Defines, among other things,

“structure” – as any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined.”

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

Also noted is that: 'Public Road' has the same meaning as in the Roads Act, 1993 i.e: '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.

S.3.(1) In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

S.4(1)(h) Provides for development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

7.2. **Planning and Development Regulations, 2001(as amended)**

Article 6 refers to Exempted Development i.e. (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.

Article 9(1) - Development to which article 6 relates shall not be exempted development for the purposes of the Act—

(a) if the carrying out of such development would—

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,

(ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width,

(iii) endanger public safety by reason of traffic hazard or obstruction of road users.

(xi) obstruct any public right of way.

Schedule 2, Part 1 (Exempted Development General) Class 5 of Part 1 of the Second Schedule to the Regulations states as follows:-

Column 1 Description of Development	Column 2 Conditions and Limitations
<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 face of any wall of concrete or concrete block, which shall be visible from any road path or public area, including public open space, shall be rendered or plastered. 3. No such structure shall be metal palisade or other security fence”.

Class 9 of Part 1 of the Second Schedule to the Regulations states as follows:-

Column 1 Description of Development	Column 2 Conditions and Limitations
<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>	<ol style="list-style-type: none"> 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. 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”.
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Class 13 of Part 1 Schedule 2 Exempted Development Regulations

Column 1 Description of Development	Column 2 Conditions and Limitations
Sundry Works	
Class 13 The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private foot path or paving.	The width of any such private footpath or paving shall not exceed 3 metres

7.3. Other

- None relevant

7.4. Precedent Cases:

Other Referrals of note having particular regard to Pedestrian entrance include RL16.2993 which relates to a decision by the Board that the creation of a pedestrian entrance at the Church of Ireland Grounds at Polranny, Achill Sound, County Mayo is development and is exempted development. Their decision provided: These works fall within the description of development (which is exempted development in accordance with Article 6, as set out in Class 40 (burial ground) of Column 1 of Schedule 2 of the P& D Regulations 2001. It is noted in this case that it was included in the Board decision that: the works do not bound or abut a public road.

In the Board decision relative to RL09.RL2734 they provided that the formation of a doorway for private pedestrian access is exempted development but that the, inclusion of the construction of a concrete step, to a public footpath to the side of a private property is not exempted development.

8.0 Assessment

8.1. Is or is not development

- 8.1.1. Having Regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended) it is considered that the creation of a private pedestrian gateway means of access formed in the shared boundary wall of No. 11 Arbour Court with Dorsel Drive constitutes development i.e the carrying out of works on lands in the ownership of Daragh Gosnell.

8.2. Is or is not exempted development

- 8.3. The Question asked is 'Whether the gateway means of access to a public road that was formed in the shared boundary wall between Dorsel Drive and the rear of No. 11 Arbour Court, Grange Cork, is or is not development or is or is not exempted development'.
- 8.4. Class 5 of the 2001 regulations provides for the construction, erection or alteration within or bounding the curtilage of a house, of a gate, gateway or railing or wooden fence or a wall of brick or stone, blocks etc. It sets out a 2m limit on the height of any structures which is complied with in this case. No other conditions and limitations in Column 2 apply. However, any exemption which might be conferred under the Class 5 must be considered in relation to the restrictions imposed by Article 9, in this case specifically Article 9(1)(a)(ii). "consists or comprise the formation, laying out or material widening of a means of access to a public road the surface carriageway of which exceeds 4 meters in width.'
- 8.5. The surfaced carriageway of the road serving Dorsel Drive exceeds 4m in width. It is approx. 4.9m wide. However, the pedestrian gate / access opens directly onto public open space, which has a width of some 5m and not directly onto the estate road of

Dosel Drive. There is no existing pathway from the gate to the road and therefore the gate / pedestrian access does not access onto the public road.

- 8.6. The critical issue, therefore, is whether the pedestrian access gate consists of or comprises the formation of a means of access to the public road.
- 8.7. Regard being had to the response from the PA to the referral I note that Section 2 of the 1993 Roads Act clearly defines a road as including:
- (a) any street, lane, footpath, square, court, alley or passage,
- A public road is one where there is a public right of way and where the local authority have responsibility for maintenance.
- 8.8. I note the case of RL09.RL2734 in which the Board disagreed with the recommendation of the PA and the Inspector. It was held that the formation of the pedestrian doorway constituted development which is exempted development. Consideration was had to Class 5 of Part 1 of Schedule 2 to the Regulations and also to Article 9(1)(a)(ii) The Board did not agree with the interpretation of the PA and the Inspector in relation to the applicability of this restriction in the case of a pedestrian access onto a footpath, which would otherwise be exempted development under the provisions of Class 5 Part 1 of Schedule 2 to the Regulations.
- 8.9. In that instance the Board considered that, applying a purposive interpretation of the Regulations, the word “access” as applied at the said Article 9(1)(a)(ii) refers to an access suitable for a vehicle and not to a pedestrian access onto a footpath.
- 8.10. I am of the opinion the subject case is similar and that the restriction under Article 9(1)(a)(ii), placed on the formation of an access onto a public road more than 4m wide is concerned essentially with the question of traffic safety. The interpretation put forward by the referrer would remove the exemption provided for a pedestrian gateway under Class 5 of Part 1 of Schedule 2 to the Regulations in many cases where the gate opens onto public open space or a public footpath, with no implications for traffic safety.
- 8.11. The public open space at this location is 5 m wide. The distance to traverse same and the volume of traffic within an estate road both ameliorates the issue of public

safety. I do not consider that the pedestrian gate / access would give rise to a traffic hazard or obstruction to pedestrians.

- 8.12. I am also of the opinion that the pedestrian gateway would not contravene a condition attached to a planning permission, regard being had in particular to Conditions 6 and 7 attached to Reg. Ref. 2266/77, the original planning permission for Dosal Drive.
- 8.13. I therefore conclude that the construction of the pedestrian access gate in an existing rear boundary wall “Is Development” and “Is Exempted Development”.

9.0 Recommendation

- 9.1. 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 pedestrian gateway means of access to a public road that was formed in the shared boundary wall between Dosel Drive and the rear of No. 11 Arbour Court, is or is not exempted development:

AND WHEREAS Alan Duggan requested a declaration on this question from Cork City Council and the Council issued a declaration on the 20th day of July 2022 stating that the matter was development and was exempted development:

AND WHEREAS Alan Duggan referred this declaration for review to An Bord Pleanála on the 28th day of July 2022:

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

- (a) sections 2, 3 and 4 of the Planning and Development Act, 2000,
- (b) articles 6 and 9 of the Planning and Development Regulations, 2001,

- (c) class 5 of part 1 of Schedule 2 to the said Regulations,
- (d) the definition of 'public road' within the meaning of the Planning and Development Act, 2000 and the definition of 'public road' within the meaning of the Roads Act, 1993,
- (e) the meaning of the word "access" as applied at Article 9(1)(a)(ii) of Planning and Development Regulations, 2001, and
- (f) the location of the 5m wide public open space area, outside of the rear curtilage of No. 11 Arbour Court, onto which the pedestrian gate accesses.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the formation of a pedestrian doorway is development which comes within the scope of the exempted development provisions of Class 5 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001,
- (b) the restrictions on exempted development contained at Article 9(1)(a)(ii) of Planning and Development Regulations, 2001, do not affect the exemption under the said Class 5 for a solely pedestrian access onto open space amenity area and
- (c) the formation of the doorway for pedestrian use is, therefore, exempted development.

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 said formation of the doorway is development and is 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.

Fiona Fair
Planning Inspector

07.06.2023