



An
Bord
Pleanála

Inspector's Report RL61.RL3808

Question

Whether construction of a railing and footpath and a 1.2m high bow top railing is or is not development or is or is not exempted development.

Location

Lands adjacent to No.6A Devon Park, Salthill, Galway.

Declaration

Planning Authority

Galway County Council

Planning Authority Reg. Ref.

P/DC/3/15/17

Applicant for Declaration

Sisters of Mercy Western Province

Planning Authority Decision

Constitutes Development which is not Exempted Development.

Referral

Referred by

Sisters of Mercy

Owner/ Occupier

Owner

Observer(s)

None

Date of Site Inspection

6th of December 2017

Inspector

Angela Brereton.

1.0 INTRODUCTION

A referral case has been received by An Bord Pleanála pursuant to Section 5 of the Planning and Development Act 2000 (as amended) whereby the referrer has sought a determination as to whether or not the construction of a railing and footpath and a 1.2m high bow top railing at lands adjacent to N.6A Devon Park, Salthill, Galway is or is not development or is or is not exempted development within the meaning of the Planning and Development Acts, 2000 (as amended) and Planning and Development Regulations, 2001 (as amended).

2.0 Site Location and Description

2.1. The area in question is to the west of Galway city in Salthill. It is to the north of the junction with Salthill Road Lower and Devon Park. It is at the end of a short cul-de-sac off Devon Park road and is within the grounds of nos. 6A and 6B Devon Park. There is a small area of communal open space opposite the frontage of these properties that includes 4no. parking spaces. The area in question is a narrow green strip adjacent to the south western boundary. There is a boundary wall between the site and no. 8 Devon Park to the south and a boundary wall along the rear of the site with the convent lands to the north west. There is a gated vehicular entrance to the grounds of nos. 6A and 6B Devon Park which is at the end of this heavily parked cul-de-sac road.

3.0 The Question

3.1. Whether the construction of a railing and footpath and a 1.2m high bow top railing at lands adjacent to N.6A Devon Park, Salthill, Galway is or is not development or is or is not exempted development.

4.0 Background - Referral to the Council

4.1. O'Neill/O'Malley Architecture & Project Management have submitted a Referral to the Council on behalf of the Sisters of Mercy. They note that it is their client's intention to erect a 1.2m high bow top railing along a 1.5m wide strip of land adjacent to 6A Devon Park, owned by the Sisters of Mercy Western Province. They

seek to provide a concrete footpath inside this railing. It is their understanding that the proposed works constitute exempt development as set out in Schedule 2, Part 1 – Exempted Development, of the Planning and Development Regulations 2001 (as amended) Classes 11 &13 relate.

5.0 **Planning Authority Declaration**

5.1. **Declaration**

On the 24th of August 2017, Galway City Council decided (P/DC/3/15/17 refers):

- It is considered that such a path and railing would not be exempted development as it would contravene and would be inconsistent with a condition no.1, and use specified in permission, P1.Ref.No.97/8.

5.2. **Planning Authority Reports**

5.2.1. Planner's Report

This notes that the Sisters of Mercy have a Freehold interest in the land outlined in red, the remainder of the lands outlined in blue do not form part of this Section 5 application and consists of a Convent and its attendant grounds.

The Planner had regard to consideration of exemption under Classes 11 and 13 of the Planning and Development Regulations 2001 as raised by the Referrer. They noted that Class 11 relates to development of a fence/wall on lands “other than within or bounding the curtilage of a house”. They consider that in this case this may be applicable due to the fact that the wall and railing are located in the communal open space.

They have regard to Class 13 and consider that in this case this relates to the development of a path and railings in an area of open space permitted under P1.Ref.no.97/8. In this case such a proposal would erode the communal open space and would contravene a condition no.1 attached to this permission which would not comply with Article 9,1 (a)(i). They consider that this proposal would not be exempted development as it would be inconsistent with a use specified in a

permission, in addition Class 5 and 11 would also fall within this assessment and would not be exempt for this reason.

6.0 Planning History

6.1. The following are the relevant or in proximity to the area of land in question that is the subject of this referral:

Subject Referral Site:

- 201/94 – Permission granted in July 1994 for the erection of a dwelling house on site at the rear.
- P1.Ref.no.97/8 - Permission granted subject to conditions by Galway Corporation to incorporate approved detached house at rear of No.92 Lower Salthill Road into a proposed pair of semi-detached houses with access off Devon Park.

- *Condition no.1 - Before the occupation of any dwelling the developer shall pay the Planning Authority a contribution of £1,900 per dwelling.*

Reason: So that the developer shall contribute an equitable portion of the cost of the services which facilitate the development. The use or return of this contribution shall be carried out as provided for in Local Government (Planning and Development) Act 1963. Section 26(2)(g)(h).

- *Condition no.7 – Front boundary walls beside the entrance shall be 900m.m high and shall be of block plastered externally and capped.*

Reason: In the interests of visual amenity.

- P/DC/3/6/17 – Galway City Council decided on the 28th of April 2017 that works consisting of ‘Construction of a path and 1.2m high bow top railings’ at Lands adjacent to 6A Devon Park were not exempted development and required planning permission.

Note: Copies of these decisions are on file.

Adjacent to the Referral site:

- Reg.Ref.10/322 – Permission granted to the Sisters of Mercy Western Province for the construction of a new Convent. The proposed 2 and 3 storey convent to be accessed by extending the existing Croi Nua access road off Rosary Lane. This was subsequently granted subject to conditions by the Board – PL61.238690 relates.
- Reg.Ref. 11/299 – Permission granted to the Convent of Mercy Galway Company Ltd for minor revisions to that permission previously granted (Reg.Ref.10/322). It is noted that the Referral Site is not included within the red line boundaries of the Convent site.

7.0 Policy Context

7.1. Galway City Council Development Plan 2017-2023

As shown on the Land Use Zoning Map the site is within the Residential (R) Zoning adjoining the Community, Cultural and Institutional (CF) Zoning. It is also just within the City Centre boundary.

Fig.11.34 relates to Neighbourhood Areas- the site is located within the Established Suburbs proximate to the Inner Residential Areas. Section 11.3.1 relates – Section 11.3.2 relates to the Established Suburbs where amenity standards are generally as per the Outer Suburbs.

Section 11.3.1 (c) refers to Amenity Open Space Provision in Residential Developments and includes regard to Communal Open Space. Section 11.3.2(b) refers to Established Suburbs. This requires: *Communal recreation and amenity space is required at a rate of 15% of the gross site area. This also provides: Private open space (areas generally not overlooked from a public road) exclusive of car spaces shall be provided at a rate of not less than 50% of the gross floor area of the residential unit.*

Section 11.3.2(g) provides the Car Parking Standards.

8.0 The Referral

8.1 Referrer's Case to the Board

- 8.1.1. O'Neill & O'Malley Architects have submitted this Referral to the Board on behalf of their client the Sisters of Mercy Western Province. They note the Council's Declaration but it is their opinion that the proposed Construction of a railing and footpath and 1.2m high bow top railing at lands adjacent to No.6A Devon Park, Salthill would be exempted development.
- 8.1.2. They note that the Sisters of Mercy Western Province own a 1.5m wide strip of land adjacent to No.6A Devon Park and the residents of the adjacent houses nos. 6A and 6B have no legal interest in the relevant lands. They provide that it is their client's intention to erect a 1.2m high bow top railing along this boundary and provide a concrete footpath inside this railing.
- 8.1.3. They wish to clarify that the proposed footpath and railing are located on lands owned by the Sisters of Mercy and that the residents of the adjacent houses 6A & 6B Devon Park have no legal interest in the relevant lands (Land Registry Folio details are enclosed). They provide that the proposed footpath is located adjacent to an area of communal open space associated with 6A & 6B Devon Park. They note that the sale of the relevant area to their client by the previous owners of the properties reduced the amount of communal open space by 2.7% of the overall area as defined in P1.Ref.no.97/8 as being 558sqm. Also that the remaining communal open space amounting to 128sqm equates to 23% of the overall site area which far exceeds the current development requirement for 15% public/communal open space for such developments. They enclose a copy of the above permission and note that there are no conditions attached to this permission which preclude the footpath and railing as proposed.
- 8.1.4. They note that Galway City Council's consideration that these works were not exempt was that the proposed works would contravene condition no.1 of planning permission P1. Ref.no.97/8. However, this condition pertains to a financial contribution and they contend that the proposed works in no way relate to or contravene this condition.

8.2. Planning Authority Response

8.2.1. Galway City Council comments have regard to the Referral made to the Board and include the following:

- In this case, they note that the Referrer considers that the development is exempt under Classes 11 and 13. They previously sought exemption under Class 5 (which relates to a boundary structure within the curtilage of a house) but have not included it this time in the referral. They consider that nothing has altered since the previous referral.
- Having regard to Class 11 the Council note that this relates to the development of a fence/wall on lands *other than within or bounding the curtilage of a house*. They consider that this is not applicable as notwithstanding the applicant's apparent acquisition of the land for the pathway it remains part of the open space associated with these dwellings and no planning permission has been granted for this subdivision.
- With regards to Class 13 they note that in this case, the area outlined in red relates to the development of a path and railings in an area of open space permitted under P1.Ref. No.8/97.
- They acknowledge that Condition no.1 refers to a financial condition. Notwithstanding this, they consider that the development which provides for a pathway, through the amenity space associated with two private dwellings for a pathway associated with the adjoining convent use would be in conflict with the residential use of the shared garden area.
- They note that no application has been sought or granted for the subdivision of this residential garden to provide for an access way for an adjoining unrelated use, which could have serious implications in relation to residential amenity for the occupiers of the existing houses.
- They request the Board to uphold the Council's decision and refuse the Section 5 declaration.

9.0 Statutory Provisions

9.1. Legislative Context

- 9.1.1. In order to assess whether or not the activity constitutes development that is exempted development, regard must be had to the following items of legislation:

9.2. Planning and Development Act, 2000 (as amended)

Under Section 2(1), the following is the interpretation of 'works':

"...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..."

'unauthorised development' includes the "carrying out of unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use."

'unauthorised works' means any works on, in over or under land commenced on or after the 1st of October 1964, being a use which is a material change in use of any structure or other land and being development other than –

- (a) Exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act, or.....
- (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any conditions to which that permission is subject'

Section 3 (1) states as follows:

"In this Act, '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) of the Act states that the following shall be exempted developments for the purposes of this Act:

Section 4 (2)(a) of the Act enables certain classes of development to be deemed exempted development by way of regulation.

9.3. Planning and Development Regulations, 2001(as amended)

Article 6 (1) provides: Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted 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.

Article 9 (1) provides: 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.

Article 10(1)(d) states the following:

‘Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not –

- (a) involve the carrying out of any works other than works which are exempted development,
- (b) contravene a condition attached to a permission under the Act,
- (c) be inconsistent with any use specified or included in such a permission, or -

SCHEDULE 2

Part 1 relates to Exempted Development – General

Column 1 Description of Development	Column 2 Conditions and Limitations
<i>Development within the curtilage of a house</i> CLASS 5 The construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or	1. The height of any such structure shall not exceed 2 metres or, in the case of a wall or fence within

<p>wooden fence or a wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>or bounding any garden or other space in front of a house, 1.2 metres.</p> <ol style="list-style-type: none"> 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.
<p><i>Sundry Works</i> CLASS 11 The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –</p> <ol style="list-style-type: none"> (a) any fence (not being a hoarding or sheet metal fence), or (b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete. 	<ol style="list-style-type: none"> 1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres. 2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be

	visible from any road, path or public area, including a public open space, shall be rendered or plastered.
<p>CLASS 13</p> <p>The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving.</p>	The width of any such private footpath or paving shall not exceed 3 metres.

10.0 Assessment

10.1. Is or is not development

10.1.1. Having Regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended) it is considered that the construction of a railing and footpath and 1.2m high bow top railing at lands adjacent to No. 6A Devon Park, constitutes development.

10.2. Is or is not exempted development

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

10.2.2. Of note relative to this case is Section 4(1)(j) which refers to: *development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;*

10.2.3. It is clear from the information submitted that the Referral in question is not for purposes relevant to development incidental to the enjoyment of the dwelling house No.6A Devon Park. It is provided that this strip of land has been sold to the Sisters of

Mercy Western Province to enable them to provide railings and a footpath, therefore would no longer be part of the communal open space relative to the semi-detached pair nos. 6A and 6B Devon Park.

10.2.4. It has not been stated as to what is the reason for this short area of footpath and fence i.e whether it is proposed to be a pedestrian access to/from the convent lands at the rear. There is currently (nor does there appear to have been) no connection between the communal open space for nos. 6A and 6B Devon Park and the convent lands that adjoin to the north west. The opening of a pedestrian access to these lands would not be exempted development and would require planning permission.

10.3. Restrictions on exempted development

10.3.1. Regard is had to Exempted Development within the curtilage of a house and to the description of development and the conditions and limitations on that exemption as provided by Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended). The Referrer considers that the works constitute exempt development as per the above Regulations and that Classes 11 and 13 would apply.

10.3.2. It is of note that Part 1 refers to *Exempted Development – General* and Classes 11 and 13 are considered under *Sundry Works*. I would not consider that in this context the issue under referral would be exempt under Class 11 in that the proposed works would be bounding the curtilage of a house i.e: *The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –*. Class 5 is more applicable relative to such works within the curtilage of a house. However, these works would provide for a subdivision of and be bounding the communal open space that is included within the curtilage of the dwelling houses.

10.3.3. Class 13 includes the construction of any private footpath or paving. These works do involve the construction of a private footpath. However, it is not considered that this exemption would apply as these works would bound and subsequently be outside the curtilage of no.6A and the area now appears as communal open space for these properties. Therefore, it is considered that the issue that is the subject of this referral would involve a change of use of part of these lands and as such is not included as exempted development.

10.4. Regard to Condition no. 1

- 10.4.1. Regard is had as noted in the Legislative Section above to Article 9 (1) (a)(i) of the Planning and Development Regulations 2001. This provides a restriction on exemption, *if the carrying out of such development for the purposes of the Act would contravene a condition to a permission under the Act or would be inconsistent with any use specified in that condition.* It is provided that the development would contravene Condition no.1 of P1.Ref.97/8 as referred to in the Council's Declaration. However as noted by the Referrer this Condition relates solely to a financial contribution. The Council's response concurs with this, however they consider that the development which provides for a pathway through amenity space associated with two private dwellings for a pathway associated with the adjoining convent use would be in conflict with the residential use of this shared garden area. It is noted that no planning application has been sought or granted for the subdivision of this residential garden to provide for an access way for an adjoining unrelated use and there is concern that this could have serious implications in relation to amenity for the occupiers of the existing houses. Therefore, the use of the land in question which was included in the curtilage and for purposes incidental to the enjoyment of these houses would be sub-divided and changed. In this event the context of the current Referral while not stated, would introduce a different scenario.
- 10.4.2. Regard is had to P1.Ref.97/8 and it is noted that there is no condition that particularly stipulates compliance with the plans and particulars submitted. However, I would consider that this is taken as understood relative to the description of the development permitted in this application, which did not include mention of the issue that is the subject of the current referral. It is of note that the reason for this condition includes reference to Section 26(2)(g)(h) of the Local Government (Planning and Development) Act 1963. These both refer to development contributions which would have facilitated the development, at that time. A copy of the relevant Section of this Act which has since been superseded, is included with this Report.
- 10.4.3. It is noted that article 10(1) of the said Regulations has regard to Changes of use and refers to the use classes specified in Part 4 of Schedule 2 where a convent is included in Class 7. It is considered that the issue that is the subject of this referral

would be contrary to 10(1)(c) in that it would: *be inconsistent with any use specified or included in such a permission.*

10.5. Precedent Cases

- 10.5.1. While the Referrer has not mentioned precedent cases, regard is had to other Referrals to the Board that may have some similarities. However, while each case raises varying issues and a different set of circumstances, the cases below are of some note. Copies of these decisions are included in the Appendix to this Report.
- 10.5.2. In RL29S.RL2542 the question arose as to Whether the change of use from public road and footpath to private residential garden at 10 Inchicore Square North, Inchicore, Dublin is or is not exempted development. The Board concluded that the change of use from a footpath and roadway in the public domain to private residential garden was a material change of land and, therefore, development. Notwithstanding the private ownership of the land in question, the land comprised a footpath and roadway, which had been used by the public, on foot and by vehicle, to pass and re-pass without hindrance since its construction. The proposed change of use would obstruct road users, and therefore, the proposed development came within the restrictions on exemption under article 9(1)(a) (xi), by obstruction of a public right of way. This is of interest in that it refers to the concept of right of way and material change of use of land.
- 10.5.3. In RL05.RL3200 the question arose as to Whether the erection of the railing between two houses and part of the railing which runs to the road or footpath is or is not development or is or is not exempted development at Inch View, Rathmullen, Co. Donegal. The Board concluded that the erection of the railings was development and was exempted development in that the erection of the railings was exempted development and within the scope of Schedule 2 Part 1 Class 5 of the Planning and Development Regulations 2001. Also that the railings did not contravene conditions of the extant permissions and did not endanger public safety by reason of traffic hazard or obstruction of road users. This is of interest in that it refers to development within the curtilage of a dwelling house.
- 10.5.4. In RL07.RL3400 the question arose as to Whether the construction of a pedestrian entrance is or is not development or is or is not exempt development at Lidl,

Tullyvoheen (Galway Road), Clifden, North Connemara, Co.Galway. The Board's conclusion is of note in that it includes: *the works would come within the description of exempted development set out in Class 13 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001. However, the exemption provided under this class cannot be availed of by virtue of the restriction on exemption imposed under Article 9(1)(a)(ii) of the said Regulations.*

10.6. **Appropriate Assessment**

- 10.6.1. Having regard to the nature and scale of the development proposed and to the nature of the receiving environment, namely a suburban and fully serviced location, no appropriate assessment issues arise.

11.0 **Recommendation**

- 11.1. 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 construction of a railing and footpath and 1.2m high bow top railing at lands adjacent to No.6A Devon Park Salthill, Galway is or is not development or is or is not exempted development:

AND WHEREAS O'Neill O'Malley Architects on behalf of the Sisters of Mercy Western Province requested a declaration on this question from Council and the Council issued a declaration on the 24th day of August, 2017 stating that the matter was development and was not exempted development:

AND WHEREAS O'Neill O'Malley Architects on behalf of the Sisters of Mercy Western Province referred this declaration for review to An Bord Pleanála on the 18th day of September, 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,
- (c) Section 4(1)(j) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1), article 9(1) and article 10(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 11 and 13 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The construction of a railing and footpath and 1.2m high bow top railing at lands adjacent to No.6A Devon Park constitute works, that come within the scope of Section 3(1) of the Planning and Development Act 2000, and therefore, constitutes development,
- (b) The development does not come within the scope of section 4(1)(j) of the Planning and Development Act, 2000, and
- (c) The development would come within the restriction on exemption in that it would not comply with Article (9)(1)(a)(i) of the Planning and Development Regulations 2001, in that it would be inconsistent with the use specified in permission, P1.Ref.No. 97/8.
- (d) The exemptions provided under Classes 11 and 13 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, cannot be availed of by virtue of the restriction on exemption imposed under Article 9(1)(a)(i) of the said Regulations.

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 construction of a railing and footpath and 1.2m high bow top railing at lands adjacent to No.6A Devon Park Salthill, Galway is development and is not exempted development.

Angela Brereton,
Planning Inspector

29th of January 2018