

The Secretary,  
An Bord Pleanála,  
64 Marlborough Street,  
Dublin 1.

<b>AN BORD PLEANÁLA</b>	
LDG-	<u>029368-20</u>
ABP-	_____
<b>14 AUG 2020</b>	
Fee: €	<u>220</u> Type: <u>Cheque</u>
Time:	<u>10:20</u> By: <u>Hand</u>

**O'NEILL**  
Town Planning  
PLANNING AND DEVELOPMENT CONSULTANTS  
OAKDENE, HOWTH ROAD, HOWTH, CO. DUBLIN, D13 DK31.  
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e-mail: planmon46@gmail.com

August 14, 2020.

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**Appeal Re: Notification of decision by Planning Authority regarding a Declaration under Section V of the Planning and Development Act 2000 (as amended). Lands Between Carrick Court Housing Estate and Church Lane/Suncroft, Portmarnock, Co.Dublin.**

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A Chara,

On behalf of our client, Darren Jackson, a director of **Ballymastone Properties Limited, Suaimhneas, Surlgalstown, Swords, Co.Dublin**, who has developed the above mentioned lands, we wish to appeal the decision of the Planning Authority, by order dated July 20, 2020, with regard to the above Section 5 application. We sought a section 5 order with regard to condition No. 4 of An Bord Pleanala Order Reference ABP PL06F.248412 and Fingal County Council Planning Permission Register Reference F16A/0520, i.e.

*'The developer shall provide a pedestrian only access from the proposed development to Suncroft Avenue generally in accordance with the drawings submitted to the Planning Authority on the 10<sup>th</sup> day of February 2017. Prior to commencement of development detailed plans and particulars providing for this access shall be submitted to, and agreed in writing with, the Planning Authority, and pedestrian access shall be provided prior to the making available of the houses for occupation'*

As there was a disagreement between our client and the Planning Authority with regard to the manner in which are client complied with the above condition, we sought a section 5 declaration on the matter, i.e. that the gated pedestrian entrance constructed by our client was in compliance with condition no. 4 of the Bord's order, and as such is an exempted development as per the Planning and Development Act 2000, and the Planning and Development Regulations 2001.

In their decision on the matter, the Planning Authority gave one reason for declaring the development to be not exempt, and as such requiring planning permission, i.e.

*The proposal IS not Exempted Development under Section 5(1) of the Planning and Development Act 2000 for the following reason(s):*

*1. The development of a gated pedestrian walkway contravenes a condition attached to a permission, Condition No 4 ABP PL06F.248412 and is contrary to Article 9 (1)(a), Planning and Development Regulations 2001 as amended .*

This is an appeal against this decision, and we will set out our grounds of appeal below, but before doing that it is important to review the planning history of the site, the statutory development plan for the area which is the Fingal County Development Plan 2017 -2023, and the legislation and regulations covering development, and in this case exempted development, i.e. Planning and Development Act 2000 – 2019, and the Planning and Development Regulations 2001 - 2020.





## 1.1 PLANNING HISTORY

### REG. REF. F16A/0520, AN BORD PLEANÁLA PL06F.248412

Planning permission was granted by An Bord Pleanála on November 27, 2017, for the following:-

*The construction of five number detached two storey private dwelling houses (3 no. detached Type A size 159m<sup>2</sup>, 1 no. detached Type B size 152m<sup>2</sup> and 1 no. detached Type C size 158m<sup>2</sup>). A new vehicular and pedestrian access from Carrick Court, internal road with turning circle, Footpaths, Landscaping, Boundary Treatments, Lighting, Suds Drainage, piped and other services, ESB substations including re-positioning and all other ancillary development works necessary to facilitate the development. All on lands with a site area of .2275 Hectare located between and adjoining Carrick Court Housing Estate to the north, Church Lane to the west and Suncroft Avenue to the south.*

Of import to the subject declaration is condition No. 4 of An Bord Pleanála Order Reference ABP PL06F.248412 and Fingal County Council Planning Permission Register Reference F16A/0520 the planning permission granted, i.e.

*'The developer shall provide a pedestrian only access from the proposed development to Suncroft Avenue generally in accordance with the drawings submitted to the Planning Authority on the 10<sup>th</sup> day of February 2017. Prior to commencement of development detailed plans and particulars providing for this access shall be submitted to, and agreed in writing with, the Planning Authority, and pedestrian access shall be provided prior to the making available of the houses for occupation'*

Following this decision and the decision to amend the scheme, our client sent in compliance drawings to the Planning Authority on August 12, 2018 setting out the design of the proposed pedestrian access on drawing 18.06-c101 which was attached. To date the Planning Authority have not specifically responded to the compliance correspondence relating to the condition no. 4 of the Bord's decision, other to serve a Warning Notice in relation to same. That submission also included a drawing showing areas to be taken in charge by the Planning Authority. Following discussions regarding taking in charge, the Planning Authority were not willing to take in charge the public lands in the estate, so our client agreed to retain all of the lands, including roads and lighting, which would be managed by the five residents in the estate.

### REG. REF. F18A/0351

Planning permission was granted by the Planning Authority on September 17, 2018, for the following:-

*Alterations to already approved development Reg. Ref. F16A/0520, PL06F.248412, comprising: change of house types A,B and C from 3 bedroom to 4 bedroom with subsequent alterations to elevations and increase in floor areas, change of roof type from flat roof to low pitched roof and change of proposed stone cladding to selected brick finish.*

Of import to the subject declaration is condition No. 2 of this order which stated the following:-

*The terms and conditions of the grant of permission made by Fingal County Council under F16A/0520 and An Bord Pleanála PL06F.248412 shall be complied with in full in the course of the development herein permitted, save for the changes to the plans submitted for this application. REASON: In the interest of the proper planning and sustainable development of the area.*

## 1.2 STATUTORY DEVELOPMENT PLAN FOR THE AREA

The subject site is within the functional area of Fingal County Council, and is therefore governed by the objectives, policy and Development Control Standards as set out in the statutory Development Plan for the



area, which is the Fingal County Development Plan 2017 - 2023. The specific thrust of the policy for the area is to protect the quality of the natural and built environment.



Fingal County Development Plan 2017 -2023 showing the location of the subject site (white star)

The site is zoned RS 'to provide for residential development and protect and improve residential amenity' in the Fingal County Development Plan 2017-2013. Residential development is permitted in principle in areas so zoned and the objective is to "ensure that any new development in existing areas would have a minimal impact on and enhance existing residential amenity"

All of the lands directly adjoining the site are zoned RS' (Residential) which has a stated land use zoning objective to "provide for residential development and protect and improve residential amenity".

Section 12.3 of the Development Plan sets out the design criteria for urban development and

it refers to guidelines published by the Department of Environment, Community and Local Government in respect of quality housing and sustainable residential development. It also refers to the Design Manual for Urban Roads and Streets published jointly by the Department of Transport Tourism and Sport and the Department of Environment, Community and Local Government. Policy objectives PM31 to PM33 of the Development Plan seek to promote good urban design in accordance with these guidelines.

With respect to residential densities, the Plan states that regard should be had to the national guidance set out in the 'Sustainable Residential Development in Urban Areas Guidelines and the accompanying Urban Design Manual.' The Development Plan promotes higher densities at suitable locations such as along public transport corridors and in main town centres. Development Plan objective PM41 reiterates this.

The design of buildings in residential areas is spelled out in the Plan in the following way:-

*" Places should be designed around people. Good design is central to creating more attractive living environments. Through good design sustainable development is delivered by more efficient use of land – a non-renewable resource, provision of a variety of housing choices and improved accessibility to local facilities and public transport. The fundamentals of good design are discussed in the Design Section of the Plan. The approach needed to design and plan for people, places and the environment includes the following principles:*

- Efficient use of available land and buildings, thereby reducing demand for greenfield development,
- Homes which are attractive and environmentally friendly,
- Well laid-out urban areas with good quality buildings, well-designed streets, and good quality public open spaces,
- People enabled to get to work easily and to the services they need such as shops or health and leisure facilities, and
- Good public transport made viable and walking and cycling made attractive options."

AN BORD PLEANALA  
14 AUG 2020  
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### 1.3 STATUTORY PROVISIONS

#### ✚ PLANNING AND DEVELOPMENT ACT, 2000

Section 2 of the Planning and Development Act 2000 as amended defines 'works' as follows:

*'works includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal .....*'

Section 3.1 of the Planning and Development Act 2000 as amended defines 'development' 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 of the Planning and Development Act 2000 as amended sets out certain forms of development which shall be exempted development, certain agriculture related works, certain tree planting activities, works carried out by a Local Authority or in partnership with a Local Authority and other developments.

Section 4(1)(h) states that, *development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;*

Section 4.4 of the Planning and Development Act 2000 as amended provides that development shall not be exempted if it requires an environmental impact assessment or appropriate assessment.

As can be seen from the above there is nothing in the Act that would require our clients to seek planning permission for the proposed changes, particularly as there will be no intensification of use on the site or a change of use on the site. As such the changes proposed are not material and as such must be deemed exempt.

#### ✚ PLANNING AND DEVELOPMENT REGULATIONS 2001

Article 9 of the Planning and Development Regulations 2001 as amended sets out specific circumstances where development (to which Article 6 relates) is not exempted development, specifically (and of particular relevance to the subject site;

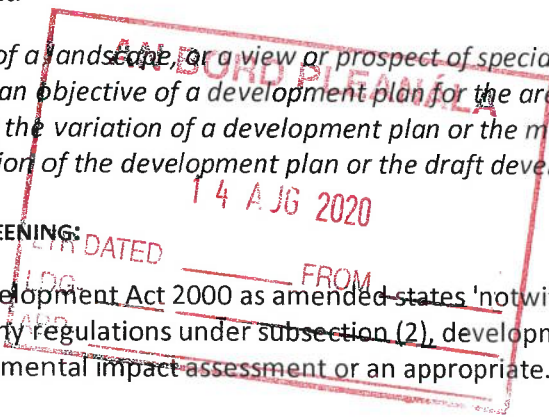
(a) if the carrying out of such development would, *inter alia*, -

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

.....(vi) *interfere with the character of a landscape or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan.....,*

#### ✚ APPROPRIATE ASSESSMENT SCREENING:

Section 4 (4) of the Planning and Development Act 2000 as amended states 'notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.







Given the nature of the proposed development, the distance to the closest Natura 2000 site and the absence of a receptor pathway, no negative impacts on Natura 2000 sites are anticipated. Accordingly, an Appropriate Assessment is not required in respect of the proposal.

#### 1.4 PLANNING AUTHORITY DECISION

In their report in support of their decision to declare the gated pedestrian access as being not exempt from the requirements to seek planning permission, the Planning Authority gave one reason for their decision, i.e. it did not comply with Article 9 (1)(a)(i) which states that,

*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.....*

Of import here is not that they identified the wording of the condition as to be at variance with Article 9, but that they referred to the reason for the condition as being pertinent to their decision, i.e.

*An Bord Pleanála inserted Condition No.4. into the Conditions attached to the grant of permission under ABP PL06F.248412 for the reason 'To improve permeability in the area in the interest of residential amenity'. The applicants have inserted a gate on this pedestrian walkway thereby impeding permeability in the area. It is considered the provision of a gate, with limited and selective access is at variance with Condition No. 4.*

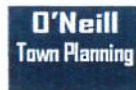
We would submit that the applicant has not in any way deferred from the wording of the condition which is included in the Bord's order, but is also in compliance with the reason for this condition, which incidentally is not included in the wording of Article 9. That said the gated pedestrian access does improve permeability in the area by allowing the residents and their families, and visitors, have direct access to their houses from Suncroft Avenue. Furthermore, the gated pedestrian access greatly improves and protects the residential amenity of residents in the area, something an open pedestrian access would not allow. We would therefore submit that the Planning Authority's narrow and biased interpretation of compliance in this instance is misdirected, particularly when one sees that their interpretation of the reason for the condition is to allow all residents in Portmarnock use the access. Because the subject lands are private, and where there was no right of way through them previously, the imposition of one now would require at least a section 47 agreement with the Planning Authority, which is not in place, and was not conditioned as part of the planning permission granted. As such our interpretation of Condition no. 4 and the reason for it in no way undermines our belief that the gated pedestrian link is in full compliance with condition no. 4 and the reason for it.

AN BORD PLEANALA  
14 AUG 2020  
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#### 1.5 GROUNDS OF APPEAL

As is clear from comments we have made above, our client submitted information by way of compliance for a number of conditions through their architects in August 2018, which we believed the Planning Authority were happy with. In relation to the subject matter of this appeal, which is the interpretation of condition no. 4, it is important to state the following:-

- ALL OF THE LANDS IN THE SUBJECT SITE ARE PRIVATELY OWNED AND MANAGED, AND NONE OF THE LANDS ARE BEING TAKEN IN CHARGE BY THE PLANNING AUTHORITY. THE ESTATE AND THE PEDESTRIAN ACCESS WILL BE MANAGED BY THE RESIDENTS' MANAGEMENT COMPANY WHICH HAS BEEN SET UP TO MANAGE AND MAINTAIN ALL OF THE LANDS IN THEIR OWNERSHIP, INCLUDING THE PEDESTRIAN ACCESS UNTO SUNCROFT AVENUE.
- Our client has provided a pedestrian only access from the proposed development to Suncroft Avenue. The pedestrian only access was gated in order to ensure that there would be no





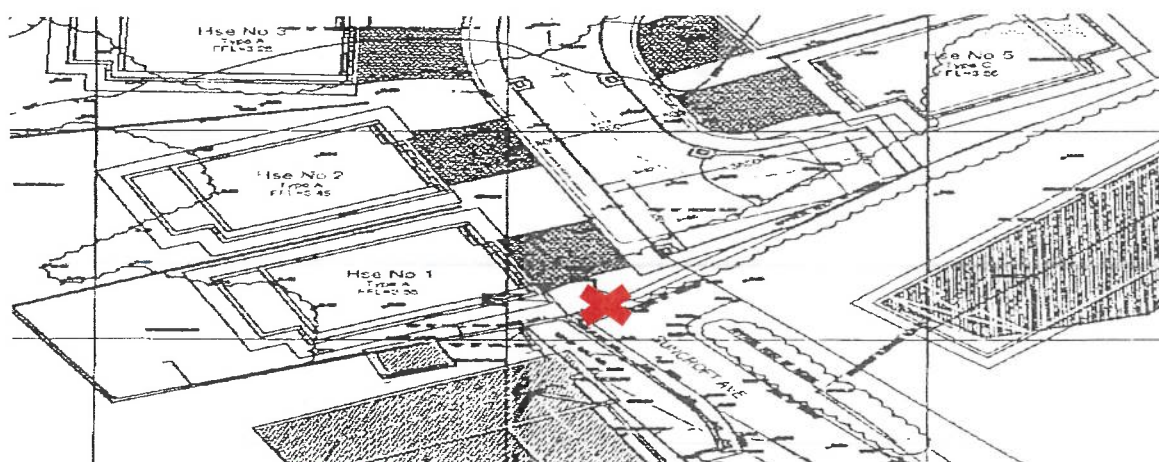
unauthorised access to and from the lane from persons other than those living in the subject development, i.e. to secure the five residential properties and to ensure that the pedestrian access would not become a right of way through this private estate.<sup>1</sup>

- All of the residents in the estate have keys to the pedestrian gate. The access to the pedestrian access is therefore open to all of the residents, their friends and colleagues. As such the pedestrian access is available to them and their household, and any others approved to use the access.
- We believe that Condition No. 4 of An Bord Pleanála' order, i.e.

*'The developer shall provide a pedestrian only access from the proposed development to Suncroft Avenue generally in accordance with the drawings submitted to the Planning Authority on the 10<sup>th</sup> day of February 2017. Prior to commencement of development detailed plans and particulars providing for this access shall be submitted to, and agreed in writing with, the Planning Authority, and pedestrian access shall be provided prior to the making available of the houses for occupation'*

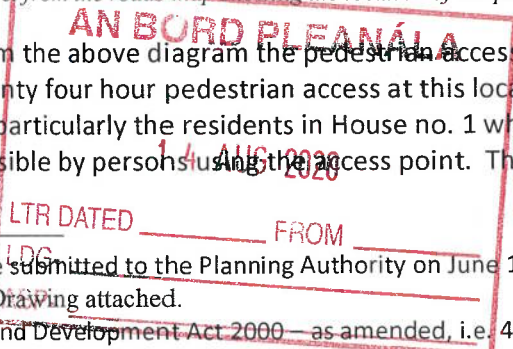
is clear in that the pedestrian access had to be made available prior to the occupation of the houses – to ensure that the pedestrian access was available to the residents immediately they moved in.

- The An Bord Pleanála order condition no.4, which is a direct copy of the Planning Authority condition no. 2, makes no reference to a requirement to provide a pedestrian access for people other than those who would be living in the five houses. If the Planning Authority, and An Bord Pleanála, required our client to provide a right of way through our client's site, then the proper procedure is to seek a section 47<sup>2</sup> agreement with the Planning Authority. As no section 47 agreement is in place, it would be our contention that no public right of way can be created by the Planning Authority in the manner they are suggesting.



Extract from the roads map showing the location of the pedestrian access point

- As can be seen from the above diagram the pedestrian access point is next to, and very close to, House no.1. A twenty four hour pedestrian access at this location would create problems for all of the residents, but particularly the residents in House no. 1 where the house and garden is immediately accessible by persons using the access point. The residential amenity of this house



<sup>1</sup> An email and drawings were submitted to the Planning Authority on June 19, 2019, showing the pedestrian design - 18.06-101 rev 1 June 2019. Drawing attached.

<sup>2</sup> Section 47 of the Planning and Development Act 2000 – as amended, i.e. 47.—(1) A planning authority may enter into an agreement with any person interested in land in their area, for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be specified by the agreement, and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the planning authority to be necessary or expedient for the purposes of the agreement.

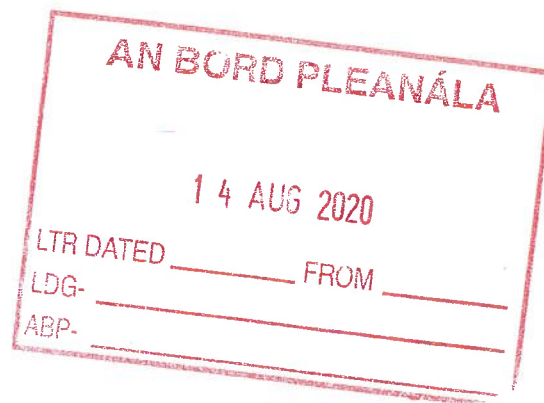


would be totally compromised if the access was a twenty four hour through road, and contrary to the reason for the condition as mentioned above.

- Our client has provided the pedestrian only access for the residents of his site. The absence of a gate became an issue for residents when buying the individual houses and while no mention of a gated pedestrian access was in the original plan submitted to the Planning Authority, the condition states that the access must be “generally in accordance with the drawings submitted to the Planning Authority on the 10<sup>th</sup> day of February 2017”. As such we are of the opinion that the present access is in full compliance with condition no. 4, as the addition of the gate is not a material consideration, as it allows the pedestrian access to be used by all of the persons using the subject site, and is necessary to protect the residents private road and estate being used as a through access. The liability of same would be outside the remit of our client or the residents.
- The estate has not, and will not be, taken in charge, and as such the residents of the small estate will be responsible for the upkeep of the road, the public lighting, and the Public Open Space, the general public liability on the common areas, and the pedestrian access unto Suncroft Avenue. The company name is Carrick Court Close Property Management Company Limited by Guarantee - registration number 644106. Currently Darren Jackson, the developer, is the sole director but he is in the process of handing over the company to the owners of the five properties in Carrick Court Close. All of the residents are in favour of this, and at present the residents pay an annual service charge to cover insurance, lighting etc.
- In summary we believe our client has complied with both the wording and the spirit of condition no. 4, particularly as the condition does not ask to provide a right of way for other persons, from other areas, unto Suncroft Avenue, and also seeks to protect residential amenity.

## 1.6 CONCLUSIONS

Having regard to the wording of condition no.4 of the An Bord Pleanála order(PL06F.248412), to the regulations, and to the nature and location of the pedestrian access, we are of the opinion that the pedestrian access is compliant with the condition of the Bord, and is available to all of the residents in the estate which was the subject of the planning application and planning decision. As such we would submit that it is of a type which is exempt from the requirement to seek planning permission by virtue of section 2, 3, and 4 of the Planning and Development Act 2000 and article 9 of the Planning and Development Regulations 2001 – as amended.






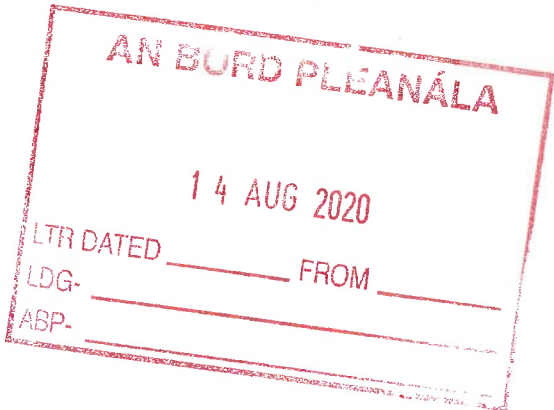


Extract from aerial photo showing the comparative distances for the great majority of residents in the area who would be walking to the centre of Portmarnock village. Notwithstanding the fact that our client's site is private, as can be seen from diagram attached, there would be a decrease of twenty metres if the pedestrian access was used. This would not represent a significant saving to residents in the area traversing our client's site and using the pedestrian access.

We would therefore conclude that the pedestrian access with gate is in compliance with condition no.4, in particular it fully complies with the intent of the Bord when writing the condition, i.e. *'The developer shall provide a pedestrian only access from the proposed development to Suncroft Avenue .....* What has been constructed is that, a pedestrian only access from the PROPOSED DEVELOPMENT. The gate ensures that there will no trespass from Suncroft avenue onto the residents' property, while at the same time ensuring that an unauthorised use does not occur by way of creating a public right of way along Suncroft Avenue and through the private lands of the owners of our estate. Furthermore, the development is in full compliance with the conditions imposed on the use of the lands and would not affect any Natura site in the vicinity of the site. We would contend that the pedestrian access to the subject lands has been undertaken in full compliance with the order of An Bord Pleanála and is an exempted development for the purposes of the Act, as it complies with the conditions and limitations specified in the Act and the Regulations.

We would respectfully ask the Bord to uphold our appeal, and we enclose the required fee of €220.00 to cover the cost of this appeal. Please forward all correspondence relating to the above to this address.

Yours Sincerely,  
  
**Michael A. O'Neill MIPI**







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Annex

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Email from O'Dwyer and Associates June 19, 2019

From: Nuala Burke

Sent: 19 June 2019 09:59

To: 'Paul.O'Brien@fingal.ie' <Paul.O'Brien@fingal.ie>; 'Grace Colfer' <Grace.Colfer@fingal.ie>; 'niall.thornton@fingal.ie' <niall.thornton@fingal.ie>; 'Gemma Carr' <Gemma.ECarr@fingal.ie>

Subject: F16A/0520 = Carrick Court, Portmarnock, Co. Dublin.

Hi Paul/ Niall/ Gemma

Can you follow up on the outstanding compliance items listed below in respect of F16A/0520, Carrick Court, Portmarnock, Co. Dublin;

- 2 Open space/ gardens/ tree planting
- 4 Details of Suncroft pedestrian access
- 5 Details of Carrick Court Entrance

I understand that you have extremely heavy work loads but the compliance submissions have been in the system since August 2018 and the outstanding confirmations are causing delays with sales.

Please note – as the estate is a private estate and the road is not being taken in charge a gate has been added for insurance purposes to the pedestrian access to/ from Suncroft Avenue for use by the residents of Carrick Court Close. The attached drawing shows the gate.

It should also be noted that we have been obliged to angle the fence line on the south eastern boundary into our property to accommodate the mature hedge on the neighbouring property. The ownership line does not change. This also facilitates the neighbour to the east on Suncroft Avenue to better access their site.

Regards

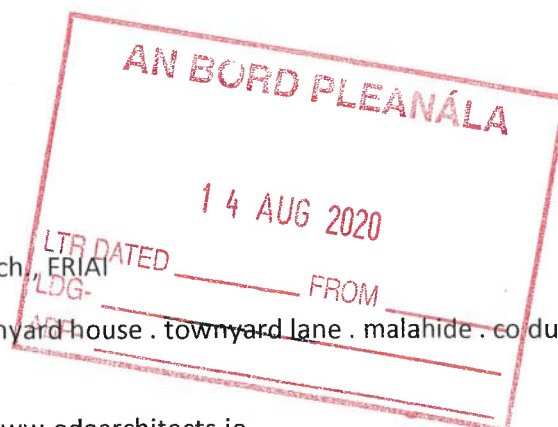
Nuala

Nuala Burke . Director . Dip. Arch., B. Arch.

o' dwyer & associates architects . 8 townyard house . townyard lane . malahide . co dublin . t. 8452448 . f. 8450085

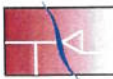
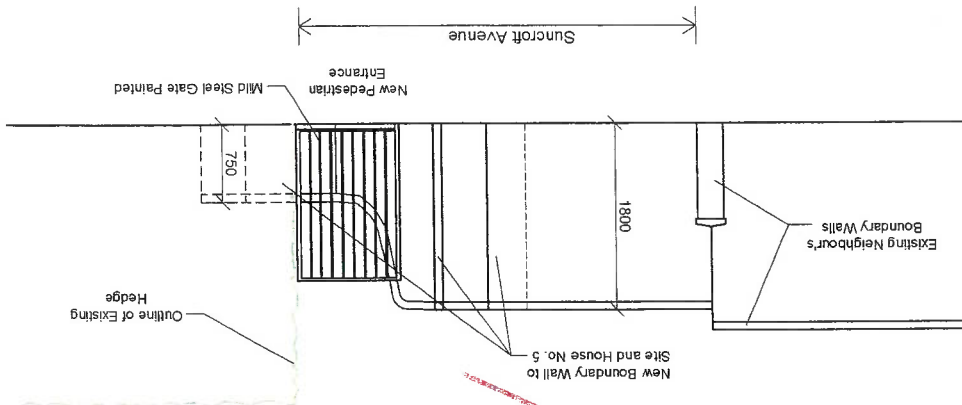
e . [nualaburke@odaarchitects.ie](mailto:nualaburke@odaarchitects.ie), w . [www.odaarchitects.ie](http://www.odaarchitects.ie)

paul o' dwyer & associates limited . registered in ireland: no. 459829 . registered office: 8 townyard house, townyard lane, malahide, co dublin





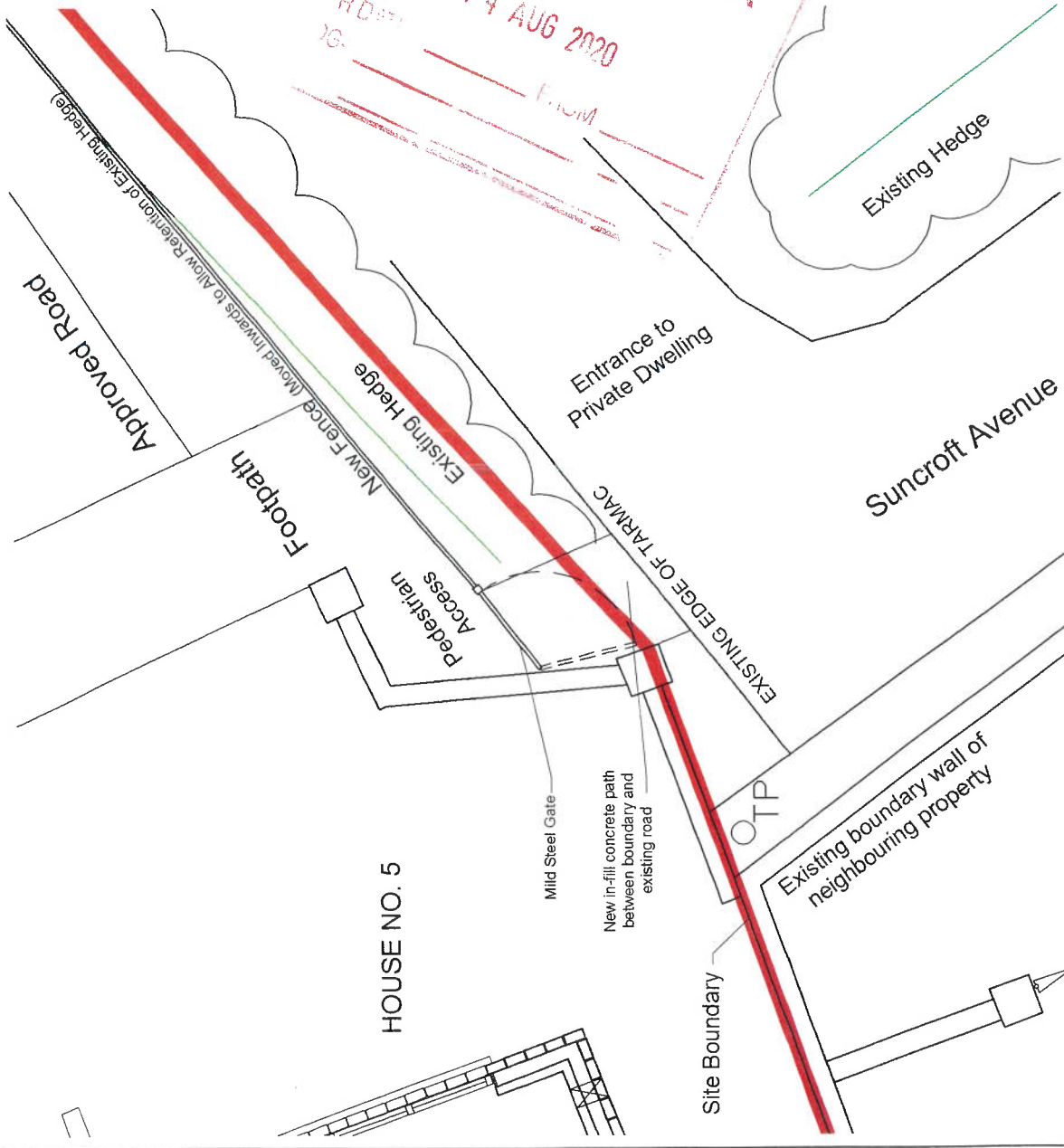
ELEVATION OF PEDESTRIAN ACCESS TO SUNCROFT AVENUE



O'Dwyer & Associates Architects Ltd  
 8 Townyard House, Townyard Lane, Malahide, Co. Dublin.  
 Tel: 01 845 2448  
 email: design@odaaarchitects.ie web: www.odaaarchitects.ie

Job: Five detached houses  
 Address: Carrick Court, Portmarnock, Co. Dublin  
 Title: Details of Pedestrian Access to Suncroft Ave.  
 Job no.: 18.06 | Dwg. no.: 110 | Rev. no.: A  
 Drawn by: PD | Date: June 2019 | Scale: 1:50@A3

AN BUIO FLEANNÁLA  
 14 AUG 2020



PLAN OF PEDESTRIAN ACCESS TO SUNCROFT AVENUE

No.	Revision	Date	Notes
A	Drawing updated to reflect as built site conditions	18/06/2019	

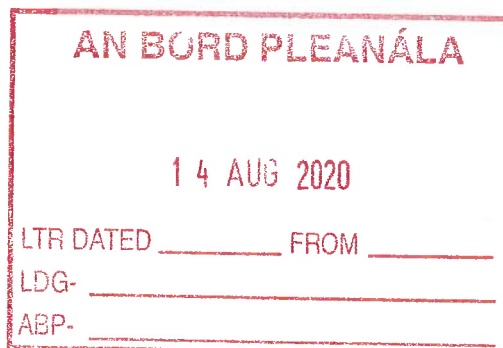
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Do Not State. Use Figure Dimensions Only





Michael O'Neill  
O'Neill Town Planning  
Oakdene  
Howth Road  
Howth  
Co. Dublin  
D13 DK31.



NOTIFICATION OF DECLARATION UNDER SECTION 5 OF THE  
PLANNING & DEVELOPMENT ACTS 2000, AS AMENDED

Decision Order No. PF/0935/20	Decision Date: 20-Jul-2020
Ref: FS5/027/20	Registered: 03-Jul-2020

Area: Howth Malahide

Applicant: Ballymastone Properties Ltd.

Development: A pedestrian access from the proposed development to Suncroft Avenue, Portmarnock, which is in compliance with Condition No. 4 of ABP PL06F.248412, Reg. Ref. F16A/0520.

Location: Lands between Carrick Court Housing Estate and Church Lane/Suncroft, Portmarnock, Co. Dublin

Application Type: Request for Declaration Under Section 5

Dear Sir/ Madam

With reference to your request for a DECLARATION under Section 5 (1) received on 03-Jul-2020 in connection with the above, I wish to inform you that the above

Áras an Chontae, Sord, Fine Gall, Co. Bhaile Átha Cliath / County Hall, Swords, Fingal, Co. Dublin \K67 X8Y2  
Swords Office t: Registry (01) 890 5541 Decisions (01) 890 5670 Appeals (01) 890 5724  
e: [planning@fingal.ie](mailto:planning@fingal.ie) [www.fingal.ie](http://www.fingal.ie)

Bóthar an Gharráin, Baile Bhlainséir, Átha Cliath 15 / Grove Road, Blanchardstown, Dublin 15 D15 W638  
Blanchardstown Office t: (01) 870 8434 e: [blanch.planning@fingal.ie](mailto:blanch.planning@fingal.ie)



proposal IS NOT Exempted Development under Section 5(1) of the Planning and Development Act 2000 for the following reason(s):

1. The development of a gated pedestrian walkway contravenes a condition attached to a permission, Condition No 4 ABP PL06F.248412 and is contrary to Article 9 (1)(a), Planning and Development Regulations 2001 as amended.

NOTE: Where a declaration is issued under section 5 (1) any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such a fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

Signed on behalf of Fingal County Council.



Nessa Duff 20-Jul-2020  
for Senior Executive Officer

