



An
Bord
Pleanála

Inspector's Report ABP-317248-23

Question

Whether the maintenance and management of part of the golf course boundary to lower Churchtown Road comprising the removal of old wooden and paladin fence, etc. above the old stone wall and the erection of c. 56 linear metres of a replacement timber fence affixed to and above the old stone boundary wall is/or is not development and is/or is not exempted development.

Location

Milltown Golf Club, Lower Churchtown Road, Churchtown, Dublin 14

Declaration

Planning Authority

Dun Laoghaire Rathdown County Council

Planning Authority Reg. Ref.

4123

Applicant for Declaration

Milltown Golf Club Trustees Limited

Planning Authority Decision

Is development and is not exempted development

Referral

Referred by

Milltown Golf Club Trustees Limited

Owner/ Occupier

Milltown Golf Club Trustees Limited

Date of Site Inspection

19th December 2023

Inspector

Conor Crowther

1.0 Site Location and Description

- 1.1. The site is located to the far south of and within the confines of Milltown Golf Club, in the established suburb of Churchtown, Dublin 14. The golf course itself is characterised by long, narrow fairways interspersed with typical landscaping features such as trees, a lake and sandpits. The golf course is dissected by Orwell Road which runs on a north-south axis across the course. The clubhouse is located at the northern end of the course at a significant remove from the site itself.
- 1.2. The site of the timber fencing lies adjacent to the 15th hole which is located in the far south of the golf course. The site is bounded to the south by no.100 Churchtown Road Lower and to the east by Churchtown Road Lower. The golf course itself bounds the site to the north and to the west. It appears as though 3 no. flat top square garden lattices have been affixed to the fencing to facilitate the growth of young trees.

2.0 The Question

- 2.1. The question has arisen as to whether or not the maintenance and management of part of the golf course boundary to Lower Churchtown Road comprising the removal of old wooden and paladin fence, etc. above the old stone wall and the erection of c. 56 linear metres of a replacement timber fenced affixed to and above the old stone boundary wall is development, and if so, is it exempt development.
- 2.2. It is stated that the replacement timber fencing is required in order to maintain and manage the golf course by means of protecting the lands from trespass, preventing stray balls from exiting the course and restricting fly-tipping of household refuse. It was also claimed that overgrown briars spreading beyond the fencing was creating an on-going safety concern for pedestrians and cyclists. Photographs of the fencing, before and after, are provided with the referrer's submission.
- 2.3. It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the removal of old wooden and paladin fence, etc. above the old stone wall and the erection of c. 56 linear metres of a replacement timber fenced affixed to and above the old stone boundary wall in respect of the proper planning and sustainable development of the area, but rather whether or not

the matter in question constitutes development, and if so, whether it constitutes exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1. The Planning Authority made the following declaration on the 5th May 2023:

Having regard to,

- Sections 2, 3, and 4(2) of the Planning and Development Act, 2000, as amended,
- Articles 6(1) and 9(1) of the Planning and Development Regulations 2001 (as amended),
- Class 34, Article 6, Part 1 of the Planning and Development Regulations 2001, as amended, and the conditions and limitations of same, and
- Plans and particulars lodged with this Section 5 application,

It was recommended that Dun Laoghaire-Rathdown County Council advise the Applicant that:

‘The maintenance and management of part of the golf course boundary to Lower Churchtown Road comprising the removal of old wooden and paladin fence, etc. above the old stone wall and the erection of c. 56 linear metres of a replacement timber fenced affixed to and above the old stone boundary wall at, Milltown Golf Club, Lower Churchtown Road, Churchtown, Dublin 14,

‘Is considered development and is not exempted development per the exemptions provided for in Class 34, Article 6, Part 1 of the Planning and Development Regulations 2001, as amended’.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Planning Officer's report issued on the 5th May 2023 declaring that the Section 5 referral constitutes development and is not exempt development. The report is summarised as follows:

- The referral constitutes 'works' under Section 2(1) of the Planning and Development Act 2000 (as amended).
- The referral constitutes 'development' under Section 3(1) of the Planning and Development Act 2000 (as amended).
- The height of the proposed works between 2.1m and 2.5m is above the height exemption limits of a maximum of 2m, as set out under Class 11 of Part 1, Article 6, Schedule 2 of the Planning and Development Regulations 2001, as amended.
- Definitions provided by the referrer relating to maintenance and management were accepted for the purpose of the assessment.
- The removal and replacement of the old wooden and paladin fence with a new timber fence does not align with the accepted definition of maintenance, in that the structure to be maintained was removed and replaced rather than maintained.
- The justification for the proposed works does not align with the definition of what constitutes 'works incidental to the maintenance and management of' the golf course, in line with the Inspector's Report for RL03.RL3483, as it is considered that the proposed works do not constitute 'maintenance'. The proposed works do not therefore come within the scope of exemption under Class 34, Part 1 of Schedule 2 of the Planning & Development Regulations, 2001.
- Restrictions on exemptions under Article 9, Schedule 2 of the Planning and Development Regulations 2001 (as amended) are not relevant.

4.0 Relevant Planning History

4.1. Referral Site:

D22B/0531 - Retention permission REFUSED on the 20th February 2023 for changes to the fence treatment at the Churchtown Road Lower boundary of the golf club grounds specifically, the replacement of previous wire mesh panel fence with painted timber fencing (56 metres in length). Refusal on the following grounds:

- Significant visual impacts as a result of excessive scale and appearance in contrast with surrounding development.
- Fails to integrate appropriately with surrounding pattern of development.
- Overbearing and unduly prominent resulting in negative impacts on residential amenity.
- Not in accordance with various policy objectives within the County Development Plan.

14/916 (ABP Ref. RL06D.RL3549) - Whether the erection of a ball catch fence which would be 22 metres in height and 60 metres in length is or is not development or is or is not exempted development. This was determined by the Board to be development and not exempted development on the 9th October 2018. The works were not determined as being works incidental to the maintenance or management of the golf course. The proposed works, in this instance, were located further north within the grounds of the golf course on the 18th fairway.

ENF35022 – Refers to the unauthorised building of a fence.

4.2. Other Relevant Referrals:

4.2.1. The following referrals decided by the Board are considered relevant to this case:

RL05E.306362 - Whether ground excavation, alteration and demolition on private and public property at Narin and Portnoo Links and Castlegoland Beach, Narin, Portnoo, Co. Donegal is or is not development or is or is not exempted development.

On the 8th October 2020 the Board determined that the removal of soil in a fairway to form a natural sand bunker constituted works incidental to the maintenance and management of a golf course and therefore constituted exempted development.

RL 3521 - Whether conversion of 12 bedrooms to recreational suites, construction of car park to putting green area, construction of car park to tee area is or is not development or is or is not exempt

On the 29th January 2018 the Board concluded that the conversion of 12 bedrooms to recreational suites, construction of car park to putting green area and construction of car park to tee area is development and is not exempted development. It is important to note that in coming to this conclusion, the Inspector clarified that the maintenance and management of a golf course is considered to be 'management of the greens and fairways'.

RL3483 - Whether raising the height of an existing driving range berm on the lands of Doonbeg Golf Club is or is not development or is or is not exempted development.

The Board concluded, on the 7th March 2017, that the above works came within the scope of Class 34 as it formed part of the management and maintenance of the golf course. In coming to this conclusion, the Board disagreed with its Inspector who had considered that the works did not accord with the Oxford Dictionary definition of either 'Maintenance' or 'Management'. The Board Direction indicated that the works effectively improve the safety of the driving range and are necessary for the management of the golf course.

RL2750 – Whether the replacement of timber fencing is or is not exempted development at Mount Henry, Torca Road, Dalkey, County Dublin.

On the 19th November 2010 the Board determined that the replacement of timber fencing is development and is not exempted development. I note the Board Order, in disagreement with the Planning Inspector, detailed that the replacement timber fence differed in character and height and was in parts entirely new and therefore didn't qualify as exempted development.

RL2405 – Whether the renovation and alteration of a section of The Curragh Plain, consisting of the relocation of an existing green to a previously unused area for use as part of an existing golf course is or is not development and is or is not exempted development and whether the use is exempted development and whether the change of use is a material change of use requiring planning permission.

On the 30th June 2007 the Board determined that the change in location of the green would constitute 'alterations to the layout' and 'works incidental to the maintenance and management' of the golf course, and therefore came with the scope of Class 34 of the Planning & Development Regulations. However, the exemption could not be applied in this instance as the proposed works had the potential to impact the Curragh Archaeological complex (RMP KD023-076).

RL2252 – Whether site excavation works to accommodate regrading and alteration to golf course layout at Narin, Portnoo, Co. Donegal is or is not development and is or is not exempted development.

On the 21st December 2005 the Board determined that the above works to the golf course were not incidental to the maintenance and management of the golf course. The proposed works were therefore not considered exempt development under Class 34.

RL2167 – Whether works carried out on the lands of Doonbeg Golf Club involving the closure of the existing public right of way and the movement and alteration of the natural line of the public vehicular right of way at this location are or are not development or are or not exempted development.

On the 25th May 2005 the Board found that the above works constituted development but did not constitute exempted development. However, it is worth noting that the inspector did determine that the works did qualify as exempted development under Class 34 but that they were disqualified for exemption on the basis of potential obstruction of a public right of way.

RL2121 – Whether the erection of fences at Ardinary, Ennerkilly, Co. Wicklow is or is not exempted development.

On the 14th May 2004 the Board found that the above works constituted development but did not constitute exempted development. In respect of Class 34, the works were not considered to constitute works incidental to the maintenance and management of the golf course due to the fact that the fencing lay partly or wholly outside of the lands in the ownership of the referrer. This disqualified exempted development privileges under Class 34.

5.0 Policy Context

5.1. Dún Laoghaire Rathdown County Development Plan 2022-2028

5.1.1. The site is zoned 'F' the objective of which is 'to preserve and provide for open space with ancillary active recreational amenities'. In addition to this, a tree preservation objective is applied in the south of the subject site.

5.1.2. The following Policy Objectives are of relevance:

- Policy Objective GIB20: Biodiversity Plan
- Policy Objective GIB25: Hedgerows.

5.2. Natural Heritage Designations

5.2.1. The closest sites of natural heritage interest to the proposed development are the Grand Canal proposed Natural Heritage Area (002104) and the Fitzsimon's Wood proposed Natural Heritage Area (001753), which are approximately 3.5km from the proposed development.

6.0 The Referral

6.1. Referrer's Case

Kiaran O'Malley & Co. Ltd., acting on behalf of the applicant, made a Section 5 referral submission to the Board on the 1st June 2023 requesting a review of the decision of Dún Laoghaire Rathdown County Council issued on the 5th May 2023 declaring that the Section 5 referral constitutes development and is not exempt development. The referrer's case is summarised as follows:

- The maintenance of the golf course boundaries are a component part of the overall maintenance and management of the golf course.
- The works do not need to constitute maintenance and management works per se, in that they only need to be 'incidental' to the maintenance and management of the golf course. As such, the works are incidental to the management and maintenance of the golf course.

- With regard to the proposed removal and replacement of a structure, Class 34 relates to 'any golf course' as a whole as opposed to a particular part or structure within the golf course.
- ABP Ref. RL3483 is referenced as a precedent referral case for the determination of such works as development and exempt development under Class 34.
- The Planning Authority incorrectly referenced the determination of the inspector in ABP Ref. RL3483 which was not accepted by the Board, in that the Board determined that the works did not need to constitute maintenance and management of a golf course.
- The existing stone wall along the boundary of the site has been fully maintained, a fact that is not acknowledged by the Planning Authority.

6.2. Planning Authority Response

6.2.1. The Planning Authority have not provided any further observations on this referral.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.2. Section 2(1)

"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 any 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,"

7.3. Section 3(1)(a)

This Section of the Act defines "Development" as, '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'.

7.4. **Section 4(1)**

This Section of the Act outlines various forms and circumstances in which development is exempted for the purposes of the Act.

7.5. **Section 4(2)**

In addition to specified exemptions in the Act, Subsection (2) of the Act provides that the Minister may by regulations provide for any class of development being exempted development.

7.6. **Planning and Development Regulations, 2001**

- 7.6.1. Article 6 of Part 2 of the Regulations provides that subject to Article 9 (1) (a), development specified in Column 1 of Part 1 of the Second Schedule shall be exempted development for the purposes of the Act subject to the conditions and limitations specified in Column 2. The main class of relevance is Class 34 which refers to works incidental to the maintenance and management of a golf course as follows:

‘Class 34 Works incidental to the maintenance and management of a golf course or pitch and putt course, including alterations to the layout thereof, excluding any extension to the area of a golf course or pitch and putt course’.

There are no conditions or limitations of this class.

- 7.6.2. Another class of relevance is Class 11 which pertains to the height of fencing generally and is worded as follows:

‘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),’

‘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’.

- 7.6.3. Article 9 (1) (a) lists the exceptions where development would not be exempted development (by virtue of Article 6).

8.0 Assessment

8.1. Is or is not development?

- 8.1.1. Having inspected the site and the timber fencing the subject of this referral, it is evident to me that the erection of the timber fencing involved the carrying out of works as defined above, and hence constitutes development within the meaning of the Act.

8.2. Is or is not exempted development?

- 8.2.1. Having regard to Section 4(1) of the Planning & Development Act 2000 (as amended), I conclude that the works the subject of this referral would not constitute exempted development under this section of the Act. I will now consider whether the works are exempted development under Article 6 of Part 2 of the Planning & Development Regulations 2001.
- 8.2.2. I note the following justifications have been provided by the referrer for the works:
- Fly-tipping occurring along the boundary of the golf course.
 - Deterring of unwanted trespassers.
 - Containment of golf balls within the confines of the site.
 - Overgrown briars present an on-going safety concern for pedestrians and cyclists.
- 8.2.3. The Oxford Dictionary defines the terms maintenance, management and incidental as follows –
- Maintenance - ‘the process of keeping something in good condition’.
 - Management - ‘the process of dealing with or controlling things or people’.
 - Incidental - ‘happening as a minor accompaniment to something else’ i.e. ancillary or subordinate to.

I note that these definitions have been referenced in previous Section 5 referrals determined by the Board; I therefore consider these definitions to be relevant.

- 8.2.4. I note that the Planning Authority have determined that the wording of the Regulations requires the works to be incidental to both maintenance and management of the golf course. Whereas the referrer has cited a Section 5 Board decision (RL3483) which appears to indicate that works do not need to be incidental to both.
- 8.2.5. Analysis of the relevant referrals in Section 4.2 of this report shows that the majority of referrals were determined against the need to demonstrate that the works were incidental to both the maintenance and management of the golf course. When considering this, in addition to ABP Ref. RL06D.RL3549 which represents the most relevant previous referral, it is my belief that the intention of the wording of Class 34 of the Regulations is that the works must be incidental to both the management and maintenance of a golf course. I therefore do not consider the works to be exempted development on the basis that they are not incidental to both the maintenance and management of the golf course.
- 8.2.6. I note that the works involve the replacement and upgrading of an old, rotted fence which functioned as part of the boundary of the golf course. For the works to be considered maintenance they must be a part of the process of keeping something in good condition. As the works involve the replacement and upgrading of a fence which differs in height and character to that of the former fence, the works cannot be considered to be maintenance as they are not keeping what was there in good condition. Rather, the works are replacing and upgrading what was there.
- 8.2.7. Notwithstanding this, I note that the referrer has outlined that the works represent the maintenance of the boundaries of the golf club and that they are a 'component part of the overall maintenance and management of the golf course'. Considering the fact that the works do not keep the existing fence in good condition, which functioned as part of the boundary of the golf course, it cannot reasonably be determined that the works represent maintenance of the golf course. In addition to this, the replacement fence differs in height and character to that of the previous fence thereby disqualifying any exempt development privileges on the basis of materiality. In this respect, I note the Board's previous determination under RL2750 which considered the difference in character and height of a replacement fence to be material and therefore not exempt.

8.2.8. The referrer has also noted the wording of the Regulations which only require works to be 'incidental' to the management and maintenance of the golf course. In determining whether the works could be considered to be incidental to the maintenance of the golf course, it is my view that if one were to determine the works to be incidental to the maintenance of the golf course, it would allow for unlimited such fencing to be erected along the boundaries of golf courses across the state. I do not believe that this is the intent of the wording of Class 34. Indeed, such an interpretation would appear to be at odds with the intent of Class 11 which deals specifically with boundary fencing, and whose height threshold of 2m for boundary fencing is exceeded by these works. In any case, the materiality issues cited above outweigh the consideration as to whether or not the works are incidental to the maintenance of the golf course. I therefore do not consider the works to be incidental to the maintenance of the golf course.

8.2.9. When considering the justification for the works and the above definition of management, one could be inclined to determine that the works constitute management as they involve the confinement of golf balls to the golf course and the management of access to the golf course. Thus, the works involve 'controlling things or people'. Notwithstanding this, I note the Board's previous determination under RL3521 which agreed with the Inspector in her assessment of the meaning of the maintenance and management of a golf course, determining it to mean the management of the greens and fairways. It is my view that this determination more accurately reflects the intent of the wording of Class 34, which is to allow for maintenance and management of the greens and fairways of a golf course. I do not believe that the works the subject of this referral relate to the management of greens and fairways. Rather, they relate to the management of the boundary of the golf course. Given that the referrer has not provided clear and unambiguous proof that the works the subject of this referral directly correlate with or are ancillary to the management of greens and fairways, I do not consider the works to be management of the golf course or incidental to the management of the golf course.

8.3. Restrictions on exempted development

8.3.1. There are no restrictions on exemption relevant to the proposed works.

8.4. **Appropriate Assessment Screening**

- 8.4.1. I note that the referral was not accompanied by a screening report for Appropriate Assessment. I also note that the Local Authority undertook Appropriate Assessment Screening of the works and determined that they would not significantly impact upon a Natura 2000 site.
- 8.4.2. The works have been considered in light of the requirements of Section 177U of the Planning and Development Act 2000 as amended. Having carried out Screening for Appropriate Assessment, it has been concluded that the works individually or in combination with other plans or projects would not be likely to have a significant effect on any European site, and Appropriate Assessment (and submission of a NIS) is not therefore required.
- 8.4.3. This determination is based on the following:
- The size and scale of the works;
 - The location of the works in an established urban area that is suitably serviced; and
 - The separation from and lack of connectivity to any European Sites.
- 8.4.4. This screening determination is not reliant on any measures intended to avoid or reduce potentially harmful effects of the project on a European Site.

8.5. **EIA Screening**

- 8.5.1. The works do not fall within a class set out in Schedule 5, Part 1 or 2 of the Planning & Development Regulations 2001, as amended, therefore no preliminary screening or EIA determination is required (see Appendix 1).

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 removal of old wooden and paladin fence, etc. above the old stone wall and the erection of c. 56 linear metres of a replacement timber fence affixed to and above the old

stone boundary wall is or is not development or is or is not exempted development:

AND WHEREAS Kiaran O'Malley & Co. Ltd. on behalf of Milltown Golf Club Trustees Limited requested a declaration on this question from Council and the Council issued a declaration on the 5th day of May, 2023 stating that the matter was development and was not exempted development:

AND WHEREAS Kiaran O'Malley & Co. Ltd. on behalf of Milltown Golf Club Trustees Limited referred this declaration for review to An Bord Pleanála on the 1st day of June, 2023:

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, as amended,
- (c) Section 4(1) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 1 and 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, including in particular Class 34 & Class 11 thereof.
- (f) the planning history of the site,
- (g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The works of alteration to the golf course comprising the removal of old wooden and paladin fence, etc. above the old stone wall and the erection of c. 56 linear metres of a replacement timber fence affixed to and above the old stone boundary wall comes within the meaning of Section 3 of the Planning and Development Act 2000 (as amended) and are, therefore, development.
- (b) The works to the golf course do not come within the scope of Class 34 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001, (as amended), not being works incidental to the maintenance and management of the golf course.

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 removal of old wooden and paladin fence, etc. above the old stone wall and the erection of c. 56 linear metres of a replacement timber fence affixed to and above the old stone boundary wall is development and is not exempted development.

Inspector - Declaration

Having reviewed the case assigned to me, I hereby declare that to the best of my knowledge I am satisfied that I do not have a conflict of interest in relation to this case and I am in compliance with the Board's Code of Conduct.

Print Name_____

Signature_____

Date _____

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.

Conor Crowther
Planning Inspector

6th February 2024

Appendix 1 - Form 1

EIA Pre-Screening

[EIAR not submitted]

An Bord Pleanála Case Reference	ABP-317248-23			
Proposed Development Summary	Removal of old wooden and paladin fence, etc. above the old stone wall and the erection of c. 56 linear metres of a replacement timber fence affixed to and above the old stone boundary wall.			
Development Address	Milltown Golf Club, Lower Churchtown Road, Churchtown, Dublin 14			
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	✓	
		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		Class.....	EIA Mandatory EIAR required	
No	✓		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	✓	N/A	Not a class	No EIAR or Preliminary Examination required
Yes				Proceed to Q.4

4. Has Schedule 7A information been submitted?		
No		Preliminary Examination required
Yes		Screening Determination required

Inspector: **Conor Crowther**

Date: **6th February 2024**