

AN BORD PLEANÁLA	
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By:	hannan

Planning Department
Decisions & Registry
Theresa Hannan
01 2054863

An Bord Pleanála
64 Marlborough Street
Dublin 1

Date: 7th November, 2019

Re: Elmfield, Ballyogan/Castle Court Lands (Clay Farm Loop Road)

Dear Sir or Madam,

I refer to the above matter and request An Bord Pleanála to determine whether erection of fence across a planned roadway within the Planning Authority's area is or is not development or is or is not exempted development.

The appropriate fee of 110 euro will be paid by credit card at An Bord Pleanála Offices with this application.

Yours sincerely,



Theresa Hannan,
Senior Staff Officer,
Planning Dept.

Encl. EO No Ref 102/19 & Planners Report Dated 4th November, 2019

Dún Laoghaire-Rathdown County Council

LOCAL GOVERNMENT ACTS 1925 - 2014

RECORD OF EXECUTIVE BUSINESS CHIEF EXECUTIVE'S ORDERS

Planning and Development Act 2000 (as amended) Section 5 (4) Referral for Determination to An Bord Pleanála

Our Ref: 93/19

Location: Elmfield, Ballyogan/Castle Court Lands (Clay Farm Loop Road)

Applicant: Dun Laoghaire Rathdown County Council, Marine Road, Dun Laoghaire, Co. Dublin

Matter for Determination: Whether the erection of a fence across a planned roadway within the planning authority's area is or is not development and is or is not exempted development.

The structure is an approximately 1.2m high steel fence consisting of steel posts with mesh between. It runs for approximately 25m across a two-lane roadway, a verge, a cycle path, and a footpath – the verge and footpath on the western side of the roadway has been left unblocked. Planning Permission No D03A/0411 and D00A/1256 refer.

It is the planning authority's contention that the completion of the Loop Road across both the Elmfield and Castle Court Lands, with free passage between the two sections, was an inherent aspect of both permissions, and in particular D03A/0411 (Elmfield), within which the fence has been constructed. As such, the construction of the fence must be considered in light of Condition 1 of D03A/0411 (emphasis added).

1. *The development to be carried out in its **entirety in accordance with the plans, particulars and specifications** lodged with the application, as amended by additional information received on 19th December 2003 and clarification of additional information received on 6th April 2004, save as may be required by the other conditions attached hereto.*

REASON: To ensure that the development shall be in accordance with the permission and that effective control be maintained.

The fence also must be considered in light of Condition 2 of D03A/0411 (emphasis added)

2. *That prior to the commencement of construction work on any of the 5 no. apartment blocks, including the associated basement car park, **the section of Loop Road distributor and the temporary junction arrangements at Ballyogan Road - as detailed in Drawing Nos. 023050 - 210 to 217 - shall be fully constructed** by the applicants to the standards of the Planning Authority. Details of the temporary junction arrangement between the Loop Road distributor and Ballyogan Road, including any interim signal control measures that might be deemed necessary, shall be submitted for the written agreement of the Planning Authority prior to commencement of development.*

REASON:- In the interests of the proper planning and sustainable development of the area.
(Note:- The applicants are advised to liaise closely with the Council's Roads Traffic & Forward Planning Section of the Transportation Department in respect of their specific requirements in advance of submitting the temporary junction details).

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As such, if it is the case that the fence contravenes one or both of Conditions 1 and 2 of D03A/0411 the fence in question falls foul of Article 9(1)(a)(i) of the Planning Regulations 2001 (as amended), and can therefore not avail of the exemption under Class 11 of Schedule 2 Part 1 of the same regulations.

Therefore, I recommend that a Referral is sought pursuant to Section 5(4) of the Planning and Development Act 2000 (as amended) from An Bord Pleanála, 64 Marlborough Street, Dublin 1 to determine whether the erection of a fence across a planned roadway within the planning authority's area is or is not development and is or is not exempted development within the meaning of the Acts.


Senior Planner


Date

ORDER

The foregoing report and recommendation of the Senior Planner is noted. The Referral to An Bord Pleanála for determination pursuant to Section 5(4) of the Planning and Development Act 2000 (as amended) of the question as to whether the erection of a fence across a planned roadway within the planning authority's area is or is not development and is or is not exempted development together with the appropriate fee of €110.00, is hereby approved.

Date: 

Signed: 

Chief Executive Officer.

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MEMORANDUM

Development Management West
Team
Planning and HR Department

From: Ger Ryan, Senior Planner
To: Bernie Gilligan, SEO, Planning Department
Date: 4th November 2019
Re: Fence at Elmfield, Ballyogan – Section 5 reference to ABP recommended

Overview

Dun Laoghaire-Rathdown County Council wish to seek an opinion from An Bord Pleanála under Section 5(4) of the Planning and Development Act 2000 (as amended) as to whether the erection of a fence across a planned roadway within the planning authority's area is or is not development and is or is not exempted development.

Background

While not directly relevant to the legal questions on hand, the following background may be of relevance by way of context.

The fence in question is located across what is a planned roadway, the 'Clay Farm Loop Road', as shown in Figure 2 below. This roadway is intended to provide access to zoned land, and has been a feature of successive County Development Plans. A large section of the eastern portion of the Loop Road is currently under construction by Park Developments as part of the 'Clay Farm' scheme (See Figure 3 below), but this reference concerns itself with the western portion, which has been developed incrementally as part of two permissions, namely 'Elmfield' to the north and 'Castle Court' to the south. Elmfield was developed by Dwyer Nolan, whereas Castle Court was developed by Sean and Anthony Deane / Deane Homes.

The section of Loop Road adjacent to Castle Court is understood to be still in the ownership of Sean and Anthony Deane / Deane Homes. However, the Loop Road section of Elmfield is understood to be now owned by Killiney Estates, with links to Park Developments.

Elmfield was developed under **Reg. Ref. D03A/0411**, whereas Castle Court was developed under the earlier permission **Reg. Ref. D00A/1256 (PL06D.125017)**. Due to the sequencing of development, Castle Court was permitted to be developed with initial access from Kilgobbin Wood, with the intention being that access would move to the 'Loop Road' on delivery of development on the Elmfield site. This requirement was incorporated into the relevant permissions.

To date, this link has never been realised, and the route is currently impeded in a physical sense by the fence that is the subject of this appeal. Not only does this impede the permitted permanent access route for Castle Court, but it also stymies the onward development of the Loop Road and access to the zoned lands it would serve.

The Planning Authority' wishes to query whether the erection of the fence (some time in 2016, and replacing a previous mound of earth) is development as is not exempted development. The Planning Authority seeks an opinion to this effect from An Bord Pleanála with a view to potentially pursuing enforcement proceedings in respect of this structure. It is understood that Killiney Estates, with links to Park Developments were the party who erected this structure.

On a related matter, the northwestern portion of Park-Developments' recently constructed 'Clay Farm' Phase 1 is accessed by way of a temporary access from the Eastern section of the Loop Road, with the permanent access intended to be onto the 'Deane' section of the subject road, just south of the fence. This arrangement is referenced in Conditions 4 and 7 of PL 06D.246601 (D15A/0247)

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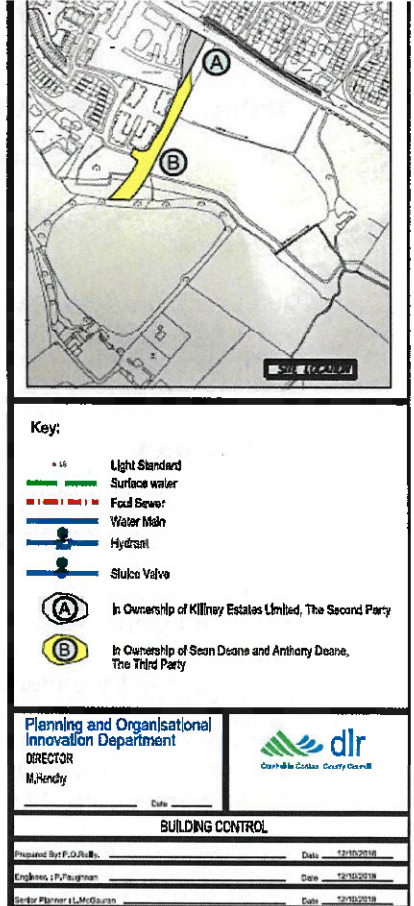


Figure 1 - Context of developments, Permissions, and landholdings

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Figure 2 - Current County Development Plan showing proposed Loop Road, with X marking location of subject fence.

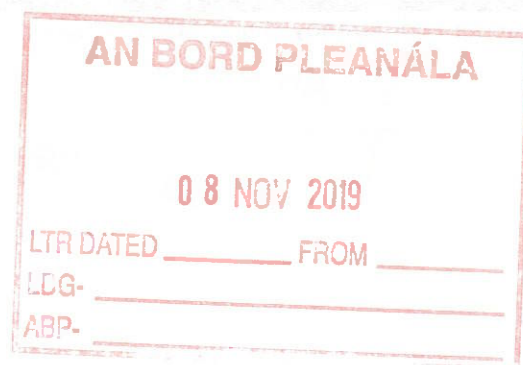




Figure 3 - Aerial Photography March 2019, showing progress on eastern section of Loop Road

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Works

The structure itself, as shown below, is an approximately 1.2m high steel fence consisting of steel posts with mesh between. It runs for approximately 25m across a two-lane roadway, a verge, a cycle path, and a footpath – the verge and footpath on the western side of the roadway has been left unblocked. The current situation is reflected in Figure 5 and Figure 6 below.



Figure 4 – Photograph 16th September 2019, looking southwest along proposed loop road

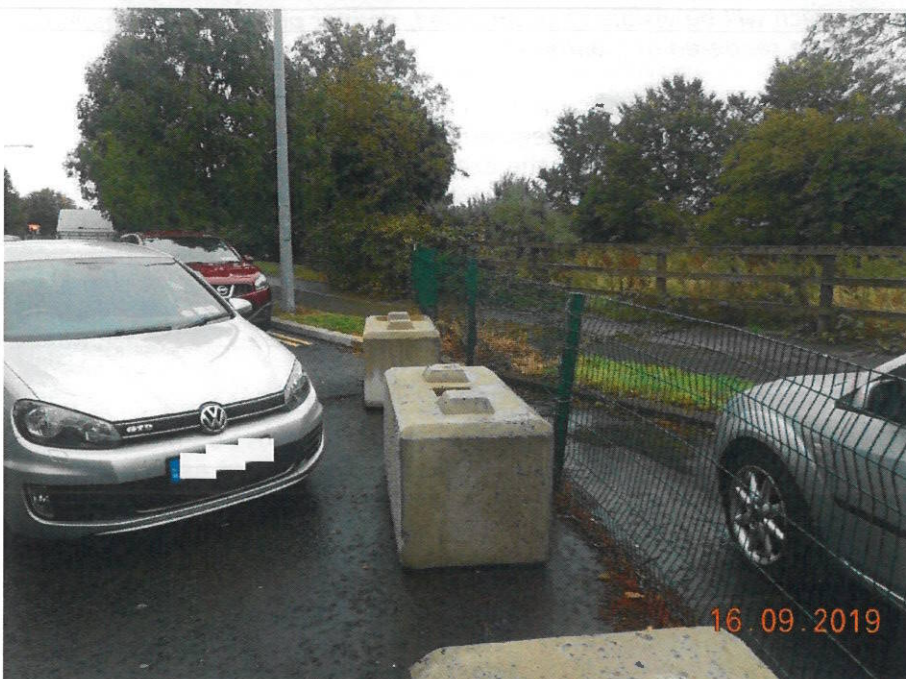


Figure 5– Photograph 16th September 2019, looking northeast from fence



Relevant Legislation

In the first instance, Section 3 of the Act defines "development" as including "works on, in, over or under land". As such, the erection of a fence must be considered works in the first instance.

Section 4(1) sets out what can be considered "exempted development", but there are no classes of works that could be considered directly applicable to this situation. Section 4(2) points to additional classes of development that could be designated as exempt by way of regulation.

Article 6 of the Planning and Development Regulations 2001(as amended) expands upon the definition of exempted development as follows.

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.

Class 11 of Schedule 2 Part 1 of the Planning and Development Regulations 2001 (as amended) confers an exemption as follows.

The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –
(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.

Subject to the following Conditions and Limitations

- 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.*

The fence is approximately 1.2 metres, and could ordinarily avail of this exemption. However, it is also a requirement that the provisions of Article 9 of the Regulations are considered. This article places restrictions on exemption, and effectively removes the exempted development rights under the regulations if one or more of a number of circumstances prevail. One such restriction is of relevance.

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,

Matters the Planning Authority considers of relevance

It is the planning authority's contention that the completion of the Loop Road across both the Elmfield and Castle Court Lands, with free passage between the two sections, was an inherent aspect of both permissions, and in particular D03A/0411 (Elmfield), within which the fence has been constructed. As such, the construction of the fence must be considered in light of Condition 1 of D03A/0411 (emphasis added).

- 1. The development to be carried out in its **entirety in accordance with the plans, particulars and specifications** lodged with the application, as amended by additional information received on 19th December 2003 and clarification of additional*

information received on 6th April 2004, save as may be required by the other conditions attached hereto.

REASON: To ensure that the development shall be in accordance with the permission and that effective control be maintained.

The fence also must be considered in light of Condition 2 of D03A/0411 (emphasis added)

2. That prior to the commencement of construction work on any of the 5 no. apartment blocks, including the associated basement car park, **the section of Loop Road distributor and the temporary junction arrangements at Ballyogan Road - as detailed in Drawing Nos. 023050 - 210 to 217 - shall be fully constructed by the applicants to the standards of the Planning Authority. Details of the temporary junction arrangement between the Loop Road distributor and Ballyogan Road, including any interim signal control measures that might be deemed necessary, shall be submitted for the written agreement of the Planning Authority prior to commencement of development.**

REASON:- In the interests of the proper planning and sustainable development of the area.

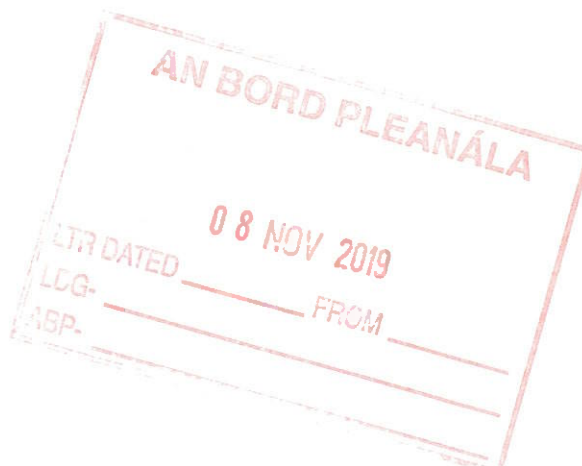
(Note:- The applicants are advised to liaise closely with the Council's Roads Traffic & Forward Planning Section of the Transportation Department in respect of their specific requirements in advance of submitting the temporary junction details).

As such, if it is the case that the fence contravenes one or both of Conditions 1 and 2 of D03A/0411 the fence in question falls foul of Article 9(1)(a)(i) of the Planning Regulations 2001 (as amended), and can therefore not avail of the exemption under Class 11 of Schedule 2 Part 1 of the same regulations.

There are a number of aspects of the 'plans, particulars and specifications' that clearly show that it was a continuous road, without any intervening fence, that was permitted. Two such details are as follows.

Detail 1 – Drawing Number 023050-210 , received by the Planning Authority by way of Further Information on 19th December 2003 and titled 'Plan Layout of Distributor Road (See Figure 6 below). This drawing clearly shows the 'Limit of Construction under this Planning Permission Reg. Ref. No. D03A/0411' which clearly lies to the south of the existing fence line, which can be seen represented by way of the former field boundary to the north. These annotations are repeated on a number of drawings.

It should be noted that these drawings are specifically referenced by Condition 2 of D03A/0411 above, on the issue of constructing this section of the Loop Road.



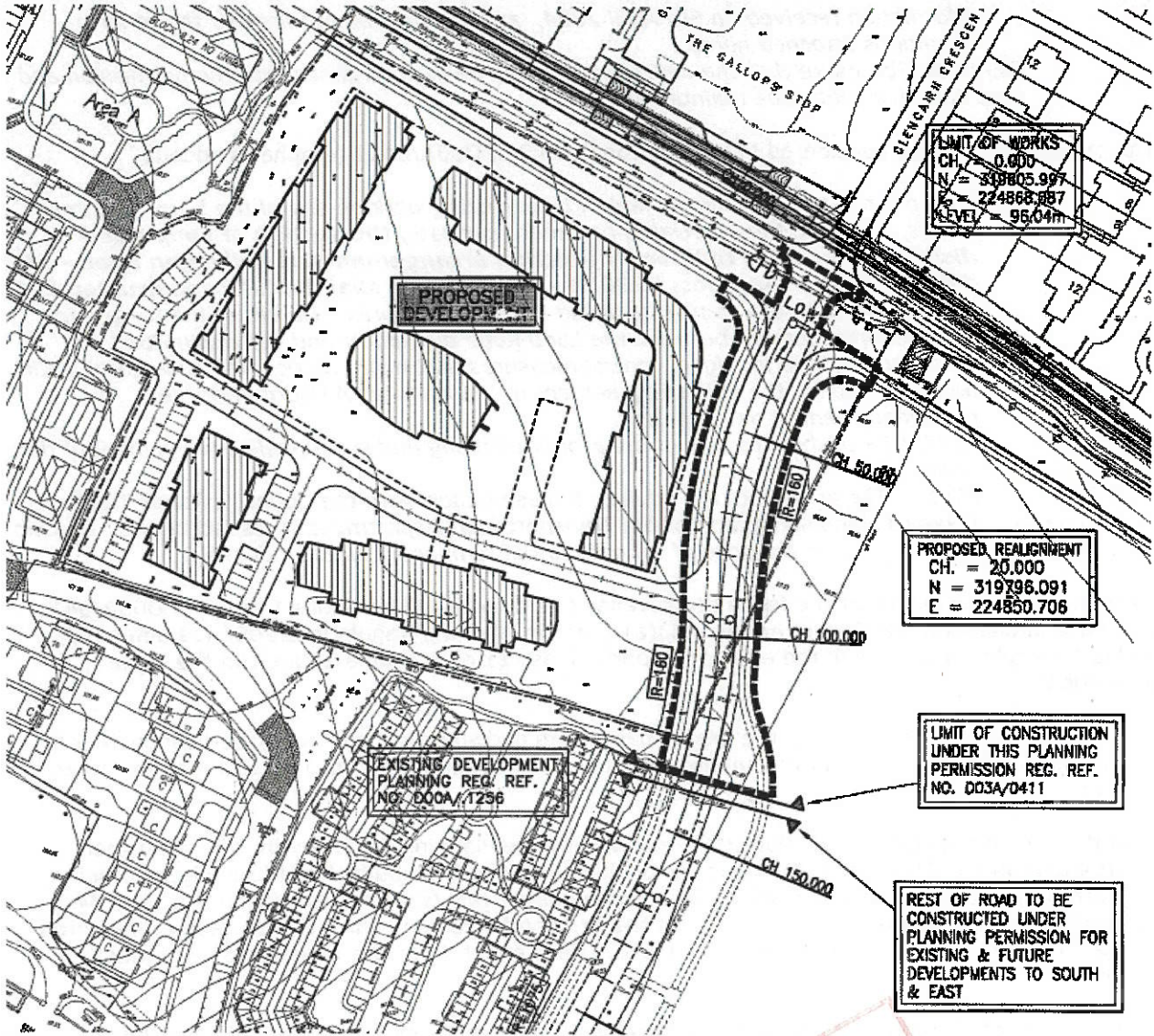


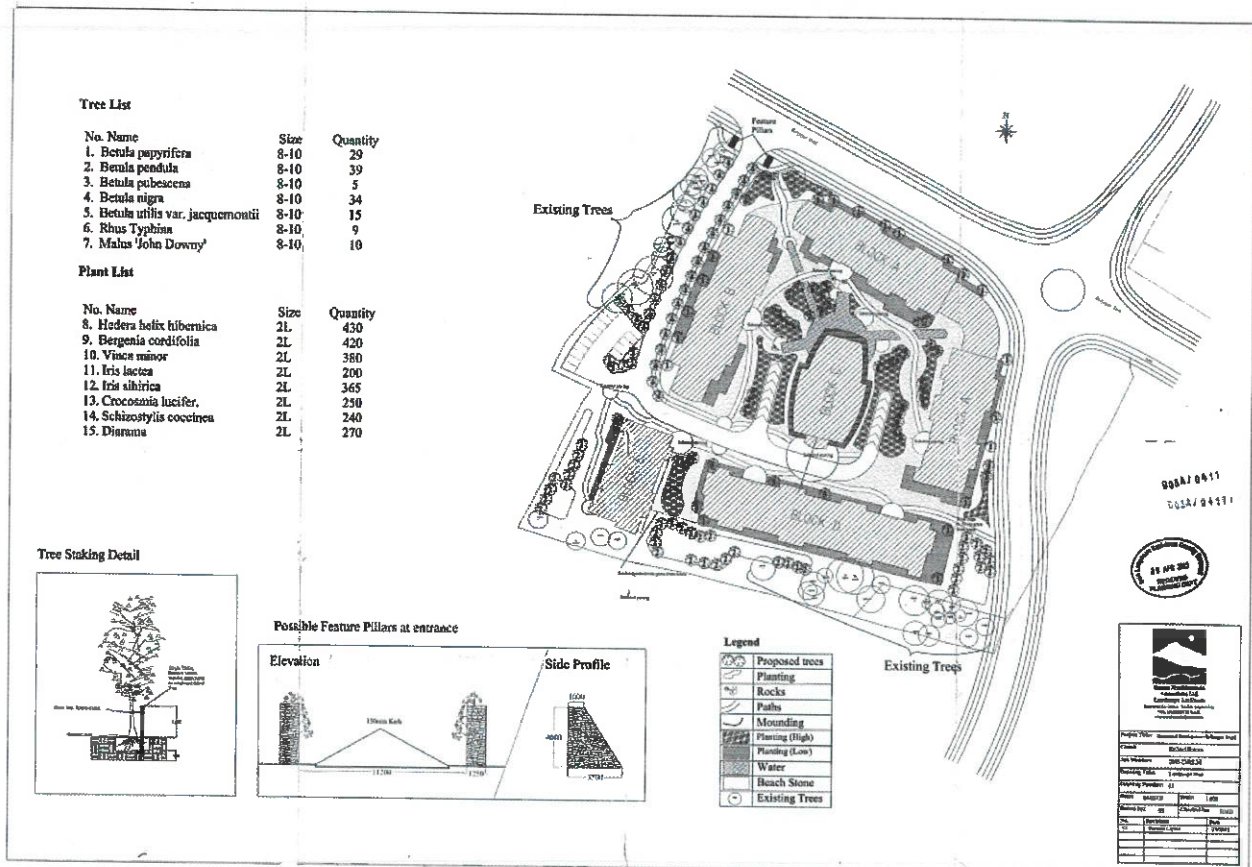
Figure 6 – Detail 1: Drawing Number 023050-210 of D03A/0411, showing the Loop Road continuing through location of current fence

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Detail 2 – As part of the response to the request for Clarification of Additional Information (Point 5), the applicant submitted a Landscape Plan as prepared by Ronan Mac Diarmada and Associates (See Figure 7 below. It does not indicate any boundary treatment at the location of the subject fence.



Conclusion

The planning authority requests the board, in light of the relevant evidence, to come to a position on whether the fence currently across the roadway is or is not development and is or is not exempted development.

There is strong evidence to suggest that while the fence would otherwise be exempt under 'Class 11', that it falls foul of Article 9 of the Planning Regulations by virtue of being contrary to Condition 1 and 2 of D03A/0411, which permitted and indeed required a continuous and unimpeded roadway at this location.

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Ger Ryan
Senior Planner
Development Management West Dundrum, Stillorgan, Glencullen-Sandyford LEAs

