



Question

Is the removal of a 4.5 metre high hedge and the construction of a post and wooden panel fence not exceeding 2 metres high within and bounding the curtilage of a dwelling development or is it exempted development.

Location

1 Allendale Drive, Bishopstown, Cork

Declaration

Planning Authority

Cork City Council

Planning Authority Reg. Ref.

R447/17

Applicant for Declaration

Diarmuid & Derval Kelleher

Planning Authority Decision

None

Referral

Referred by

Cork City Council

Owner

Diarmuid & Derval Kelleher

Observer(s)

None

Date of Site Inspection

24/10/17

Inspector

Pauline Fitzpatrick

1.0 Site Location and Description

The subject site is a detached, two storey dwelling on a corner site at the junction of Allendale Drive and Melbourn Road in the Bishopstown area of Cork within a mature residential area characterised by a mix of detached and semi-detached dwellings.

The estate is characterised by an open plan layout in that there is generally no delineation in terms of walls/fences to the front boundaries. Melbourn Road connects Curraheen Road to the south with Model Farm Road to the north.

A timber fence no higher than 2 metres has been erected to the east of the dwelling and along the site boundary to Melbourn Road enclosing garden space. The said fence runs inside the block wall which delineates the rear boundary with the dwelling that fronts onto Melbourn Road (north of site).

2.0 The Question

2.1. The owners of No.1 Allendale Drive made a section 5 declaration application to the planning authority. The question posed is as follows:

Is the removal of existing leylandii 4.5m tall hedging and is the construction of a post and wooden panel fence not exceeding 2m high within and bounding the curtilage to the east and rear (north) side of the house at No.1 Allendale Drive exempted development. Decoration and finished side of fence is faced to the road and public areas.

The application is accompanied by the following supporting details:

- The new fence is materially lower than the previous leylandii tree.
- The neighbours of the adjoining property are happy with the fence.

3.0 Planning Authority Declaration

3.1. Declaration

None

4.0 Planning History

- 4.1.1. As per the details provided in the referral by the planning authority the parent permission for the site and surrounds is C2145/3317A/64. It cannot be located in the Council archives.

5.0 Relevant Decisions by the Board

RL3574 – previous referral deemed to be invalid on the basis that no declaration was requested.

RL2053 – the Board decided that the erection of a timber fence at No.1 Sugarloaf Terrace, Bary Co. Wicklow was not exempted development. In arriving at its decision the Board decided that the development did not comply with Condition 1 of Class 5, Part 1 of the 2nd Schedule of the regulations.

6.0 Policy Context

6.1. Cork City Development Plan 2015

The site is within an area zoned ZO 4 for residential, local services and institutional uses.

6.2. Natural Heritage Designations

None in the vicinity

7.0 The Referral

7.1. Referrer's Case

The question has been referred by Cork City Council for determination by the Board. Its submission can be summarised as follows:

- the parent permission for the site and surrounds is C2145/3317A/64. It cannot be located in the Council archives. Therefore, the planning authority is not able to confirm if there was a condition limiting the type and height of boundaries.
- A recent planning enforcement file E-7790 that related to the subject fence was closed with no warning letter issued as the view was taken that the said fence is exempted development.
- The planning authority contends that the subject fence appears to be exempted development under Article 6 and Class 5 of Part 1 of Schedule 2 of the Regulations, being a fence or wall within or bounding the curtilage of a house which does not exceed 2 metres in height. Noting the long standing open plan nature of the area the planning authority cannot be certain that the fence is exempted development in the absence of confirming whether any applicable conditions relating to boundary treatment were attached to the parent permission C2145/3317A/64. There is some doubt as to whether or not the restriction on exemptions set out under Article 9 (1)(a)(i) of the Regulations would apply. The Board may be in a position to source information on the original permission.
- The planning authority is satisfied that:
 - The removal of the hedge to which no tree preservation order relates is not development. In forming this view the planning authority had regard to the Board's decision under ref. PL2964
 - The construction of the subject fence is development having regard to the definition of works in section 2(1) and development in section 3(1) of the Act.

- Having regard to the nature and scale of the development and its location relative to designated sites it is considered that AA is not required.

7.2. Owner's response

The submission can be summarised as follows:

- The leylandii trees surrounding their property were diseased and dying.
- A fence to replace the trees was seen as the best option, especially in view of the need for their children's safety.
- The property owner to the rear had no objection and benefits from increased light.
- The fence is almost 2.5 metres lower than the original hedge.
- To tie the fence into the overall look of the estate it is their intention to paint it to match the extensive wood work of the houses in the development and to plant shrubs.
- The area to the east was maintained by them.
- The view for vehicular traffic has not been obstructed at the junction. The fence is 3.5 metres back from the road with a row of mature trees inbetween.
- Melbourn estate is comprised of mixed developments. On Melbourn Road itself which consists of 48 properties, 10 have enclosed gardens front and rear. Even some of the 'open plan' houses on the road have enclosed front gardens with no impact on the harmony of the development.
- Melbourn Road was not intended as a through road which it is now. As such it is no longer a quiet estate road with open plan front gardens.
- The original requirement only mentions that the open plan be observed to the front of the houses. There is no intention of enclosing the front garden.

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000, as amended

Section 2(1) defines 'works' as any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

Section 3(1) defines developments as the carrying out of 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) The following shall be exempted development for the purposes of this Act -

(i) development consisting of the thinning, felling or replanting of trees, forests, or woodlands or works ancillary to that development, but not including the replacement of broadleaf high forest by conifer species.

Section 4(2) of the 2000 Act provides for certain classes of development to be designated as exempted development by way of regulation.

8.2. Planning and Development Regulations, 2001

Article 6(1)

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempt development for the purposes of the Act, provided that 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.

Schedule 2, Part 1 - Exempted Development — General

Description of Development	Conditions & Limitations
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	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

blocks or mass concrete.

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.

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.

9.0 **Assessment**

It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the fencing in respect of the proper planning and sustainable development of the area, but rather whether or not the erection of same constitutes development, and if so, whether it falls within the scope of exempted development.

9.1. **Is or is not development**

9.1.1. I consider it reasonable to conclude that the removal of the leylandii trees and erection of a fence constitutes the carrying out of works which come within the meaning of development as set out in Section 2(1) of the Planning and Development Act, 2000, as amended.

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

Development can be exempted from the requirement for planning permission by either (a) section 4 of the Planning and Development Act, 2000 as amended, or (b) article 6 of the Planning and Development Regulations 2001 as amended.

I am satisfied that the removal of the leylandii trees constitutes exempted development as defined in section 4(1)(i) of the Act.

In terms of the fence the only relevant exemption under Section 4 relates to 4(1)(h) – “development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure”. No case has been made that the development in this case falls within the scope of this provision and I note that the works in question do not relate to an existing structure and therefore section 4(1)(h) does not apply.

Article 6 of the Regulations exempts works specified under different Classes as set out in Schedule 2 of the Regulations. These classes of development can, however, be de-exempt under the restrictions set out in article 9.

The planning authority is of the opinion that there is uncertainty as to whether any conditions relating to boundary treatment were attached to the parent permission C2145/3317A/64 whereby the restrictions on exemptions set out under Article 9 (1)(a)(i) of the Regulations would apply. It was unable to find a copy of the said permission which was not in its archives and suggests that the Board may be in a position to obtain information on same. In the absence of an alternative source for such information and the absence of any detail in this regard I consider that an assessment of the referral case in the context of whether article 9 would pertain or not is not possible. I therefore propose to address the matter in the context of the other relevant legislative provisions.

In deciding whether the erection of a c.2.0 metre high fence delineating the garden of this house at the junction of Allendale Drive and Melbourn Road falls within the class of exempted development as set out in Class 5, Part 1, of the Second Schedule of the 2001 Regulations, as amended, I submit that the matters arising relate to the provisions of condition 1 attached to same, namely whether:-

- (a) the fence does not exceed 2.0 metres in height, and
- (b) the fence bounds any garden or other space in front of a house.

In terms of the former and as measured on inspection the fence does not exceed 2 metres in height and therefore satisfies the first consideration. I consider that the substantive issue pertains to the latter issue.

Photographic material on file and images available from Google earth dating back to 2012 would suggest that prior to the erection of the fence the eastern curtilage of the dwelling was open to the junction of Allendale Drive and Melbourn Road. A low timber fence backed by a line of leylandii trees, which was set back and at an angle to the footpath, delineated the boundary to Melbourn Road. The hedge was inside a low wall delineating the boundary shared with the dwelling to its north. The area open to public view, albeit within the site boundary, was grassed and planted. The hedge (and fence) has now been removed and the new fence has been erected to the east of the dwelling and along the site boundary immediately adjoining the public footpath along Melbourn Road enclosing a larger garden space from public view.

In considering the range of interpretations which could reasonably be applied to the phrase 'in front of a house' I would suggest that it would be unduly restrictive to confine it to areas lying directly between the front (or entrance) façade and a public road. Whilst such an interpretation satisfactorily applies to the neighbouring front garden of No. 2 Allendale Drive, it clearly does not do so in respect of the subject property. Notwithstanding its location to the side of the house I consider that the garden in question could also be described as being 'in front of' it insofar as it lies between the house and an area used by the public, namely Melbourn Road and associated footpath.

In the particular circumstances of this case where the space is bounded on two sides by roads the character and appearance of the garden before the erection of the fence development was that of a semi-private open space generally open to the view of passers-by. In my opinion it exhibited the characteristics of a front garden in a suburban context.

In concluding that the substantial portion of the side garden of No. 1 Allendale Drive lies 'in front of' a house, I am satisfied that the fence as erected to enclose same (being in excess of 1.2 metres in height) fails to comply with Condition 1 of Class 5 of Part 1 of Schedule 2 and, accordingly, is not exempted development.

10.0 Recommendation

10.1. 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 a 4.5 metre high hedge and the construction of a post and wooden panel fence not exceeding 2 metres high within and bounding the curtilage of a dwelling at No.1 Allendale Drive, Bishopstown, Cork is or is not development or is or is not exempted development:

AND WHEREAS Diarmuid and Derval Kelleher of 1 Allendale Drive, Bishopstown, Cork requested a declaration on this question from Cork City Council on the 7th day of April, 2017

AND WHEREAS the said question was referred to An Bord Pleanála by Cork City Council on the 7th day of July, 2017:

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)(i) of the Planning and Development Act, 2000, as amended.
- (d) Section 4(2) of the Planning and Development Act, 2000, as amended,
- (e) article 6(1) and class 5 of Part 1, Schedule 2 to the Planning and Development Regulations, 2001, as amended,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The removal of the leylandii trees and erection of a 2 metre high post and wooden panel fence constitutes the carrying out of works which come within the meaning of development as set out in section 3(1) of the Planning and Development Act, 2000.
- (b) The removal of the leylandii trees is exempted development as per section 4(1)(i) of the Planning and Development Act, 2000, as amended.
- (c) The erection of the 2 metre high post and wooden panel fence bounds a garden in front of the house.
- (d) the fence cannot avail of the exemption under Class 5 of Part 1 of Schedule of the Planning and Development Regulations, 2001, as amended, as it exceeds 1.2 metres in height.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the Planning 2000 Act, as amended hereby decides that the removal of a 4.5 metre high hedge and the construction of a post and wooden panel fence not exceeding 2 metres high within and bounding the curtilage of a dwelling at No.1 Allendale Drive, Bishopstown, Cork is development and is not exempted development.

Pauline Fitzpatrick
Senior Planning Inspector

February, 2018