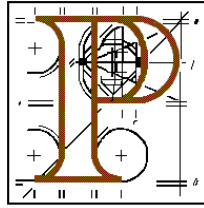


# **An Bord Pleanála**



## **Inspector's Report**

**Reference Case:** RL06F.RL3131

**Question:** Whether the erection of a gate is or is not development or is or is not exempted development at Heather Cottage, Upper Cliff Road, Howth, County Dublin.

**Owner/Occupier:** Allenpark Limited

**Referrer:** Fingal County Council

**Date of Inspection:** 15<sup>th</sup> December, 2015

**Inspector:** Kevin Moore

## **1.0 BACKGROUND**

- 1.1 By order dated 24<sup>th</sup> April, 2013, Fingal County Council made a declaration under section 5 of the Planning and Development Act 2000, as amended, that the erection of a gate at Heather Cottage, Upper Cliff Road, Howth, County Dublin is exempted development.
- 1.2 Following the issuing of this declaration the planning authority, noting that an order had been subsequently made by the Board on 15<sup>th</sup> July 2013 with regard to a previous referral, made a request to the Board under section 5(4) of the Planning and Development Act, to assess as to what in this particular case is or is not exempted development, in particular, regarding the declaration issued by the planning authority in this instance.
- 1.3 The previous referral alluded to is Board Ref. 06F. RL3078.

## **2.0 THE QUESTION**

- 2.1 The question before the Board is:

Whether the erection of a gate is or is not development or is or is not exempted development at Heather Cottage, Upper Cliff Road, Howth, County Dublin.

## **3.0 THE REFERRER'S SUBMISSION**

- 3.1 Fingal County Council's submission may be summarised as follows:

## Introduction

- A request for a Declaration was received by Fingal County Council on 25<sup>th</sup> July 2012 from Howth Pathways in respect of the erection of a gate and other works at Heather Cottage. A Declaration was issued by the Council on 8<sup>th</sup> February 2013 declaring that the development, in respect of the gate only, was considered exempted development. The matter was referred to the Board by Howth Pathways and an order was made by the Board (Ref. PL 06F. RL3078) on 15<sup>th</sup> July 2013, determining that the gate is not exempted development. Neither the planning authority nor the Board made a Declaration or Determination on the “other works” referred to. During consideration by the Board of the previous referral, a subsequent and identical Declaration, in respect of the gate only, was submitted to the planning authority (i.e. the current Declaration) and the planning authority declared the gate was exempted development. As the Board has determined the gate is not exempted development and as the planning authority’s second Declaration was issued prior to the Board’s determination, the Board is now asked as to what in this particular case is or is not exempted development, in particular with regard to the planning authority’s recent Declaration.

## Planner’s Report

- The Planner’s report prior to the issuing of the Declaration included the following:
  - The site is located within land use zoning objective ‘HA’ – protect and enhance high amenity areas’ in the Fingal County Development Plan.

- It is within the Howth SAAO and is designated as 'other areas'.  
There are map-based objectives to 'preserve views' to the north, east and west of the site. Pathways to the north, east and west are identified as Public Rights of Way.
- Planning history relating to the site was referenced.
- It was stated that the request was for a Declaration in respect of a 1.29 metre high wooden gate located on an access road to Heather Cottage.
- The works were considered to be 'development'.
- The gate is located outside of the red line boundary of Planning Permissions F97A-0563 and PL 06F.1051941.
- Reference was made to the provisions under Class 9, Part 1 of Schedule 2 of the Planning and Development Regulations and to the provisions under Section 4.6 of the Howth SAAO referring to some types of development that are exempted development.  
Having regard to these and their associated limitations/conditions, it was recommended that the gate is considered to be exempted development.
- In relation to the existence of rights of way, it was noted that there was no evidence that the access driveway serving Heather Cottage is a public right of way.
- It was considered that the gate would not have a negative impact on the visual amenities of the area which is an SAAO nor was the gate considered to interfere with the character of the landscape or any view or prospect of special amenity value, the preservation of which is an objective of a development plan.

#### **4.0 THE OWNER'S RESPONSE TO THE REFERRAL**

- 4.1 Allenspark Limited submitted to the Board on 16<sup>th</sup> September, 2013 that the Council is seeking to refer a section 5 Declaration that has already been issued by the Council and argues that this is not a valid referral in accordance with section 5 of the Act, notably with regard to subsections (3) and (4). It is contended that there is no basis in the legislation to allow a section 5 Declaration to be referred to the Board by a planning authority. It is further contended that, if the referral is accepted by the Board, the owner would be severely prejudiced as the Declaration was issued some months ago. It is submitted that the referral is invalid and the Board is precluded from adjudicating on a Section 5 Declaration that has been determined by the Council.
- 4.2 Notwithstanding the above, the erection of the gate is exempted development and the owner wishes to retain the opportunity to provide detailed submissions in the event that the Board confirms the referral is valid.

#### **5.0 DELAY DUE TO JUDICIAL REVIEW**

I note that the current referral was put into abeyance in September, 2013 due to a judicial review sought of the previous referral case, namely PL 06F.RL3078. I note also that these legal proceedings were formally adjourned and remain adjourned. The Board was also advised that the structures the subject of the referral are no longer in place.

## **6.0 THE STRUCTURES CURRENTLY IN PLACE**

I can confirm for the Board that a gate itself is no longer in place at this location. Two wooden piers / gate posts are in place on either side of the access road, one of which has a small plate with the name of the house thereon. There is no obstruction to pedestrians or other road users utilizing the access road at this location.

## **7.0 EVALUATION**

7.1 The initial request to the planning authority by Allenspark Limited was in respect of whether or not the erection of a gate on an access road outside the curtilage of Heather Cottage, Howth is or is not exempted development. The request to the planning authority did not seek to address any other matters. I must acknowledge that the Board has already adjudicated on this under Ref. 06F.RL3078. I do intend to revisit the merits of that development and the conclusions drawn and decision made are accepted.

7.2 In the interest of clarity, the Board may wish to repeat the decision previously made. This may be perceived to be prudent in the event that the landowner seeks to avail of the planning authority's determination that the gate constitutes exempted development. I would recommend this course of action in the event the Board is satisfied that (a) it can take such a decision in light of the gate not being in place, albeit that the supports for such a structure are in place, and (b) given that the Board is satisfied to take a contrary view to that of the landowner that the planning authority cannot make its request to the Board under section 5(4) of the Planning and Development Act.

7.3 Regarding the matters raised in (a) and (b) above, my considerations are:

- There is no gate in place. There are two gate posts. There is no impediment to movement along the access road, albeit that the existence of the posts and nameplate suggest entry into a property beyond the turning circle in front of the posts. With respect to these observations, the Board could reasonably conclude that the structures the subject of the referral are no longer in place and that there has been a material alteration. However, it is evident that the existing structures form an integral part of a gate structure. It is my opinion that the Board should decide the question put before it and repeat its previous decision on the gate so that there would be consistency, no element of doubt and to avoid confusion such that the landowner would potentially seek to erect a gate as exempted development having regard to the planning authority's most recent Declaration.
- The landowner raises significant issues alluding to the validity of the referral by the planning authority. It may be considered that there is merit in the submission made. The planning authority issued a Declaration on 24<sup>th</sup> April, 2013. The planning authority, by letter received by the Board on 16<sup>th</sup> August, 2013, requested the Board to assess what is or is not exempted development, in particular regarding the Declaration issued. Section 5(4) of the Act makes provision for planning authorities to "refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board." I note that subsection (4) makes no time provisions for the referral of any question to the Board by a planning authority. The issue of note is whether the referral of a *Declaration* to the Board constitutes the referral of *any question* under section 5(4). It is evident that the planning authority has placed a question before the

Board, which in this particular case, asks the Board to determine if a development, for which they have made a Declaration, is or is not exempted development. The request to the Board was made with the Declaration attached “outlining the issues” as so specified in the correspondence to the Board. Therein, it is also clear that the planning authority, in asking the question, asked the Board to undertake its assessment “in particular, regarding the Declaration issued ...” However, the question before the Board remains - does the erection of a gate at Heather Cottage constitute development and does it constitute exempted development. The question from the planning authority does not expressly seek a revisit of the Declaration issued by the planning authority.

7.4 In light of the above, I again recommend that the Board concur with its previous decision on the question posed under Ref. 06F RL3078

## 8.0 CONCLUSION AND RECOMMENDATION

I recommend as follows:

**WHEREAS** a question has arisen as to whether the erection of a gate on the road leading to a house at and in the vicinity of Heather Cottage, Upper Cliff Road, Howth, Dublin is or is not development or is or is not exempted development:



**AND WHEREAS** Fingal County Council of County Hall, Main Street Swords, County Dublin referred the question to An Bord Pleanála on the 16<sup>th</sup> day of August, 2013:

**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 9 of Part 1 of Schedule 2 to the said Regulations, as amended,
- (d) the restrictions on exempted development under Article 9(1)(a)(vi) and (x) of the said Regulations,
- (e) the location of the site, within a designated Special Amenity Area,
- (f) the zoning of the land under the objective HA – High Amenity and objectives HA01 and SA01 of the Fingal County Development Plan 2011-2017 which seek the preservation of the character of the landscape of the area, and the corresponding provisions in the previous development plan for the county, and
- (g) the submissions made by the referrer and by the owner of the land around Heather Cottage:

**AND WHEREAS** An Bord Pleanála has concluded that -

- (a) the erection of a gate constitutes development as defined in section 3 of the Planning and Development Act, 2000, as amended, and
- (b) the gate would interfere with the character of landscape whose preservation is an objective of the development plan and would enclose land that was habitually open to and used by the public during the 10 years preceding such enclosure for recreational purposes and as a means of access to a place of natural beauty and recreational utility and so the restrictions on exempted development status set down in Article 9 (1)(a)(vi) and 9 (1)(a)(x) of the Regulations apply:

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the said erection of a gate leading on the road to Heather Cottage, Upper Cliff Road, Howth, Dublin would constitute development and would not be exempted development.

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Kevin Moore  
Senior Planning Inspector  
December, 2015.