



An
Bord
Pleanála

Inspector's Report PL.91.3586

Question	Whether the opening in wall of garden to provide pedestrian entrance from road and provide gate opening into garden is or is not exempted development.
Location	36 Vartry Avenue, Raheen, Limerick
Referrer	Limerick City and County Council
Planning Authority	Limerick City and County Council
Planning Authority Reg. Ref.	DC-420-15
Owner / Occupier	Jeremiah Horan

Date of Site Inspection 29th August 2017

Inspector Kenneth Moloney

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1.0 Site Location and Description

- 1.1. The referral site is located within a suburban housing estate in the southern environs of Limerick City. The predominant character of the housing estate is semi-detached two-storey housing.
- 1.2. The referral site¹ comprises of a two-storey semi-detached house within a residential cul-de-sac. The subject house has a single storey extension / garage conversion to its side.
- 1.3. The gable end of the referral property, i.e. the side of the extension / garage conversion abuts onto a public green open space.
- 1.4. There are established two-storey houses, also within the cul-de-sac situated to the rear of the established front building line of no. 36 Vartry Avenue.
- 1.5. A footpath traverses the public open space and the subject pedestrian entrance, which is in situ, opens onto a green area. The pedestrian door does not directly open onto a footpath or public road but onto a green space.

2.0 The Background

- 2.1. Enforcement action was undertaken by Limerick City and County Council in relation to an unauthorised pedestrian entrance.
- 2.2. The owner complied with this enforcement notice and closed the pedestrian entrance.
- 2.3. However, the owner has since reopened the pedestrian entrance as he disputes the opinion of the Local Authority.
- 2.4. Accordingly, the planning authority decided to refer a question to the Board in accordance with 5(4) of the Planning and Development Acts 2000 (as amended) as to whether the subject development is or is not development or is or is not exempted development.

¹ No. 36 Vartry Avenue, Raheen, Limerick

3.0 The Question

“Whether the opening of an ope in the rear side wall of a garden to provide pedestrian entrance from the public road / green area and to provide a 1.98 metres high pedestrian timber gate opening into the rear garden at no. 36 Vartry Avenue, Raheen, Limerick is or is not development or is or is not exempted development”.

4.0 Policy Context

4.1. Local Area Plan

The operational Local Area Plan is the Southern Environs LAP, 2011 – 2017².

The referral site is zoned ‘*Existing Residential*’.

5.0 The Referral

The following is the summary of the referral submitted to An Bord Pleanala.

- A side entrance was opened onto a public green area and adjacent public roadway. The roadway is 4.3m wide.
- Complaints were received from house no. 34 and no. 35 Vartry Avenue.
- The Planning Authority took enforcement action to regularise the development.
- Planning permission was sought to retain the pedestrian entrance.
- Permission was refused because the proposal would detract from visual and residential amenities of the local area.
- The entrance was closed but subsequently reopened.
- The owner claims the pedestrian entrance is exempted development under Class 2 of part 1 of Schedule 2 of the Planning and Development Regulations, 2001. The owner submits that the Council considered these provisions when

² Extended May 2021

deciding that house no's 51 and 53 Vartry Avenue were exempted development.

- The Council have had regard to;
 - (a) Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
 - (b) Articles 6(1), 9(1) (a) (ii) and 9 (1) (a) (iii) of Part 1 of Schedule 2 of the Planning and Development Regulations,
 - (c) the planning history of the site,
 - (d) The Road Act, 1993.

6.0 Respondent

The following is the summary of a response submitted by Jeremiah Horan.

- The pedestrian entrance is onto a public green area and not a road.
- There is a similar pedestrian entrance opening onto a green area from no. 51 Vartry Avenue. The Council considered that entrance exempt under Class 5 of Part 1 of Schedule 2. This also applied to no. 55 Vartry Avenue.
- It is submitted that in a neighbouring estate, i.e. Aisling Heights estate there are similar pedestrian side entrances at no's 8, 9, 14, 15, 28, 45, 57, 75 & 85. However, the Council have not taken any action in relation to these properties.
- There are similar entrances from private houses in other neighbouring estates some of which open onto footpaths, e.g. 9 Norbitan Hill, Raheen Gardens and 26 Raheen Gardens.
- It is also submitted that planning permission was granted for a similar entrance at no. 1 Stoneyhurst.
- It is submitted that the Council's claim that a pedestrian entrance at this location would be considerably at variance with the general character of the area is not tenable.

7.0 Evaluation

7.1. The Facts of the Case

The facts of the matter include the following;

- A Warning Letter was issued to owner on the **9th March 2016**.
- On the **8th June 2016**, an Enforcement Notice was issued to the owner of no. 36 Vartry Avenue. The notice stated that the access / entrance onto the public area was unauthorised and the owner was required to take appropriate action within one month of issuing the notice.
- On the **21st October 2016** planning permission was refused for the retention of a side entrance / access. The reason for refusal stated that the entrance / access would detract from the visual and residential amenity of the local area.
- The entrance was closed off however it was subsequently reopened as the owner disputed the Council's opinion.
- On the **25th May 2017**, An Bord Pleanala received a referral from Limerick City and County Council, in accordance with the provisions of Section 5(4)(a) of the 2000 Act.

7.2. Statutory Provisions

I consider the following statutory provisions relevant to this referral case:

Planning and Development Act, 2000

Section 2 (1) states: -

- "structure" means any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined."

- “works’ includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...”
- ‘public road’ has the same meaning as in the Roads Act, 1993

Roads Act, 1993

Public Road means a road over which a public right of way exists and the responsibility for the maintenance of which lies with the authority;

“road” includes –

- Any street, lane, footpath, square, court, alley or passage,
- any bridge, viaduct, underpass, subway, tunnel, overpass, overbridge, flyover, carriageway (whether single or multiple), pavement or footway,
- any weighbridge or other facility for the weighing or inspection of vehicles, toll plaza or other facility for the collection of tolls, service area, emergency telephone, first aid post, culvert, arch, gully, railing, fence, wall, barrier, guardrail, margin, kerb, lay-by, hard shoulder, island, pedestrian refuge, median, central reserve, channeliser, roundabout, gantry, pole, ramp, bollard, pipe, wire, cable, sign, signal or lighting forming part of the road,

Section 3 (1) states: -

“In this Act, “development” means, except where the context otherwise requires, the carrying out of works on, in over or under land, or the making of any material change of use of any structures or other land.”

Section 4 (1) sets out various forms and circumstances in which development is exempted development for the purposes of the Act. Section 4 (2) of the Act provides

that the Minister may, by regulations, provide for any class of development to be exempted development. The principal regulations made under this provision are the Planning and Development Regulations, 2001.

Planning and Development Regulations, 2001

Article 6(1) of the Regulations states as follows: - “(a) Subject to article 9, development consisting of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, if such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1

Article 9 (1) of the Regulations sets out circumstances in which development to which Article 6 relates shall not be exempted development.

Schedule 2, Part 1 (Exempted Development General)

Class 5 of Part 1 of the Second Schedule to the Regulations states as follows: -

Column 1 Description of Development	Column 2 Conditions and Limitations
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 face of any wall of

	concrete or concrete block, which shall be visible from any road path or public area, including public open space, shall be rendered or plastered. 3. No such structure shall be metal palisade or other security fence”.
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7.3. Relevant Related Cases

The following are relevant cases to the current case before the Board;

- RL3380
- RL3381
- RL3382
- RL3383
- RL3384
- RL3385
- RL3387
- RL3389
- RL3390
- RL3391
- RL3388

The above 11 no. cases relate to a suburban housing development in Terenure, Dublin 6W. The 11 no. houses known as The Cloisters, comprise of mid-terrace and end-of-terrace 2-storey housing and all have a rear garden with rear boundary wall facing onto a public road. The rear boundary wall is generally 2 metres in height and has a pebble dash finish.

In most cases the rear boundary wall faces onto a public footpath however in some cases, i.e. 76, 77, 78 and 80 The Cloisters, the rear boundary wall adjoins directly onto a small green strip of open space that includes some mature planting.

The question before the Board was;

- *“Whether the opening of an ope in rear wall of rear garden to provide pedestrian entrance from public road / pavement and provide 1.95m high pedestrian timber gate opening into rear garden is or is not development and is or is not exempted development”.*

The Board decided in these cases that the opening of a pedestrian entrance onto a public road is development and is not exempted development.

7.4. Assessment

I would consider that there are two questions in this referral which need to be addressed in assessing whether a pedestrian gate on the referral site would be exempted development. The first question is whether the pedestrian gate is or is not development and the second question is whether the pedestrian gate is or is not exempted development.

Is the proposal development

In relation to the first question the proposal involves the act of construction, and hence would involve “works” within the meaning of Section 3 of the Planning and Development Act, 2000 (as amended). Such works constitute “development” within the meaning of the Act.

Is the proposal exempted development

I would consider that there are no exemptions within the Planning and Development Act, 2000 (as amended), that would apply to the subject development.

I would consider that the subject development would come within the scope of Class 5, Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended). I have outlined the provisions of Class 5 in Section 7.2 above.

Article 9 (1) (a) of the Planning and Development Regulations, 2001 (as amended), sets out certain conditions that would de-exempt development applicable under Class 5, Part 1, Schedule 2. I have reviewed Article 9 (1) (a) of the said regulations and I would consider the following provisions are relevant considerations to this current case;

- 9 (1) (a) (i)
- 9 (1) (a) (ii)

Under Article 9 (1) (a) (i) of the Planning and Development Regulations, 2001, it is stated that development would not be exempted development when it is inconsistent with any use specified in a permission under the Act. Permission was refused by Limerick City and County Council³ for the retention of a pedestrian entrance in the same location to that which is now under consideration by the Board in this referral. The use is residential and the subject pedestrian entrance would not be, in my view, inconsistent with this use. Therefore, I would not consider that Article 9 (1) (a) (i) would de-exempt Class 5 in this instance. The Board will note that the Local Authority in referring this Section 5 case to An Bord Pleanála argued that Article 9 (1) (a) (i) would de-exempt Class 5 in this case.

³ L.A. Ref. 16/784

Under Article 9 (1) (ii) it is stated that development to which Class 5 relates shall not be exempt '*if the carrying out of such development would consist or comprise the formation, laying out or material widening of means of access to a public road the surfaced carriageway of which exceeds 4 metres in width*'. I would consider that Vartry Avenue is a public road consistent with the definition of a public road as outlined in Section 7.2 above. I would note that the pedestrian entrance opens directly onto a grassed area and it is arguable whether this grassed area is part of the adjoining public open space or whether it is part of the public road.

I would note that in accordance with the definition of a Road, as per the Roads Act, 1993, that a road includes the margin and this would include grass verges. The Roads Act, 1993, in defining a public road clearly states a footpath and margin are included as part of the road.

I would also draw the Board's attention to previous cases outlined in Section 7.3 above. In some of these cases the proposed pedestrian gates opened directly onto a grassed area and in these instances the Board considered the grassed area was part of the public road in accordance with the definition of the public road in the Roads Act, 1993. I would consider that although the pedestrian gate in this case opens directly onto a grassed area that this grassed area forms part of the public road given its proximity to the public road. Therefore, I would consider, the subject pedestrian gate is de-exempted by Article 9 (1) (a) (ii).

I would acknowledge that the respondent refers to no's 51, 53 and 55 Vartry Avenue as precedents for the current case. In these three cases the respondent submits that the properties have pedestrian openings onto a green space from their rear gardens. I would consider that each individual case must be dealt with on its own merits, however based on an overview it would appear to me that rear garden of no. 51 would adjoin a large public open space which could not be considered a public road.

In relation to no. 53 Vartry Avenue I would be of the opinion that the rear garden of this property adjoins a public open space and therefore would not open onto a public road. Whereas no. 55 Vartry Avenue is a mid-terrace property.

Overall and having regard to the information on the file and the relevant legislation I would consider that the opening of a pedestrian gate along the side rear boundary wall would come within the scope of Class 5, Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended) however it would be de-exempted by the provisions of Article 9 (1) (a) (ii) of the Planning and Development Regulations, 2001, (as amended).

8.0 Recommendation

8.1. Conclusions and Recommendations

It is considered that the construction of a pedestrian gate along the side boundary wall of a rear garden would not be exempted development having regard to Article 9 (1) (a) (ii) of the Planning and Development Regulations, 2001, (as amended).

WHEREAS a question has arisen as to whether the opening of an opening in side wall of rear garden to provide pedestrian entrance from public road / pavement and provide 1.98m high pedestrian gate opening into rear garden is or is not development and is or is not exempted development at no. 36 Vartry Avenue, Raheen, Limerick.

AND WHEREAS the said question was referred to An Bord Pleanála by Limerick City and County Council.

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) Article 9 (1) (a) (ii) of the Planning and Development Regulations, 2001,
- (c) Class 5 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001,
- (d) the planning history of the site:
- (e) the Roads Act, 1993,

AND WHEREAS the Board has concluded that the construction of a pedestrian gate along the side boundary wall of a rear garden;

- (a) would constitute the carrying out of works which comes within the meaning of development in section 3(1) of the Planning and Development Act 2000, (as amended),
- (b) comes within the scope of Class 5, Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended),
- (c) would not be exempted development by reason of Article 9 (1) (a) (ii) of the Planning and Development Regulations, 2001 (as amended),

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 opening of an ope in rear wall of rear garden to provide pedestrian entrance from public road and provide 1.98m high pedestrian gate opening into rear garden is not exempted development.

Kenneth Moloney
Planning Inspector

15th September 2017