



An
Bord
Pleanála

Inspector's Report ABP-319589-24

Question

Whether the proposed erection of a fence and gate is, or is not, exempted development within the meaning of the Planning and Development Acts, 2000 (as amended) (PDA) and the PDR, whether such development would result in the segregation of the estate, and the control, and or prohibition, of access through Ardpatrick, and whether this would represent development that would materially alter the terms of the parent planning permission, as amended, and the interruption of a recreational amenity currently enjoyed by residents and members of the public.

Location

Land at the communal recreational/amenity area of Ardpatrick (formerly Susie's Field) between Assumption Road and Pope's Road, Lady's Well east of North City Link Road (N20), Cork City

Declaration

Planning Authority	Cork City Council
Planning Authority Reg. Ref.	R82324
Applicant for Declaration	Donal Kelleher
Planning Authority Decision	Is exempted development

Referral

Referred by	Donal Kelleher
Owner/ Occupier	Blackline Properties Ltd.
Observer(s)	None

Date of Site Inspection	15 th January 2025
Inspector	Bernadette Quinn

1.0 Site Location and Description

- 1.1. The appeal site is comprised of a grassed area of open space located within the Ardpatrick residential estate in Lady's Well located to the north of Cork city. The site is adjacent to a cul de sac and area of car parking which serves the northern end of The Avenue. The Avenue consists of a mix of detached and terraced three storey dwellings. The northern side elevation of an end of terrace three storey dwelling at no. 40 The Avenue addresses the grassed area and there is a pedestrian path linking from The Avenue through the open space to The Close which is located on the opposite side of the area of open space.

2.0 The Question

- 2.1. The question that has arisen pursuant to Section 5 of the Planning and Development Act 2000 as amended, is as follows:
- (i) Whether the proposed erection of a fence and gate is, or is not, exempted development within the meaning of the Planning and Development Acts, 2000 (as amended) (PDA) and the Planning and Development Regulations. Whether such development would result in the segregation of the estate, and the control, and or prohibition, of access through Ardpatrick, whether this would represent development that would materially alter the terms of the parent planning permission, as amended and the interruption of a recreational amenity currently enjoyed by residents and members of the public.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.2. Cork City Council, in accordance with Section 5 of the Planning and Development Act 2000 as amended, considered that the works as described would constitute development and would be exempted development.

The order dated 22nd March 2024 states that having regard to Section 2, 3 and 4 of the Planning and Development Act 2000 as amended, the Planning Authority

considers that the erection of a fence and gate on land at the communal recreational/amenity area of Ardpatrick (formerly Susie's Field) between Assumption Road and Pope's Road, Lady's Well, east of the North City Link Road (N20), Cork City is development and is exempted development.

3.3. Planning Authority Reports

3.3.1. Planning Reports

The report of the planning officer can be summarised as follows:

- The question relates to a local authority proposal. Limited details have been submitted with the section 5 application.
- The proposal constitutes development within the meaning of the act.
- The proposal falls within subsection (1) of section 4 of the Act.
- The erection of a gate and fence would come within the scope of section 4(1)(d) being development by the council of an urban district in that district.
- It is understood that the cost of the fence is less than €126,000 and the proposal would therefore not be subject to the Part 8 process under Section 179 of the Planning and Development Act and Article 80 (1) of the Planning and Development Regulations.
- It is considered that the proposal would not result in a material change of use. The communal amenity space area would remain an area of communal amenity space.
- Having regard to the nature, scale and location the proposal would not be likely to have significant effects on the environment and an Environmental Impact Statement would not be required.
- Having regard to the location of the proposed development site relative to European sites and related watercourses and to the nature and scale of the proposed development it is considered that the proposal would not affect the integrity of any European site and Appropriate Assessment is not required.
- Having regard to Sections 2, 3 and 4 of the Planning and Development Act the Planning Authority considers that the erection of a fence and gate on land

at the communal recreational/amenity area of Ardpatrick is development and is exempted development.

3.3.2. Other Technical Reports

None.

4.0 Planning History

4.1. There are a number of planning permissions relating to development in the area. The following planning applications are considered relevant:

01/25226 / PL 28.131123 Permission granted by the planning authority and ABP on 21st November 2003 following a third party appeal for 125 residential units (reduced to 72 dwellings following submission of revised drawings to ABP on 08.10.03) and which included the appeal site as public open space to serve the development.

PL 28.218187 Permission refused by the planning authority and granted by ABP to vary permission PL 28.131123 by removing condition 12 relating to the requirement for a management company to maintain open space, roads and communal areas.

4.2. Previous Board References/ Referrals

I have searched the Boards database and consider the following precedents to be relevant.

RL2128: Whether development comprising the erection of a public light on an Electricity Supply Board pole by Galway County Council adjacent to a public roadway at Gort An tSleibhe, Claregalway, Co. Galway is or is not development or is or is not exempted development.

This referral related to a public light erected on an ESB pole located on a small area of open ground and adjacent to a public road serving a cluster of houses. The Board decided on 11/05/2004 that: The erection of the light, being development by the Council in its functional area, was exempt by virtue of Section 4(1)(b), regardless of whether or not the lighting was erected on private property. The development did not come within the scope of sections 178 and 179 of the Planning and Development Act, 2000. The restrictions on exemption contained in Article 9 of the Planning and Development Regulations, 2001 do not apply to development exempted under

Section 4(1) of the Planning and Development Act 2000. The said development was exempted development.

RI2865: Whether the erection of a timber fence is or is not development or is or is not exempted development. The referral related to the construction of a wooden fence on lands purchased by Sligo County Council to secure public access to the shoreline at Culleenamore Beach. The timber fence was c1.2m in height and approximately 120m in length with gateways at each end and had been erected by the local authority. The area abutted by the fence appeared to be in use as a private garden ancillary to one of the adjacent beach houses. The referral was made by a Third Party (Culleenamore Public Right of Way Protection Group). The Board decided on 19/09/2011 that erection of the timber fence constituted exempted development, as follows: The works in question were carried out within the functional area of the local council and were considered exempted development by reason of S 4(1) (b) of PDA, 2000. As Articles 6 and 9 of PDR, 2001 did not relate to local authority works, they were not relevant.

RL2997: Whether the erection of a pair of free-standing gates on the public footpath is or is not development or is or is not exempted development. This referral relates to gates that had been erected on the public footpath, and which were used to close off a street in Galway city at certain times. The referrer (a local trader in an adjoining street) argued that the gates, when closed, obstructed a public right of way, and therefore were not exempt by reason of Article 9(1)(a)(xi) of the Regulations.

The Board decided on 20/12/2012 that, based on the evidence on the file, the gates had been erected by the City Council within its own functional area, and that their erection was within the scope of the exemption set out in Section 4 (1)(c) of the Act and was therefore exempted development.

5.0 Policy Context

5.1. Development Plan

The Cork City Development Plan 2022 – 2028 is the statutory development plan for the area. The appeal site contains the zoning objective ZO 01 Sustainable

Residential Neighbourhoods - To protect and provide for residential uses and amenities, local services and community, institutional, educational and civic uses.

5.2. Natural Heritage Designations

None relevant.

6.0 The Referral

6.1. Referrer's Case

The referrer has appealed the decision of the Planning Authority. The appeal includes correspondence with Cork City Council, a local representative, and a report from the local area committee members in relation to the proposed gate and fence and an extract from Cork City Council's taking in charge map. The issues raised can be summarised as follows:

- The local authority failed to consider the material change and consequential segregation of the estate and interruption of residential amenity as a result of the proposed fence and gate.
- The local authority failed to disclose and deliberate on information it regarded as a requirement to make the declaration in relation to information and drawings for the fence and gate.
- The screening for Environmental Impact Assessment was inadequate.
- There are concerns relating to impacts on permeability, increase in walking distances, reliance on cars and dividing of communities as a result of a proposed fence and gate.
- Details are enclosed of the opening hours for the gate and details of key holders and public consultation in relation to the proposal.
- The proposal has been amended from a previously proposed 1.2m high fence to a now proposed 2m high fence and lockable gate.
- The local authority's finding that the proposal would be exempt under section (1)(d) of the act is an error as this section has been removed from the act.

- The local authority failed to consider restrictions on development by local authorities.
- No reference was made by the planning authority to Section 178(2) of the Act which states that the council shall not effect any development which contravenes materially the development plan.
- The planning authority's finding that matters relating to the proper planning and sustainable development of the area are not a consideration under Section 5 is not correct.
- The zoning of land was considered in the assessment of a Section 5 referral by An Bord Pleanála under reference ABP-316016-23.
- The proposal fails to support the primary objective of the Z1 Sustainable Residential Neighbourhoods land use zoning objective by restricting access to open space.
- The Planning Authority's finding that the proposal would not result in a material change of use is incorrect as the restricted access means the open space would no longer be public.
- The consequences of the proposed gate and fence would materially alter the character and existing use of the estate in the context of its zoning and the terms of the permission and conflicts with other objectives of the plan relating to permeability and safe access and would thereby materially contravene the development plan.
- The impact of a change in access rights and resulting impact on the local community would be profound as a result of the proposed segregation of the residential neighbourhood and these impacts should be considered by the board in relation to the requirement for EIA.
- The proposal fails to protect access to areas of high landscape value in the vicinity.
- Appropriate Assessment and stage 2 Natura Impact Statements have been carried out on development in the vicinity. A more detailed screening should

have been carried out of any possible interactions with European sites designated SAC and SPA.

- The Board is requested to overturn the decision of Cork City Council and confirm that the development is not exempted development by reason of it being a development by the council of a city and a development that would contravene materially the development plan.

6.2. Planning Authority Response

None received.

6.3. Owner/ occupier's response

None received.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1) provides the following definitions

“exempted development” has the meaning specified in Section 4.

“fence” includes a hoarding or similar structure but excludes any bank, wall or other similar structure composed wholly or mainly of earth or stone.

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure’.

Section 3(1) defines development as follows:

‘development’ means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.’

Section 4 (1) sets out development that is exempt from requiring planning permission and includes Section 4(1)(a)(aa) development by a local authority in its functional area (other than, in the case of a local authority that is a coastal planning authority, its nearshore area);

Section 4(3) states A reference in this Act to exempted development shall be construed as a reference to development which is—

- (a) any of the developments specified in subsection (1) or (1A), or
- (b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.

Section 4(4) ‘Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.’

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.

Part XI – Development by Local and State Authorities, etc.

The following sections are relevant:

Section 178 ‘Restrictions on development by certain local authorities’

(2) ‘The council of a city shall not effect any development in the city which contravenes materially the development plan.’

Section 179 (1) ‘Local authority own development’

‘(a) The Minister may prescribe a development, other than development to which *section 179A* applies, or a class of development for the purposes of this section where he or she is of the opinion that by reason of the likely size, nature or effect on the surroundings of such development or class of development there should, in relation to any such development or development belonging to such class

of development, be compliance with the provisions of this section and regulations under this section.

(b) Where a local authority that is a planning authority proposes to carry out development, or development belonging to a class of development prescribed under *paragraph (a)* (hereafter in this section referred to as “proposed development”) it shall in relation to the proposed development comply with this section and any regulations under this section.

7.2. Planning and Development Regulations, 2001

7.3. **Part 8** of the Planning and Development Regulations 2001 as amended refers to ‘Requirements in respect of specified development by, on behalf of, or in partnership with local authorities’

Article 80 outlines classes of development prescribed for purposes of section 179 of the Act. Article 80 (k) states any development other than those specified in paragraphs (a) to (j), the estimated cost of which exceeds €126,000, not being development consisting of the laying underground of sewers, mains, pipes or other apparatus.

7.4. Environmental Impact Assessment (EIA) Preliminary Examination

7.4.1. Schedule 5, Part 1 and Part 2 of the Planning and Development Regulations, 2001 (amended) sets out specified development for which EIA is mandatory and development which requires screening for EIA. The proposed development does not fall within a class of development for the purposes of EIA. Having regard to the limited nature and scale of development and the absence of any significant environmental sensitivity in the vicinity of the site, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

7.5. Appropriate Assessment

7.5.1. The site is located approximately 3.6 km northwest of Cork Harbour SPA (Site Code:004030) and approximately 8.5 km west of Great Island Channel SAC (Site Code:001058). Having regard to nature and scale of the development and the nature

of the receiving environment and the distance and lack of connections to the nearest European sites, it is concluded that no Appropriate Assessment issues arise as the development would not be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.0 Assessment

- 8.1. No drawings have been submitted in relation to the proposed gate and fence. The referral to Cork City Council notes that the North East Local Area Committee of Cork City Council intends to erect a fence and gate at Ardpatrik. It is understood that the partition would be erected to an area surrounding the turning head north of the terraced houses at Ardpatrik Avenue and is described as a 2 metre high fence with a gate at the footpath end. The rationale for the proposal is stated to control through access in response to historical incidents of anti-social behaviour.
- 8.2. The area of open space referred to was included as public open space to serve the houses permitted under planning reference PL 28.131123 and which now comprise 'The Avenue' and 'The Close' in the Ardpatrik estate. The installation of a fence and gate in the area indicated (noting no drawings were submitted confirming the exact location and details) would appear to close off an existing connection through the area of open space in question.
- 8.3. The referral asks whether the erection of a fence and gate is, or is not, exempted development and whether such development would result in the segregation of the estate, and the control, and or prohibition, of access through Ardpatrik, and whether this would represent development that would materially alter the terms of the parent planning permission, as amended, and the interruption of a recreational amenity currently enjoyed by residents and members of the public. I address the question of whether or not the fence and gate is exempted development in section 8.4 and 8.5 below. In relation to the second part of the question I note the provisions of the legislation provide that the purpose of a referral under Section 5 is not to determine the acceptability or otherwise of the development referred to in the question but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development. I consider the question of whether the development would segregate the estate, prohibit access and materially alter the

terms of the parent planning permission and interrupt a recreational amenity currently enjoyed by the public is not a question which falls within the scope of Section 5 of the Planning and Development Act (as amended) and I consider it is beyond the jurisdiction of the Board as provided to it under section 5 of the Act to make a declaration on this aspect of the question.

8.4. Is or is not development

- 8.4.1. Based on the definition of development as stated in Section 3(1)(a) as the carrying out of any works in, on, over or under land and based on the information submitted I consider the provision of a fence and gate would constitute the carrying out of works on land and constitutes 'development' within the meaning of Section 2(1) and Section 3(1) of the Planning and Development Act 2000 as amended.

8.5. Is or is not exempted development

- 8.5.1. Having established that the installation of a fence and gate amount to 'development,' the next issue to be considered is whether the development is exempted development or not.
- 8.5.2. Section 4(1) of the Act defines certain types of development as being 'exempted development.' In this regard, section 4(1)(a)(aa) is relevant and states the following: *development by a local authority in its functional area (other than, in the case of a local authority that is a coastal planning authority, its nearshore area)*. I note that the works are proposed to be carried out by Cork City Council within its functional area and I consider the proposal falls within Section 4(1)(a)(aa) of the Act. The referral argues that Cork City Council considered the works exempt under Section (4)(1)(d) and that this section of the Act has been removed. I note that Section (4)(1)(d) of the Act has been deleted and I consider the relevant provision of the Act is section 4(1)(a)(aa).
- 8.5.3. The report of the planning officer states that the works will be carried out by Cork City Council and that the value of the works is less than €126,000. Correspondence included with the referral indicates the overall cost of the proposal is in excess of €10,000. Article 80 of the Planning and Development Regulations prescribes certain classes of development for the purposes of Section 179 of the Act. A gate or fence

are not included in the classes of development listed in Article 80 paragraphs (a) to (j) and the provisions of Section 178 were not considered to apply to the proposed development based on the costs being less than €126,000 as provided for in Article 80 (k). I am satisfied that the provisions of Section 179 of the Act do not apply having regard to the nature of the works proposed and the estimated costs. Notwithstanding this, I consider Section 179 does not relate to whether or not the development is exempted development, but merely to whether there is an onus on the local authority to comply with the provision of the Regulations in Part 8.

- 8.5.4. Section 178(2) of the Act states that a city council shall not effect any development in the city which materially contravenes the Development Plan. The referral notes that the installation of a fence and gate will restrict access resulting in the open space no longer being public and would contravene objectives of the development plan relating to permeability. I note from the documentation on file that a key is to be provided to residents and that access arrangements will be made locally. I note that the area of land will continue to be used as public open space and I am satisfied that no change of use is proposed. I am satisfied that the proposal to erect a fence and gate does not result in a material contravention of the development plan, noting that there is no proposed change to the use of the open space area.
- 8.5.5. With regard to the restrictions or exemptions under Article 9 of the Planning and Development Regulations 2001 (as amended), I note that these restrictions relate only to development referred to in Article 6 and Schedule 2 of the 2001 Regulations (as amended) which does not relate to works carried out by local authorities. I therefore consider that any de-exemption specified under the provisions of Article 9 would not apply to works carried out by local authorities as these works are exempted under Section 4(1)(a)(aa) of the Planning and Development Act.
- 8.5.6. The referrer raises concerns in relation to the requirement for Environmental Impact Assessment and a Natura Impact Statement. Section 4(4) of the Planning and Development Act 2000 (as amended) states that development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required. I have carried out preliminary examination of EIA and AA screening in sections 7.4 and 7.5 above and I am satisfied that the restrictions on exemption, as indicated in section 4(4) of the Act, do not apply in this instance.

8.5.7. Having regard to the above I consider the erection of a gate and fence by the local authority in its functional area is exempt development.

9.0 Recommendation

9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

- (i) **WHEREAS** a question has arisen as to whether the proposed erection of a fence and gate is, or is not, exempted development within the meaning of the Planning and Development Acts, 2000 (as amended) and the Planning and Development Regulations. Whether such development would result in the segregation of the estate, and the control, and or prohibition, of access through Ardpatrick, whether this would represent development that would materially alter the terms of the parent planning permission, as amended and the interruption of a recreational amenity currently enjoyed by residents and members of the public.

AND WHEREAS Donal Kelleher requested a declaration on this question from Cork City Council and the Council issued a declaration on the 22nd day of March, 2024 stating that the matter was development and was exempted development:

AND WHEREAS Donal Kelleher referred this declaration for review to An Bord Pleanála on the 17th day of April, 2024:

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

- (a) Sections 2(1), 3(1), 4(1)(a)(aa), 4(4), 5, 178 and 179 of the Planning and Development Act, 2000, as amended,

- (b) The provisions of the Cork City Development Plan 2022-2028,
- (c) The planning history of the site, and
- (d) The pattern of development in the area.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the proposed erection of a fence and gate is development and is exempted development having regard to the nature of the development being development by a local authority in its functional area, the development comes within the scope of section 4(1)(a)(aa) of the Planning and Development Act 2000 as amended;
- (b) having considered the nature of the question of whether such development would result in the segregation of the estate, and the control, and or prohibition, of access through Ardpatrick, whether this would represent development that would materially alter the terms of the parent planning permission, as amended and the interruption of a recreational amenity currently enjoyed by residents and members of the public, An Bord Pleanála is satisfied that this aspect of the referral should not be further considered by it as these are not matters provided for consideration under Section 5 of the Planning and Development Act, 2000 (as amended).

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Planning and Development Act (as amended), hereby decides that the erection of a fence and gate 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.

Bernadette Quinn
Planning Inspector

31st January 2025