



An
Bord
Pleanála

Inspector's Report ABP-315097-22

Question	Whether the construction of a tennis/pickleball court is or is not development or is or is not exempted development
Location	Heather Cottage, Upper Cliff Road, Howth, County Dublin
Declaration	
Planning Authority	Fingal County Council
Planning Authority Reg. Ref.	FS5/057/22
Applicant for Declaration	Patrick O'Reilly
Planning Authority Decision	Is not exempted development
Referral	
Referred by	Applicant
Owner/ Occupier	Patrick O'Reilly
Observer(s)	None
Date of Site Inspection	15 th December 2023
Inspector	Philip Maguire

1.0 Site Location and Description

- 1.1. The referral site is located in an upland area on the eastern side of the Howth peninsula, known locally as East Mountain. Howth town centre is some 1.7km to the northwest. The site is accessed via a private laneway off the Upper Cliff Road which serves several houses and agricultural entrances. There is a turning area where the road terminates and laneway starts. It facilitates access to the coastal walking routes which encircle the site. The surrounding area is predominantly heathland and scrub.
- 1.2. The referral site is irregular shaped and encompasses an area of roughly 2.5ha. It consists of a dwelling, known as Heather Cottage, and some private amenity space to the south and east which is generally contained within a low stone wall. It also includes agricultural grassland beyond this boundary to the south and east and heathland to the west. The grassland is divided into smaller paddocks by timber post and rail fencing and was being used for grazing donkeys and goats at the time of inspection.
- 1.3. The dwelling is a contemporary, flat roof structure with Howth Stone and metal clad finishes. It nestles neatly into the landform which falls steeply towards the cliff face and Irish Sea. The private amenity space within the stone wall is itself divided into a landscaped garden and separate grazing area which was occupied by alpacas at the time of inspection. I also observed some ancillary and incidental domestic features in this area including a wastewater treatment system, path and steps to the paddocks.

2.0 The Question

- 2.1. The matter has been referred by the applicant for the declaration. The description of the proposed development, as outlined in section 5 of the application form, simply stated "Tennis Court".
- 2.2. In addition to the application form, the submission to the Planning Authority included:
 - Location map with site boundary outlined in red and "proposed location" illustrated;
 - Orthophotograph with "proposed location of tennis court" illustrated; and
 - Extract from Planning Authority website regarding a 'tennis court' exemption.
- 2.3. The referral documentation date received 15th November 2022 includes a cover letter, which is summarised in section 6.1 below and a revised site location map. The Board

should note that the court size is stated as 6 metres by 13.5 metres and its location is amended to the inside of the stone wall and therefore within the residential amenity area, as described above. It is referred to as a “pickleball court”, a form of tennis.

- 2.4. By correspondence dated 5th December 2022, the Planning Authority responded to the referral submission, which is summarised in section 6.2 below. The response acknowledges that the referral documentation relates to a proposed “pickleball court”.
- 2.5. By correspondence date received 26th January 2023, the referrer provided further clarification of the type of ball court proposed, which is summarised in section 6.3 below. In this regard, the referrer has requested the Board to confirm that a pickleball court (quarter-sized tennis court) within the curtilage of a domestic dwelling is exempted development. It is further stated that the court is c. 6 metres by 12 metres.
- 2.6. Having regard to the above and in the absence of a properly defined question by either the referrer or the Planning Authority, I intend to proceed with my assessment on the basis of the following question:

Whether the construction of a 6 metre by 12 metre pickleball court within the curtilage and to the rear of Heather Cottage, Upper Cliff Road, Howth, County Dublin is or is not development, or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. A declaration was issued on 24th October 2022. It states:

1. *The said works do come within the scope of the restrictions on development set out at Article 9(1)(a)(viiB) of the Planning and Development Regulations, whereby the works comprise development in relation to which the planning authority is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European Site.*

In addition, some forms of development in the special amenity area remain exempt from the requirements to secure planning permission. However, the exemption only applies if the proposed development would not conflict with other considerations.

Objective 2.4 of the SAAO document seeks to preserve existing areas of heathland and maritime grassland. The laying out of a tennis court at this location would reduce the existing area of heathland.

3.2. Planning Authority Reports

3.2.1. Planning Report dated 19th October 2022:

- Basis for the Planning Authority decision.
- It stated that the proposal was lacking in detail with no drawings etc. and considered a lack of cross sections particularly relevant given development within a residential curtilage that involves a change in level of one metre requires permission. It also noted a lack of detail regarding proposed surfaces, fences etc.
- It considered that the provision of a tennis court is development.
- It stated that the site of the proposed tennis court is within the Howth Head SAC which is selected for vegetated sea cliffs and European dry heaths. It considered that the works would involve the removal of European dry heath and that Appropriate Assessment would be required. On this basis the Planning Authority was not satisfied that the proposal would not have a significant effect on the integrity of a European site.
- It also stated that the site is also within the Howth Special Amenity Area and noted that some forms of development in areas subject of a special amenity area order (SAAO) remain exempt from the requirement to obtain permission where it would not conflict with other considerations. It considered the proposed tennis court is one such form of development, subject to design restrictions. However, referring to Objective 2.4 and Policy 2.4.1 of the SAAO, it considered the development would affect a site, building or feature of special interest which is an objective to preserve and is therefore not exempted development.
- It concluded that the proposal comes within the scope of the restrictions under Article 9(1)(a)(viiB) of the Planning Regulations and would conflict with Objective 2.4 of the SAAO for the area as it would reduce the area of heathland.

- It recommended that the applicant be informed that the works are considered to be development and not exempted development by virtue of Article 9(1)(a)(viiB) of the Planning Regulations.

4.0 Planning History

4.1. Relevant permissions:

- 4.1.1. PA ref. F19B/0080 – in March 2020 the Board granted permission for a single-storey extension to the rear of the existing house etc. (ref. ABP-305966-19). Condition 6 requires compliance with the NIS mitigation measures. Condition 7 precludes any walls, fences or railings on any part of the site boundary or dwelling curtilage.
- 4.1.2. PA ref. F97A/0563 – in July 1998 the Board granted permission for a revised design for previously approved split-level dwelling etc. (ref. PL06F.105191). Condition 4 restricted further development on site without a prior grant of planning permission.
- 4.1.3. PA ref. F96A/0199 – in April 1997 the Board granted permission for a revised house design, garage and septic tank etc. (ref. PL06F.100342).
- 4.1.4. PA ref. 90A/1440 – in July 1991 the Board granted permission for a replacement dwelling and septic tank etc. (ref. PL 6/5/84703).

4.2. Relevant declarations and referrals:

- 4.2.1. PA ref. FS5/013/20 – in September 2020 the Board decided that the replacement of timber posts with round rubble stone pillars at the entrance gateway to Heather Cottage was development and was exempted development (ref. ABP-307179-20).
- 4.2.2. PA ref. FS5/014/13 – in May 2016 the Board decided that the erection of gateposts was development and was exempted development (ref. RL06F.RL3131).
- 4.2.3. PA ref. FS5/013/12 – in July 2013 the Board decided that the erection of a gate on the road leading to Heather Cottage was development and was not exempted development. In the absence of sufficient information, the Board did not come to conclusions on the erection of fencing, decking, pergola structure, landscaping and floodlighting, at or in the vicinity of the Heather Cottage (ref. 06F.RL3078).

5.0 Policy Context

5.1. Fingal Development Plan 2023-2029

- 5.1.1. The current Development Plan came into effect on 5th April 2023. The Planning Authority decision of 24th October 2022 was made under the previous Plan for the period 2017-2023. This referral shall be considered under the current Plan.
- 5.1.2. The site is zoned 'High Amenity' with a zoning objective to *'protect and enhance high amenity areas'*. The vision for this zoning seeks to *'protect these highly sensitive and scenic locations from inappropriate development and reinforce their character, distinctiveness and sense of place'* etc.
- 5.1.3. The referral site also lies within a Coastal Landscape Character Type, which is identified as being highly sensitive to development (Table 9.3) and is subject to the Howth Special Amenity Area Order (SAAO), as noted above. I also note that the site is encircled by coastal walking routes, which are designated as 'Preserve Views'.
- 5.1.4. The main objectives relevant to the proposed development are set out in chapter 9 (Green Infrastructure and Natural Heritage) of the Written Statement. The following sections are particularly relevant:
- 9.6.14 – Landscape Character Assessment
 - 9.6.15 – Views and Prospects
 - 9.6.16 – Special Amenity Areas
 - 9.6.17 – High Amenity Zoning
- 5.1.5. Summary of the relevant policies and objectives:
- | | |
|---------|--|
| GINHP25 | Seeks to ensure the preservation of the uniqueness of a landscape character type by having regard to the character, value and sensitivity of a landscape. |
| GINHO58 | Seeks to resist development which would interfere with the character of highly sensitive areas or with a view or prospect of special amenity value, which it is necessary to preserve. |
| GINHP26 | Seeks to preserve views and prospects and the amenities of places and features of natural beauty or interest. |

- GINHO60 Seeks to protect views and prospects that contribute to the character of the landscape, particularly those identified in the Development Plan, from inappropriate development.
- GINHP27 Seeks to protect and enhance the special amenity value of Howth, including its landscape, visual, recreational, ecological, geological, and built heritage value, as a key element of the County's Green Infrastructure network and implement the provisions of the Howth SAAO.
- GINHP28 Seeks to protect High Amenity areas from inappropriate development and reinforce their character, distinctiveness and sense of place.
- GINHO67 Seeks to ensure that development reflects and reinforces the distinctiveness and sense of place of High Amenity areas, including the retention of important features or characteristics, taking into account the various elements which contribute to its distinctiveness such as geology and landform, habitats, scenic quality, settlement pattern etc.

5.2. Howth Special Amenity Area Order, 1999

- 5.2.1. The Howth Special Amenity Area Order (SAAO) was confirmed by the Minister for the Environment on 16th May 2000. The referral site is identified as the 'site of Heather Cottage' in Map A of the Order within an area designated as 'Other Areas within the Special Amenity Area'. The referral site is also identified on Map B of the Order and is in close proximity to three pathways that have the designation to protect views. The area around the cottage is recorded as heathland and maritime grassland on Map B.
- 5.2.2. Schedule 1 sets out objectives for area enhancement. Objective 1.1 seeks to:
- Conserve its natural and cultural assets,
 - Realise its exceptional potential as a place for informal recreation, tourism and environmental education,
 - Ensure that all sections of the local community have an equal opportunity to enjoy the natural attractions of the area,
 - Protect the amenity of local residents, and
 - Ensure effective local participation in the management process.

- 5.2.3. Schedule 2 sets out the objectives for the preservation of the character or special features of the area. These include views from public footpaths and roads (Objective 2.1) and existing areas of heathland and maritime grassland (Objective 2.4). Policy 2.4.1 states that development which reduces existing areas of heathland and maritime grassland will not be permitted except for reasons of overriding public interest.
- 5.2.4. Schedule 3 of the Order sets out the objectives for the prevention and limitation of development, including Objective 3.4, which seeks to preserve the beauty and distinctive character of the natural, semi-natural and other open areas within the special amenity area. Policy 3.4.2 sets out design guidelines for new development.
- 5.2.5. Section 4.6 provides that the exemptions for certain types of 'development on a residential property' remain in force in the SAAO area, including:
- *construction of a path, drain or pond or any other landscaping works within the curtilage of a house provided that the level of the ground is not altered by more than 1 metre above or below the level of the adjoining ground,*
 - *the provision at the rear of a house of a hard surface for any purpose incidental to the enjoyment of the dwelling house, and*
 - *the provision at the front or side of a hard surface for parking of not more than 2 motor vehicles used for a purpose incidental to the enjoyment of the dwellinghouse.*

5.3. Natural Heritage Designations

- 5.3.1. The area around the footprint of Heather Cottage and associated amenity space, as described above, is encircled by Howth Head SAC (000202).
- 5.3.2. Other European sites which lie in the vicinity of the referral site include:
- Rockabill to Dalkey Island SAC (003000)
 - Howth Head Coast SPA (004113)
 - North-West Irish Sea SPA (004236)
- 5.3.3. Howth Head is also designated as a proposed Natural Heritage Area.

6.0 The Referral

6.1 Referrer's Case

6.1.1. The referrer's case can be summarised as follows:

- It is accepted that there was an error made in respect of the location of the court which should have been located within the 'inner curtilage' (residential curtilage) of Heather Cottage on both maps submitted to the Planning Authority.
- It is stated that Heather Cottage has an 'inner curtilage' and 'outer curtilage' and cites ABP ref. RL09.RL2012 as an authority for a definition of the latter.
- It is submitted that a proposed tennis court within a residential curtilage is not affected by the presence of Howth Head SAC.
- It is stated that area outlined in red on the map submitted to the Planning Authority is within the referrer's ownership.
- It is submitted that the proposed court is to be used for pickleball, a recent form of tennis which requires an area less than one quarter of a standard tennis court and does not require a high surround netting. The stated area is 6 metres by 13.5 metres.

6.1.2. As noted above, the referral includes a map showing the location of the proposed court within the residential curtilage of the referrer's dwelling, as observed on inspection.

6.2 Planning Authority Response

6.2.1. The Planning Authority's response can be summarised as follows:

- It is stated that the determination was based on the information submitted and related to a tennis court as opposed to a 'pickleball' court, as now suggested.
- It is submitted that the application is lacking substantial detail. No drawings have been submitted. The site slopes steeply and no cross sections have been provided which is relevant given a change in level of one metre requires planning permission and it is not clear as to the extent of the earthworks required for a level tennis court.

- It is also stated that no details regarding proposed surfaces or boundaries have been given but notes that the referrer has indicated that boundary treatment is not required for a pickleball court.
- It requests that the Board uphold the decision of the Planning Authority.

6.3. Further Responses

6.3.1. As noted, the referrer has provided further clarification of the type of ball court proposed in a rebuttal to the Planning Authority response. The response includes an orthophotograph of tennis courts located at Portmarnock Leisure Centre and an adjacent pickleball court for further context regarding size etc.

6.3.2. It can be summarised as follows:

- It acknowledges an error was made in the original submission to the Planning Authority regarding the location of the proposed court and this matter has been clarified in the appeal submission.
- It is submitted that the pickleball court, now stated as c. 6 metres by 12 metres, is to be located within the residential curtilage of Heather Cottage and will not be visible from any Public Right of Way or public area on Howth Head.
- It is stated that the refusal reason which relates to the reduction of heathland and maritime grassland would not therefore apply to the long-established residential curtilage of Heather Cottage.
- It is suggested that the pickleball court is for the enjoyment and use of the residents of Heather Cottage only.
- It refers to the Planning Authority website where it is stated that a tennis court within the curtilage of a domestic dwelling is exempted development and notes that other tennis courts, both inside and outside the Howth Special Amenity Area, have been constructed in the past 20 years without having to obtain planning permission.
- It reiterates that there will be no boundary treatments or fences associated with the court and it clarifies that it proposes to use the standard tennis court hard surface and the ground level within the curtilage of the dwelling will not be altered by one metre or more.

- The referrer submits that they wish to establish that the principle of exemption for the small tennis court which appears to have applied to similar developments both inside and outside the Howth Special Amenity Area.
- It is hoped that the Board will confirm that the pickleball court within the curtilage of a domestic dwelling for residential use only is exempted development.

7.0 Statutory Provisions

7.1. The relevant provisions are set out in the Planning and Development Act 2000, as amended, ('PDA 2000 or the Act') and the Planning and Development Regulations 2001, as amended, ('PDR 2001 or the Regulations').

7.2. Section 2 – PDA 2000

7.2.1. Section 2(1) provides the following interpretations which are relevant:

“structure” means *inter alia* any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and where the context so admits, includes the land on, in or under which the structure is situate etc.; and

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal etc.

7.3. Section 3 – PDA 2000

7.3.1. Except where the context otherwise requires, “development” is defined as:

The carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land.

7.4. Section 4 – PDA 2000

7.4.1. Section 4(1) provides a list of broad statutory exemptions, including:

(h) 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; and

(j) development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such.

7.4.2. Section 4(4) provides development shall not be exempted development if an Environmental Impact Assessment (EIA) or an Appropriate Assessment (AA) of the development is required.

7.5. Section 5 – PDA 2000

7.5.1. Section 5(3)(a) provides for a referral of a declaration for review by the Board within 4 weeks of the date of issuing of the declaration.

7.6. Section 127 – PDA 2000

7.6.1. Section 127 sets out the provisions for the making of referrals etc.

7.7. Section 177U – PDA 2000

7.7.1. Section 177U(9) provides that in deciding a referral under S. 5 the Board, shall where appropriate, conduct an AA screening in accordance with the provisions S. 177U.

7.8. Article 5 – PDR 2001

7.8.1. Article 5(2) provides that “ground level” means the level of the ground immediately adjacent to the structure and where the level of the ground where the structure is to be situated is not uniform, the level of the lowest part of the ground adjacent to it.

7.9. Article 6 – PDR 2001

7.9.1. Subject to the restrictions in Article 9, Article 6(1) provides for the classes of exempted development under column 1 of Parts 1, 2 and 3 of Sch. 2, subject, where applicable, to the conditions and limitations opposite such classes as set out in column 2.

7.9.2. Schedule 2, Part 1 (General), Class 6:

<i>Column 1</i>	<i>Column 2</i>
<i>(a) The construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house.</i>	<i>The level of the ground shall not be altered by more than 1 metre above or below the level of the adjoining ground.</i>
<i>(b) Any works within the curtilage of a house for—</i>	
<i>(i) the provision to the rear of the house of a hard surface for use for</i>	

<p><i>any purpose incidental to the enjoyment of the house as such, or,</i></p> <p>(ii) <i>the provision of a hard surface in the area of the garden forward of the front building line of the house, or in the area of the garden to the side of the side building line of the house, for purposes incidental to the enjoyment of the house as such.</i></p>	<p><i>Provided that the area of the hard surface is less than 25 square metres or less than 50% of the area of the garden forward of the front building line of the house, or 50% of the area of the garden to the side of the side building line of the house, as the case may be, whichever is the smaller,</i></p> <p><i>or</i></p> <p><i>if the area of the hard surface is 25 square metres or greater or comprises more than 50% of the area of the garden forward of the front building line of the house, or 50% of the area of the garden to the side of the side building line of the house, as the case may be, it shall be constructed using permeable materials or otherwise allow for rainwater to soak into the ground.</i></p>
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7.9.3. Schedule 2, Part 1 (General), Class 33:

<i>Column 1</i>	<i>Column 2</i>
<p><i>Development consisting of the laying out and use of land—</i></p> <p><i>[...]</i></p> <p>(c) <i>for athletics or sports (other than golf or pitch and putt or sports involving the use of motor vehicles, aircraft or firearms), where no charge is made for admission of the public to the land.</i></p>	

7.10. **Article 9 – PDR 2001**

7.10.1. Article 9 imposes specific restrictions on development of classes specified in Parts 1, 2 and 3 of Schedule 2 and in effect de-exempts certain classes of development that would be exempt under normal circumstances. The restrictions under Article 9(1)(a) apply 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,

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan,

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,

(viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.

7.10.2. The restrictions under Article 9(1)(b) apply in an area to which a SAAO relates only under certain specified classes of development, excluding Class 6 of Part 1 of Schedule 2 of the PDR 2001 in this instance.

7.11. Article 132C – PDR 2001

7.11.1. Article 132C provides that if a development is of a class but sub-threshold, a preliminary examination will be required, and the question of a structured EIA screening may arise before any declaration is made.

7.12. Precedent Referral Cases

7.12.1. The following referral determinations by the Board provide some relevant context.

Within a scenic landscape and outside the curtilage of a house

7.12.2. In ABP ref. RL2133, the Board considered whether a decking area, as constructed at ‘Fisherman’s Cottage’, Sandycove, Kinsale, Co. Cork was or was not development etc. The Board concluded *inter alia* that the timber decking area, as constructed, did not come within the scope of Class 6(b)(i) of Pt. 1 of Sch. 2 of the PDR 2001 as the decking was not within the curtilage of the house or located to the rear of the house. Moreover, the Board also concluded that the restriction under Article 9(1)(a)(vi) applied as the site was within a designated scenic landscape area which was subject to amenity preservation in the Development Plan, and it constituted a prominent, visually obtrusive, man-made intervention to the natural features of the cliff and beach edge

and therefore interfered with a landscape of special amenity value of special interest. In this case the Planning Inspector noted that the timber decking was on the seaward side of a cliff top walk and public right of way, with the cottage on the opposite side.

Outside the curtilage of a house

7.12.3. In ABP ref. RL2912, the Board considered whether the construction of a patio area on lands to the rear at 15 Broadmeadows, Drogheda, Co. Louth was or was not development etc. The Board concluded *inter alia* that the patio area was located on lands that were outside of the original boundary of the dwelling and therefore could not avail of the exemption provision set out at Class 6 of Part 1 of Schedule 2 of the PDR 2001, not being within the curtilage of a house and the provisions of Section 4(1)(j) of the PDA 2000 were not applicable as they relate to use of a structure or land. In this case the Planning Inspector considered that the curtilage of a dwelling comprises those lands that are within the original walls of a dwelling as constructed.

Alteration of ground level

7.12.4. In ABP ref. RL3106, the Board considered whether the construction and erection of a patio deck to the rear of dwelling at 4 Crocknamurleog, Downings, Co. Donegal was or was not development etc. The Board concluded *inter alia* that the structure did not comply with the conditions and limitations attached to Class 6 of Part 1 of Schedule 2 of the PDR 2001 insofar as the level of the ground had been altered by more than one metre above the level of the adjoining ground and, accordingly, the said development could not avail of the exempted development provisions of Class 6. In this case the Planning Inspector considered that the condition limiting the works to one metre above or below ground level, only related to Class 6(a), but the Board ultimately disagreed.

7.12.5. In ABP ref. RL3370, the Board considered whether the erection of decking at 'Villa Maria', Sorrento Heights, Dalkey, Co. Dublin was or was not development etc. In not accepting the recommendation of the Planning Inspector that part of the decking was exempted development, the Board considered that the decking constituted a single development, and that it was not appropriate to distinguish between parts of this development. As a single development, the Board considered that the provisions of Article 5(2) of the PDR 2001 applied to the issue of what constituted the level of the adjoining ground, for the purposes of interpreting the condition and limitation of Class

6(a), and the Board decided that the decking was therefore development but was not exempted development as it did not comply with this condition and limitation.

7.12.6. Similarly, the Planning Inspectors under ABP refs. RL2651 and RL2900 had regard to the condition limiting the works to one metre above or below ground level in their reports. In RL2900, the Board concluded that the timber decking to the rear of the chalet constituted a hard surface to the rear of a house, notwithstanding the elevated topography of the rear garden which came generally within the provisions of Class 6 of Part 1 of Schedule 2 of the PDR 2001 and did not exceed the conditions and limitations governing the class as ground levels had not been altered by more than one metre above or below the level of the adjoining ground. In RL2651, the Board concluded *inter alia* that the timber decking to the rear of the dwelling did not comply with the limitations attached to Class 6 of Part 1 of Schedule 2 of the PDR 2001, insofar as the level of the ground had been altered by more than one metre above the level of the adjoining ground and, therefore, could not avail of the Class 6 exemption.

Tennis court

7.12.7. In ABP ref. RL2069, the Board considered whether the construction of a tennis court/multisport court and 2.4 metres surround fencing at Castlepark School, Dalkey, Co. Dublin was or was not development etc. Having regard to the extent of the works, the raising of ground levels and the importation of large quantities of fill material, the Board concluded that that the construction of a tennis court/multisport court and 2.4 metres high surround fence did not come within the scope of laying out and use of land as set out in Class 33(c) of Part 1 of Schedule 2 of the Planning Regulations.

7.13. Precedent Judgements

Reformulation of referral question

7.13.1. In *Roadstone Provinces Ltd v An Bord Pleanála [2008] IEHC 210*, the High Court considered that the Board is entitled to reformulate questions posed where necessary. In this instance, Finlay Geoghegan J. noted at para. 31 that the Planning Inspector was critical of the content of the referral, having regard to S. 127 of the PDA 2000, and that the Inspector summarised the questions which she considered she could extract.

Improvement of a structure etc.

7.13.2. In *Michael Cronin (Readymix) Ltd v An Bord Pleanála and Others [2017] IESC 36, [2017] 2 I.R. 658*, the Supreme Court considered whether an extension to a structure (a concrete yard within a quarry) constituted exempted development. The court agreed with the Board's submission that the exemption under Section 4(1)(h) of the Act applies to a limited category of works that amount to alterations (with the concepts of maintenance and improvement being subsets), which are either wholly internal or, if external, are insignificant. An "improvement", for the purposes of an exemption, must be something that relates to the internal use and function of the structure, resulting in either no externally noticeable difference or an insignificant difference.

8.0 Assessment

8.1. Preliminary Points

8.1.1. The question has arisen as to whether a tennis court is or is not development or is or is not exempted development. Having regard to the judgement in *Roadstone Provinces Ltd.* and as outlined in section 2.0, I consider this referral relates specifically to a pickleball court, measuring 6m by 12m, in the rear curtilage of Heather Cottage, Howth, Co. Dublin. Neither party is prejudiced by this reformulation (see section 6.0).

8.1.2. The Planning Authority considered that the said works come within the scope of the restrictions set out under Article 9(1)(a)(viiB) of the PDR 2001, whereby they would comprise development that would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site. In their declaration they also note that exemptions in the special amenity area only applies if the proposed development would not conflict with other considerations including Objective 2.4 of the SAAO which seeks to preserve existing areas of heathland and maritime grassland. In this regard, the Planning Authority has considered that the laying out of a tennis court at this location would reduce the existing area of heathland.

8.2. Development – *Is or is not?*

8.2.1. Section 2(1) of the PDA 2000 defines "works" as including any act or operation of construction, excavation, alteration etc. Notwithstanding the general lack of detail, as

noted by the Planning Authority, according to the Pickleball Ireland website¹, a pickleball court is the same size as a badminton court with an additional non-volley-zone line and is split into two sides by a low net. The website includes a 'Court Construction Guide' link to the Pickleball USA website². Here it is suggested that that asphalt or concrete both provide an acceptable base which is then coated in paint. The referrer has stated that he proposes to use a standard tennis court hard surface.

- 8.2.2. It is therefore reasonable to presume that the pickleball court will involve the construction of a hard surface such as asphalt or concrete, painted, and divided in two by a low net. Having regard to the observed topography, this will require a degree of excavation to achieve a level court. I am satisfied that, in accordance with the above definition, the construction of a pickleball court constitutes 'works'. This is not disputed by the parties. In terms of Section 3(1)(a), "development" means, except where the context otherwise requires, the carrying out of works on, in, over or under land etc. I am satisfied that these 'works' comprise 'development' and neither is this in dispute.

Conclusion on Development

- 8.2.3. The proposed pickleball court, with a stated area of 6m by 12m, is development.

8.3. Exempted Development – *Is or is not?*

- 8.3.1. Having established that the pickleball court measuring 6m by 12m is development, the issue now to be considered is whether it is, or is not, exempted development.
- 8.3.2. Section 4(1)(h) of the PDA 2000 provides a broad exemption for the carrying out of works for the maintenance, improvement or other alteration of any structure etc. Having visited the site and observed the location of the proposed court, I am satisfied that no structure exists for this exemption to apply. Moreover, were there to be an existing hard surfaced structure, it is arguable that this exemption would not apply in any event having regard to the judgement in *Michael Cronin (Readymix) Ltd.*
- 8.3.3. A similarly broad exemption applies under Section 4(1)(j) of the PDA 2000, however this relates only to the use of a structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such, and not to 'works'.

¹ www.pickleballireland.org

² www.usapickleball.org

- 8.3.4. Class 6(a) of Part 1 of Schedule 2 provides an exemption for the construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house provided that the level of the ground is not altered by more than one metre above or below the level of the adjoining ground. The referrer would appear to have exercised this exemption in the provision of a pond, gravelled pathway and steps to the paddocks to the rear of the house, but I am not convinced it applies to a ball court as it is evidently not a path or could be reasonably considered as landscaping works.
- 8.3.5. Class 6(b)(i) of Part 1 of Schedule 2 exempts any works within the curtilage of a house for the provision to the rear of the house of a hard surface for use for any purpose incidental to the enjoyment of the house as such. This exemption is generally unfettered in that no conditions or limitations are listed opposite in Column 2. The exemption under Class 6(b)(i) would appear to me to be relevant to the subject referral.

Works within the curtilage of a house

- 8.3.6. There is no statutory definition of “curtilage” in the PDA 2000 or the PDR 2001. However, it has long been interpreted as land used to serve the purposes of the house in some necessary or reasonably useful way³ and which is so intimately associated with it that it forms part and parcel of the house, constituting an integral whole⁴. There must therefore be some reasonable connection between the use of the land and the house. This can be obvious in the case of a suburban house, as it was in ABP ref. RL2912, as cited above, but less so in the case of an older rural or coastal dwelling.
- 8.3.7. I note that the original Heather Cottage is depicted on historical mapping for the area (OSI Historic 25 Inch, 1897-1913), indicating that it was a pre-1964 structure, hence the first planning history record being for a replacement dwelling circa 1991. It is clear from the ‘brace’ symbols on this map that the enclosures so connected to the south and southeast of the cottage were included in the same area which is illustrated on the map as 0.583 statute acres, or roughly 0.24ha. This correlates roughly with the area within the low stone wall, or ‘inner curtilage’ as suggested by the referrer.
- 8.3.8. The original cottage has since been replaced and extended, with the most recent extension permitted under ABP-305966-19 (PA ref. F19B/0080). The referral site boundary is broadly similar to this planning application site boundary, which had a

³ *Sinclair-Lockhart's Trust v Central Land Board* [1951] S.C. 258, [1951] S.L.T. 121.

⁴ *Methuen-Campbell v Walters* [1979] 2 QB 525

stated area of 2.53ha. There is a distinction therefore between the referral site, as submitted to the Planning Authority, and the actual residential curtilage of the house.

- 8.3.9. In this regard, I accept that the referrer has provided clarity on this matter and indeed the location of the proposed pickleball court within the curtilage of the house, as defined to the south and east by the stone wall. I therefore fully accept that the revised location of the proposed works is within the curtilage of Heather Cottage, although I do note that the locus was initially illustrated to the south-western side of the house, on an area of heathland and maritime grass, as noted by the Planning Authority. Indeed, the accompanying orthophotograph submitted to the Planning Authority indicated a different location again to the south, both outside the curtilage in any event.

Hard surface to the rear of the house

- 8.3.10. As noted, the revised location of the proposed pickleball court is within the curtilage of the house and I accept that it is generally to the rear of the house, notwithstanding its contemporary design and layout. In this regard, I am fully satisfied that the front of the house is that elevation to the north and beyond which lies the main entrance gates.

- 8.3.11. The hard surface to facilitate the court is therefore to the rear of Heather Cottage as it now stands and notwithstanding its historic orientation which appeared seaward.

Any purpose incidental to the enjoyment of the house

- 8.3.12. The referrer has submitted that the pickleball court will be for the enjoyment and use of the residents of Heather Cottage only. In the absence of a statutory definition of 'incidental' and having regard to the ordinary, natural meaning of the word, I am satisfied that the court is for a purpose incidental to the enjoyment of the house.

- 8.3.13. If the Board considered that Class 6(b)(i) only applies to the provision of the hard surface in a more limited sense, and restricted mainly to the 'works', then I would suggest that Section 4(1)(j) of PDA 2000 would apply on completion of these 'works'.

Conclusion on Exempted Development

- 8.3.14. Whilst the Planning Authority note that the site slopes steeply and have raised concerns in respect of level changes of more than one metre, it is respectfully suggested that this condition and limitation only relates specifically to Class 6(a) for the construction of any path, pond or other landscaping etc., and notwithstanding

previous Board determinations, albeit in the context of decked areas. The referrer has stated that the ground level will not be altered by more than one metre in any event.

- 8.3.15. Equally, their concerns regarding the impact of the proposal on existing heathland having regard to Objective 2.4 of the Howth SAAO have been addressed by the referrer who accepts that there was an error in the initial siting of the court. For clarity, I am satisfied that the siting is on a grazing area within the curtilage of the house.
- 8.3.16. Whilst I also note that Class 33 of Part 1 of Schedule 2 provides an exemption for the laying out and use of land for sports, I am not convinced that it applies to this case.
- 8.3.17. In the absence of any other legal provision to exclude the exemption, the proposed pickleball court, that being a hard surface measuring 6m by 12m, would appear to be exempted development under Class 6(b)(i) of Part 1 of Schedule 2 of the PDR 2001.

8.4. Restrictions on Exempted Development

- 8.4.1. As noted, the proposed pickleball court, that being a hard surface measuring 6m by 12m, comes within the scope of Class 6(b)(i) of Part 1 of Schedule 2 of the PDR 2001. This exemption is not prevented or limited by the provisions of the Howth SAAO, either expressly by the terms of the Order or by the operation of Article 9(1)(b) of the PDR.
- 8.4.2. The development must however be considered in light of the statutory restrictions set out under Section 4(4) of the Act and under Article 9(1)(a) of the PDR 2001. Section 4(4) de-exempts any development where Appropriate Assessment (AA) or Environmental Impact Assessment (EIA) is required. A similar de-exemption is provided for under Article 9(1)(a)(viiB) of the PDR 2001 in respect of AA only. This is particularly relevant in the context of the Planning Authority's declaration in this case.
- 8.4.3. The following paragraphs set out my assessment of the relevant provisions. In this regard, the Board should note that the proposed development is not a class of development set out in Schedule 5, Part 1 or Part 2 of the PDR 2001 and therefore no preliminary EIA examination is required as per Article 132C of the PDR (Appendix 1).
- Section 4(4) and Article 9(1)(a)(viiB) – Appropriate Assessment Screening*
- 8.4.4. The low stone wall to the south and east of the locus of the proposed development separates the curtilage of the house from the Howth Head SAC (000202). It measures roughly 25m in length to the south and runs in an east-west alignment. From the

southeasterly corner it runs 45m in a northerly direction before terminating. Therefore, the court would be immediately adjacent to a European site, albeit separated by a wall.

8.4.5. Howth Head is described as a rocky headland situated on the northern side of Dublin Bay within the SAC Site Synopsis. The peninsula is composed of Cambrian slates and quartzites, joined to the mainland by a post-glacial raised beach. Limestone occurs on the north-west side while glacial drift is deposited against the cliffs in places.

8.4.6. This SAC is selected for the following habitats:

- 1230 - Vegetated sea cliffs of the Atlantic and Baltic coasts; and
- 4030 - European dry heaths

8.4.7. Map 3 of the Conservation Objectives Series illustrates the estimated distribution of vegetated sea cliffs in the SAC. The area illustrated is remote to the referral site.

8.4.8. In terms of dry heath, it is stated that European dry heath has not been mapped in detail for the Howth Head SAC and thus the total area of the qualifying habitat is unknown. Whilst I accept that the original siting of the proposed development as initially submitted to the Planning Authority indicated two marginally different locations, one of which was evidently on dry heath, the referred locus is now on improved grassland and clearly within the curtilage of Heather Cottage, as previously stated.

8.4.9. I also note that the referral site is roughly within 130m of Howth Head Coast SPA (004113). According to the Site Synopsis document, this site comprises the sea cliffs extending from just east of the Nose of Howth to the tip of the Bailey Lighthouse peninsula and the marine area to a distance of 500 metres from the cliff base.

8.4.10. This SPA is selected for the following habitats:

- A188 - Kittiwake *Rissa tridactyla*

8.4.11. Notwithstanding the location of the referral site directly adjacent to Howth Head SAC and within relative proximity of Howth Head Coast SPA, it is my view that the proposed development would not be likely to have a significant effect on either European site having regard to:

- the limited nature and scale of the works which would replace a sloped grazing area within the curtilage of a house with a 6 metre by 12 metre level hard surface,

- the characteristics of the area including the improved grassland paddocks to the south and east, which together with the stone walls provide a physical buffer between the proposed development and the European dry heath, allowing for adequate infiltration of construction and operational surface waters to ground,
- the fact that the locus of the proposed development offers no supporting habitat, *ex situ* or otherwise, to the Kittiwake or other protected seabird species which breed within the SPA, and
- the nature of the qualifying interests of the SAC and SPA.

8.4.12. It is therefore reasonable to conclude that the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on the Howth Head SAC, Howth Head Coast SPA or any other European site, in view of the site's Conservation Objectives, and a Stage 2 Appropriate Assessment (and submission of a NIS) would not be required before consent if it were authorised.

8.4.13. Accordingly, the restrictions on exempted development status provided for in Article 9(1)(a)(viiB) of the PDR and S. 4(4) of the Act do not apply in this instance, and I am satisfied that the declaration of the Planning Authority may be overturned on this basis.

Article 9(1)(a)(i) – Contravention of a condition etc.

8.4.14. The Planning Authority note that no boundary details have been provided and this is relevant in the context of Condition 7 of ABP-305966-19 (PA ref. F19B/0080) which restricts any fences or railing on any part of the boundary of the site or curtilage of the dwelling. The referrer has confirmed that there will be no boundary treatments or fences associated with the court and on balance the net is likely to be demountable.

8.4.15. I also note that Condition 4 of ABP ref. PL06F.105191 (PA ref. F97A/0563) restricted further development on site without a prior grant of permission, however, I am satisfied that this condition has since been superseded by Condition 7 of ABP-305966-19.

8.4.16. I have reviewed all other relevant conditions and I am satisfied that the restrictions on exempted development status under Article 9(1)(a)(i) do not apply in this instance.

Article 9(1)(a)(vi) – Interference with landscape character etc.

8.4.17. The referral site is located in a highly sensitive coastal landscape and zoned 'High Amenity' with a zoning objective to '*protect and enhance high amenity areas*' and a

Plan vision *'to protect these highly sensitive and scenic locations from inappropriate development'* etc. There is a Specific Objective which seeks to 'Preserve Views' in proximity to the referral site to the east and west. I also note that Objective GINHO60 seeks to protect such views and prospects from "inappropriate development".

8.4.18. As noted, the referrer has not provided any detailed drawings of the proposed development other than a location map clarifying the siting within the curtilage of the house, to the north and west of the low stone walls on a grassed area currently being used for the grazing of animals. Whilst I accept the provision of a levelled hard surface to facilitate the pickleball court in this area will require a degree of cut and fill, I do not consider it so significant so as to interfere with the character of this highly sensitive coastal landscape, or the adjacent views of special amenity value and interest. In this regard, I note that the locus of the court cannot be viewed from the lower, seaward, coastal walking route and would be imperceptible from the upper walking route having regard to its immediate domestic context of walls, landscaping and buildings. I am therefore satisfied that the case details differ from ABP ref. RL2133, as cited above.

8.4.19. Accordingly, the restriction on exempted development status provided for in Article 9(1)(a)(vi) of the PDR 2001 does not apply in this instance.

Article 9(1)(a)(viiC) – Would adversely impact on an NHA etc.

8.4.20. This restriction relates specifically to designated natural heritage areas (NHA's). The referral site is located within Howth Head 'proposed' NHA (pNHA). Accordingly, this restriction does not apply to the subject referral and requires no further consideration.

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 construction of a 6 metre by 12 metre pickleball court within the curtilage and to the rear of Heather Cottage, Upper Cliff Road, Howth, County Dublin is or is not development, or is or is not exempted development:

AND WHEREAS Patrick O'Reilly requested a declaration on this question from Fingal County Council and the Council issued a declaration on the 24th day of October, 2022 stating that the matter was not exempted development:

AND WHEREAS Patrick O'Reilly referred this declaration for review to An Bord Pleanála on the 15th day of November, 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, as amended,
- (b) Articles 6 and 9 of the Planning and Development Regulations, 2001, as amended,
- (c) Class 6 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended;
- (d) the location of the referral site within the Howth Special Amenity Area and the provisions of the Special Amenity Area Order in respect of this area,
- (e) the provisions of the Fingal Development Plan 2023-2029 as they apply to the referral site,
- (f) the documentation on file, including submissions from the referrer and the Planning Authority;
- (g) the planning history of the referral site;
- (h) relevant precedent referrals and judgments; and
- (i) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the construction of a 6 metre by 12 metre pickleball court consists of the carrying out of works and therefore constitutes development as defined in Section 3 of the Planning and Development Act 2000, as amended;
- (b) the pickleball court would be a hard surface to the rear of Heather Cottage for a purpose incidental to the enjoyment of the house, coming within the scope of Class 6(b)(i) of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, which exemption is not prevented or limited by the provisions of the Howth Special Amenity Area Order,
- (c) by reason of the limited scale of the pickleball court, it does not interfere with the character of the landscape whose preservation is an objective of the Fingal County Development Plan 2017-2023, and accordingly the restrictions on exempted development status provided for in Article 9(1)(a)(vi) of the Planning and Development Regulations, 2001, do not apply in this instance, and
- (d) having regard to the limited nature and scale of the development, the characteristics of the area in which the pickleball court is to be located, and to the nature of the qualifying interests of the SAC and SPA, that the proposed development would not be likely to have a significant effect on the Howth Head SAC (site code 000202), Howth Head Coast SPA (site code 004113) or any other European site and accordingly the restrictions on exempted development status provided for in Article 9(1)(a)(viiB) of the Planning and Development Regulations, 2001, do not apply in this instance:

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 construction of a 6 metre by 12 metre pickleball court within the curtilage and to the rear of Heather Cottage, Upper Cliff Road, Howth, County Dublin 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.

Philip Maguire

Planning Inspector

12th January 2024

Appendix 1

EIA Pre-Screening (Form 1)

Case Reference	ABP-315097-22		
Proposed Development Summary	Construction of a tennis court/pickleball court measuring 6 metres by 12 metres		
Development Address	Heather Cottage, Upper Cliff Road, Howth, County Dublin		
1. Does the proposed development come within the definition of a 'project' for the purposes of EIA? (that is involving construction works, demolition, or interventions in the natural surroundings)		Yes	X
		No	No further action required
2. Is the proposed development of a class specified in Part 1 or Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) or does it equal or exceed any relevant quantity, area or limit where specified for that class?			
Yes			EIA Mandatory EIAR required
No	X		Proceed to Q.3
3. Is the proposed development of a class specified in Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) but does not equal or exceed a relevant quantity, area or other limit specified [sub-threshold development]?			
		Threshold	Comment (if relevant)
			Conclusion
No	X		No EIAR or Prelim. Exam. required
Yes			Proceed to Q.4
4. Has Schedule 7A information been submitted?			
No			Preliminary Examination required
Yes			Screening Determination required

Inspector: _____

Date: _____