



An
Bord
Pleanála

Inspector's Report ABP-318936-24

Question

Whether the erection of gate from private to public space and change of use from publicly accessible open space to private use is or is not development or is or is not exempted development.

Location

36 Monastery Crescent, Clondalkin, Dublin 22

Declaration

Planning Authority

South Dublin County Council

Planning Authority Reg. Ref.

ED23/0051

Applicant for Declaration

Paul Campbell

Planning Authority Decision

Cannot determine

Referral

Referred by

Paul Campbell

Owner/ Occupier

Keith Howell

Observer(s)

None

Date of Site Inspection

07 March 2025

Inspector

Gillian Kane

Contents

1.0 Site Location and Description	3
2.0 The Question	3
3.0 Planning Authority Declaration	3
3.1. Declaration.....	3
3.2. Planning Authority Reports	3
4.0 Planning History.....	4
5.0 Policy Context.....	5
5.1. South Dublin County Development Plan 2022-2028.....	5
5.2. Natural Heritage Designations	5
6.0 The Referral.....	5
6.1. Referrer's Case	5
6.2. Planning Authority Response.....	7
6.3. Owner/ occupier's response.....	7
7.0 Statutory Provisions	8
7.1. Planning and Development Act, 2000.....	8
7.2. Planning and Development Regulations, 2001	9
8.0 Assessment	10
8.2. Is or is not development.....	10
8.3. Is or is not exempted development	12
8.4. Restrictions on exempted development	14
9.0 Recommendation.....	14

1.0 Site Location and Description

- 1.1.1. The subject site is a grassed area of open space to the side (east) of no. 36 Monastery Crescent, a mature housing estate in the Dublin suburb of Clondalkin.
- 1.1.2. The character of the estate is open gardens with no boundaries. A pathway has been laid running from the extended driveway, down the side of the gable wall of the house to a pedestrian gate in the rear garden wall. A perimeter of young trees and wire has been created around the open space, blocking access to the space.

2.0 The Question

- 2.1. Whether the erection of a gate from private to public open space and change of use from publicly accessible open space to private use is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On the 11th of January 2024, the Planning Authority issued a declaration stating:
“ 1) The erection of a gate within the curtilage of number 36 Monastery Crescent, Clondalkin, Dublin 22 is development, however due to the insufficient details of information submitted a determination could not be made whether it is or is not exempted development or whether planning permission is or is not required pursuant to the Planning and Development Act 2000, as amended and / or the Planning and Development Regulations 2001,
2) The submission has not demonstrated a material change in the use of any land in private ownership located to the side of no. 36 Monastery Crescent and is therefore considered not to constitute works or development having regard to the definition of same under the Planning and Development Act 2000, as amended, this planning permission is not required.!”

3.2. Planning Authority Reports

- 3.2.1. **Planning Report:** Erection of the gate is works and is development. No scaled drawings have been submitted to accurately determine the height of the gate and therefor determination under Class 5 cannot be determined. Lands are privately

owned by no. 36 and are not maintained by the Council as public open space. Land is zoned open space, privately owned land can be zoned open space. No evidence of a material change of use has been provided, therefore Planning Authority consider that a material change of use has not taken place. Recommendation that 'determination cannot be made' on the erection of the gate and that 'planning permission is not required' be made on the material change of use question.

4.0 Planning History

- 4.1.1. Planning Authority reg. ref. **ED230026**: Section 5 referral declared that the planting of trees within the curtilage of a house does not constitute works or development, the addition of path widening / widening of drive within the curtilage of the house is development and is exempted development and the installation of a gate is development but due to the information submitted a determination could not be made whether it is or is not exempted development.
- 4.1.2. **PL06S.207045**: Permission refused for a 600mm high dwarf wall to the boundary of the existing house at 36 Monastery Crescent for the following reason:
- 1 The proposed development, which provides for the enclosure of the entire open area of ground (including the mature trees) alongside no. 36 Monastery Crescent, would be out of character with the prevailing open plan layout of the Monastery estate and would seriously injure the visual and residential amenities of the area. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.
- 4.1.3. **PL06S.RF1052**: Declaration that the building of a wall enclosing the open space at 36 Monastery Crescent is not exempted development as it involved the enclosure of land that had been habitually open to the public for a period of at least ten years for recreational purposes within the meaning of article 10(1)(xii) of the 1994 Regulations.
- 4.1.4. **PL06S.113117**: Permission granted to extend dwelling at no. 36. With new gates and garden walls to side and rear. Condition no. 1 states:
1. The proposed development shall contain the hall, utility room, extended bathroom and bedroom only. The proposed development including part of the

extension to the west of the existing building line, the proposed 1.8 metre high wall enclosing the garden and the gates to the front shall be omitted.

Reason: To clarify the extent of the development permitted and in the interest of the residential amenity of the area.

5.0 Policy Context

5.1. South Dublin County Development Plan 2022-2028

- 5.1.1. Subject site is zoned 'open space', which has the stated objective 'to preserve and provide for open space and recreational amenities'.

5.2. Natural Heritage Designations

None on the subject site or in the immediate vicinity.

6.0 The Referral

6.1. Referrer's Case

- Declaration of South Dublin County Council in the subject referral runs counter to the 2002 declaration of An Bord Pleanála in RF1052 which found that the 'proposed development would consist of the enclosure of land that has been habitually open to the public for a period of at least 10 years for recreational purposes within the meaning of article 10(1)(xii).'
- An application in 2004 SD04A/0046 for a dwarf wall enclosing the space was refused for the reason of seriously injury to visual and residential amenity.
- The subject site has been open to and used by the public since the estate was built in 1964.
- The land is now zoned as open space. This re-enforces the view that the private land is for the use and enjoyment of all residents.
- The Planning Authority was asked to five questions. South Dublin County Council requested additional information but the response was deemed to have sufficient information.
- South Dublin County Council found that the enclosure of the space is not development and the installation of the path and extension of the driveway over shared sewage services are development and are exempted development.

- The enclosure of land that has been used as public space for upwards of ten years cannot be considered exempted development.
- The decision of South Dublin County Council that the planting in trees in a linear fashion was not development is consistent with the decision of the Board under RL2060. This declaration was made under the 1963 Planning Act, as amended and should be reviewed under the Planning and Development Act 2000, as amended.
- RL2482, RL3357 and RL3133, all made under the 2000 Act all found that the enclosure of public space is development and is not exempted development.
- Given that South Dublin County Council acknowledge the open space zoning and that there is a long recognised history of the site being used by the community for recreational purposes, their decision appears to be inconsistent with their own policies.
- There are some inaccuracies in the Councils decision – wrong address. Council documents dating to the 1980's show that the site was in their care for general maintenance. This was relinquished in the early 2000's.
- It appears that the Planning Authority set aside previous planning decisions on the site – RF1052, PL06S.207045 and SD06B/0093.
- It appears that a change of use / enclosure can occur without any activity that may be considered as development by the Planning Authority.
- The consequence of fast growing non-native trees enclosing the space has the same effect as the dwarf wall that was refused permission by the Board – RF1052 and PL06S.207045.
- The Planning Authority have wrongly equated curtilage with registered title. Curtilage is a matter of fact and is not equivalent to the extent of registered title. The Planning Authority have wrongly considered the registered owner as being the registered owner of areas outside the curtilage.
- It appears that the open space zoning of the site has been over ruled by the residential zoning of the adjoining plot.
- The referral is accompanied by the following appendices:

1. Section 5 referrals submitted by current referrer,
2. Section 5 decisions made by South Dublin County Council,
3. An Bord Pleanála decisions RF1052, PL06S.207045, PL06S.113117,
4. Legal letter,
5. Updated scaled drawing of open space,
6. Area committee meeting details from 2006,
7. Letter referring to Council involvement with subject space,
8. Statutory declarations

6.2. **Planning Authority Response**

- 6.2.1. The Planning Authority confirms its decision. The issues raised in the appeal have been covered in the Chief Executive Order.

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

Erection of the Gate

- The referrer does not provide any evidence that the gate is not exempted development. He does not address the insufficiency of information noted by the Planning Authority.
- The decisions noted by the referrer RF1052, PL06S.207045 and 06S.113117 are not relevant to the question of the planning status of the gate. The decision of the Board under RF1052 was that the erection of a wall was not exempted development. The decision under PL06S.207045 was a refusal of permission for the wall. 06S.113117 referred to an extension to the dwelling.
- The erection of the gate in a wall on the owners property is exempted development under Class 5 of Part 1 of the second schedule of the Planning and Development Regulations 2001, as amended.
- Under ABP-308493-20 the Board found that “the opening of a pedestrian gateway in the boundary wall between the rear amenity space and an area of public open space, both to the rear of no. 31 The Maples...is development and is exempted development.”

Use of Open Space

- The referrer suggest that the area in question does not form part of the curtilage of no. 36 Monastery Crescent, however that is not what the Board is asked to review – only whether there has been a material change in the use of the land.
- The Planning Authority noted that the lands are privately owned by no. 36 and are not maintained by the Council as public open space. The Planning Authority noted that no evidence had been submitted to demonstrate that a material change of use had occurred. No evidence has been submitted to the Board under the current referral.
- The question posed to the Board does not relate to the planting of trees or the placing of wire. The zoning objective of the lands has no relevance in determining whether a material change of use has occurred.
- In conclusion the Board is requested to determine that the gate in the wall is development that is exempted development and that the change in use from publicly accessible open space to private use is not development.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. The following statutory provisions are relevant in this instance.

7.1.2. Section 2(1): In this Act, except where the context otherwise requires

"**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 this context so admits, includes the land on, in or under which the structure is situated".

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

- 7.1.4. **Section 4(1):** sets out developments that shall be exempted development for the purposes of this Act.
- 7.1.5. **Section 5(1):** If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.
- 7.1.6. **Section 5(3)(a)** Where a declaration is issued under this section, any person issued with a declaration under subsection (2) (a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration. (b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

Section 5(4): Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be

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

- 7.2.1. Part 2 of the Planning and Development Regulations, 2001 refers to Exempted Development. Of relevance to the subject proposal:
- 7.2.2. “Subject to Article 9 development of a class specified in Column 1 and Part 1 of Schedule 2 shall be exempted development for the purposes of the Act”.

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. (x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a

means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility

7.2.3. **Class 5 of Part 1 of Schedule 2**

CLASS 5

The construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or wooden fence or a wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.

1. The height of any such structure shall not exceed 2 metres or, in the case of a wall or fence within or bounding any garden or other space in front of a house, 1.2 metres.

2. Every wall other than a dry or natural stone wall bounding any garden or other space shall be capped and the face of any wall of concrete or concrete block (other than blocks with decorative finish) which will be visible from any road, path or public area, including public open space, shall be rendered or plastered.

3. No such structure shall be a metal palisade or other security fence.

8.0 **Assessment**

8.1.1. The purpose of this referral is not to determine the acceptability or otherwise of the above proposal in terms of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.

8.2. **Is or is not development**

8.2.1. As per section 3(1) of the Act, "development" is the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land.

- 8.2.2. Two questions are put to the Board – 1) whether the erection of a gate from private to public open space and 2) change of use from publicly accessible open space to private use is or is not development and is or is not exempted development.
- 8.2.3. With regard to the erection of a gate in a boundary wall between the walled rear garden of the dwelling at no. 36 and providing access to the open space to the east, this is an act of construction and demolition and therefore constitutes works. I am satisfied that this constitutes “development” as per section 3(1) of the Planning and Development Act 2000, as amended.
- 8.2.4. With regard to the change of use of the space to the east of the existing dwelling, the planting of trees with a wire fence changes the use of the space from being accessible to the wider public to accessible only to the residents of no. 36. With regard to whether that change of use is material (and therefore would constitute development under section 3(1)), I note the test advanced by Barron, J in *The County of Galway v Lackagh Rock Ltd* [1984 21 MCA] in the determining of whether or not a material change of use has occurred. In that case, Barron, J considered that ‘in determining whether or not a present use was materially different from a use being made on the appointed day one must look at matters which the planning authority would take into consideration if a planning application were made on both dates and if these matters were materially different than the present use must be equally materially different.
- 8.2.5. One of the matters that would be taken into consideration by the Planning Authority or An Bord Pleanála, in this instance would be the planning history of the subject site. Namely, that under PL06S.RF1052 the Board declared that the building of a wall enclosing the open space at 36 Monastery Crescent was not exempted development as it involved the enclosure of land that had been habitually open to the public for a period of at least ten years for recreational purposes within the meaning of article 10(1)(xii) of the 1994 Regulations. Also, that under PL06S.207045, the Board refused permission for a 600mm high dwarf wall to the boundary of the existing house at 36 Monastery Crescent on the grounds that the proposed development “which provides for the enclosure of the entire open area of ground (including the mature trees) alongside no. 36 Monastery Crescent, would be out of character with the prevailing open plan layout of the Monastery estate and would seriously injure the visual and residential amenities of the area”. Further, under

PL06S.113117, condition no. 1 of the permission specifically prohibited a proposed 1.8 metre high wall enclosing the garden and any development to the west of the existing building line.

- 8.2.6. I note the decision of the Board under PL28.RL3360 wherein the Board declared that works undertaken which consisted of the fencing and enclosure of land habitually open to or used by the public during the 10 years preceding the fencing and enclosure for recreational purposes, and the removal of the original rear garden fencing/wall and the fencing and enclosure of the land and its use as a private garden serving a private dwellinghouse constitutes a change of use which was considered to be a material change of use of the space habitually open to or used by the public for recreational purposes. This was declared to be development that was not exempted development.
- 8.2.7. The Board will note declarations under PL29S.RL2497 and PL27S.RL2452 which related to lands in private ownership which has been habitually used by the public for the preceding years and wherein the Board declared that a change of use to these lands was material and was not exempted development.
- 8.2.8. The use of the lands has changed from a public use to a solely private use. Given the decisions of the Board and the declarations of the Board regarding the use of the lands by the public and the impact of that on the residential and visual amenity of the wider estate, I am satisfied that the proposed development amounts to a change of use that is material and thus constitutes development under section 3(1) of the Act.

8.3. **Is or is not exempted development**

- 8.3.1. The owner of the property, in responding to the subject referral states that the erection of the gate in a wall on the owners property is exempted development under Class 5 of Part 1 of the second schedule of the Planning and Development Regulations 2001, as amended.
- 8.3.2. Class 5 of Part states that the construction, erection or alteration within or bounding the curtilage of a house of gate not exceeding 2m shall be exempted development. On the date of my site visit, I calculated the height of the gate to be in excess of 2m (approx. 2.2m in height). Therefore it does not fall under the exemption provided by class 5 of Part 1.

- 8.3.3. The owner of the property, in responding to the referral noted that under ABP-308493-20 the Board found that “the opening of a pedestrian gateway in the boundary wall between the rear amenity space and an area of public open space, both to the rear of no. 31 The Maples”...was development and was exempted development.” This referral is not comparable to the subject development as in that case the gate was 1.4m high. I note that this referral concerned a gate between a private garden and an area of *public* open space, which the owner claims the subject lands are not.
- 8.3.4. With regard to the material change of use from publicly accessible space to private open space, I note that the Planning Authority considered the development to be exempt under section 4(1)(h) of the Planning and Development Act 2000, as amended. I do not agree. The material change of use that has occurred is not de-exempted by section 4(1)(h) as that provision of the act applies only to *works*, not *use*. Further, section 4(1)(h) applies to structures only. I note that the appellant is not claiming such an exemption exists, as they assert that no material change of use has occurred.
- 8.3.5. The Board will note the decision under RL13.RL2482 noted by the referrer. This case is not directly applicable to the subject referral as it related to lands designated as open space by a previous planning permission. The referrer also noted the decision of the Board under PL04.RL3357 in which the Board declared that a gate exceeded 2m which fenced off open space adjacent to a dwelling was development and was not exempted development due to the height of the gate. The decision of the Board under PL04.RL3133 related to the construction of a boundary ditch around lands intended to act as open space for the housing estate. In that referral the Board found that the limited scale and extent of the embankment did not prevent public access to or constitute enclosure of the subject lands and therefore it was considered that no material change of use has arisen and therefore no development had arisen in this respect. I am satisfied that this decision is not directly comparable to the subject referral as access to the subject lands by the public has been restricted.
- 8.3.6. I am satisfied that the change of use from public to private open space is not exempted development.

8.4. Restrictions on exempted development

- 8.4.1. Article 9 of the Regulations states that development of a class specified in Column 1 and Part 1 of Schedule 2 shall not be exempted development for the purposes of the Act if certain conditions are met. Of relevance to the subject referral is article 9(1)(a)(i) which states contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act. The enclosure of the subject lands and the material change of use that arises from that enclosure contravenes condition no. 1 of PL06S.113117, which specifically prohibited development enclosing the space and any development to the west of the existing building line. The proposed development cannot therefore be considered exempted development, subject to Article 9(1)(a)(i).
- 8.4.2. Further, the Board has already declared that the enclosure of the open space was development and was not exempted development under PL06S.RF1052 as it consisted of the enclosure of land that had been habitually open to the public for a period of at least ten years for recreational purposes. The proposed development cannot be considered exempted development, subject to Article 9(1)(a)(x).
- 8.4.3. I note the reference of South Dublin County Council to RL16.2060, however this is not relevant to the subject referral as it did not involve lands open to the public.
- 8.4.4. There are no other exemptions provided for under the Act or under the Regulations that apply to the subject 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 erection of a gate from private to public open space and change of use from publicly accessible open space to private use is or is not development and is or is not exempted development is or is not development or is or is not exempted development:

AND WHEREAS Paul Campbell requested a declaration on this question from South Dublin County Council and the Council issued a declaration on the 6th day of December, 2023 stating that the matter could not be determined

AND WHEREAS Paul Campbell referred this declaration for review to An Bord Pleanála on the 26th day of January, 2024:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (d) Parts 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (e) the planning history of the site,
- (f) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The erection of a gate in excess of 2m from private to public open space is development and is not exempted development
- (b) and the change of use from publicly accessible open space to private use is a material change of use that is development and is not exempted development as it would consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(b) of the 2000 Act, hereby decides that the erection of a gate from private to public open space and change of use from publicly accessible open space to private use is development and is not exempted development.

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

Gillian Kane
Senior Planning Inspector

12 March 2025