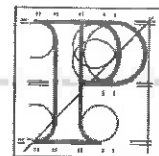


Validation Checklist

Lodgement Number : **LDG-031059-20**
Case Number: **ABP-308254-20**
Customer: **Tetrarch Capital Limited**
Lodgement Date: **23/09/2020 15:28:00**
Validation Officer: **Garry Dorgan**
PA Name: **Fingal County Council**
PA Reg Ref: **FS5/031/20**
Case Type: **Section 5 Referrals**
Lodgement Type: **Referral**



An
Bord
Pleanála

Validation Checklist	Value
Confirm Classification	Confirmed - Correct
Confirm PA Case Link	Confirmed-Correct
Confirm ABP Case Link	Confirmed-Correct
Fee/Payment	Valid – Correct
Name and Address available	Yes
Agent Name and Address available (if engaged)	Yes
Subject Matter available	Yes
Question	Yes
Sufficient Fee Received	Yes
Received On time	Yes
Eligible to make lodgement	Yes
Completeness Check of Documentation	Yes
Valid Lodgement Channel	Yes

* Task-186013-20 to 3rd Party (ABP Case)

* Task-186000-20 to P.A (lodgement).

* Task-185999-20 to 1st Party (lodgement)

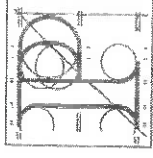
* Referral to be scanned to system*

Run at: 24/09/2020 12:07

Run by: Garry Dorgan

LDG-031059-20

ABP-308254-20



An Bord Pleanála

Submission Date	23/09/2020
Applicant	Tetrarch Capital Limited
Submission Channel	In Person
Submitted by Agent	Yes
Applicant Name	Tom Phillips and Associates
Response Primarily Sent to	Agent
Submitted Post Reference	

Lodgement ID	LDG-031059-20
Map ID	
Created By	Anna Rychlinska
Physical Items included	No
Generate Acknowledgement Letter	
Customer Ref. No.	
PA Reg Ref	

Authorisation

Submission Type	Appeal Reopened
Submission Status	Processing

PA Name	Fingal County Council
Case Type (3rd Level Category)	

Appeals and Payments

Appeal Body	No
Appeal Hearing	No
Calculation Method	System
Currency	Euro
Value	0.00
Submitted Amount	0.00

Observation/Objection Allowed?	
Payment	PMT-022107-20
Related Payment Details Record	PD-022030-20

Applicant

P.A. notified by email

Decision date : 28/8/20.
Last date for referral: 24/9/20.

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1

AN BORD PLEANÁLA	
LDG- <u>031059-20</u>	
ABP- _____	
23 SEP 2020 AR	
Fee: € <u>220</u>	Type: <u>cheque</u>
Time: <u>15:25</u>	By: <u>lward</u>

Wednesday, 23rd September 2020
[By Hand]

Dear Sir/Madam,

RE: APPEAL AGAINST THE DECISION OF FINGAL COUNTY COUNCIL IN RELATION TO SECTION 5 DECLARATION OF MAINTENANCE WORKS TO FENCE NOT BEING CONSIDERED AS EXEMPTED DEVELOPMENT AT HOWTH CASTLE, HOWTH, CO. DUBLIN

FINGAL COUNTY COUNCIL REG. REF.: FS5/031/20

1.0 INTRODUCTION

Tom Phillips + Associates¹ have been retained by Tetrarch Capital Limited² to submit this Appeal in relation to the Section 5 Declaration made by Fingal County Council (FCC) with regard to works undertaken at Howth Castle, Howth, Co. Dublin.

The Friends of the Irish Environment (FIE) requested FCC to make a Section 5 Declaration in relation to works undertaken at Howth Castle. This request was made on 31st July 2020. FCC did not seek any comment from the landowner, Tetrarch Capital Ltd., in respect of works carried out within the landholding. This was further to a request by Tetrarch to allow representations to be made (in accordance with Section 5(2)(c) of the *Planning and Development Acts 2000-2020*). This should have been allowed as a matter of course to provide a right of reply and clarify that these works related to improvement and maintenance works in the vicinity of the property.

FCC initially issued the Section 5 Declaration to the FIE on 27th August 2020. The Appellant requested that FCC issue the Declaration to them as the owner of the property, which they did so on 9th September 2020 (A copy of the declaration as issued to Tetrarch Capital Limited is included as Appendix A). The Declaration was issued to Tetrarch Capital Limited who, through a subsidiary company WSHI Limited, are the owner of Howth Castle and its associated lands. It is considered that the works to the maintenance of the fence and the provision of the pedestrian gate can be considered separately or as a whole in the determination by An Bord Pleanála.

The Appeal is being submitted within 4 weeks of the decision, by 23rd September 2020, and a cheque of €220 is included as the appropriate fee in this instance.

The Appeal specifically deals with the declaration made by FCC that:

¹ 80 Harcourt Street, Dublin 2

² Heritage House, 23 St. Stephens Green, Dublin 2

1. The development fails to meet the conditions and limitations for exempt development of the gate under Class 9, Planning and Development Regulations 2001 (as amended) as its height is in excess of 2m. Similarly, the applicant fails to meet the conditions and limitations for exempt development of the fence under Class 11, Planning and Development Regulations 2001 (as amended) as its height is in excess of 2m. It is considered therefore that the gate and fence are considered not to be exempt development under Class 9 and Class 11 respectively relating to Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended).

It is our contention that the Classes highlighted in the *Planning and Development Regulations 2001-2020* do not apply to the works undertaken and that they are clearly exempted development as maintenance and improvement works under Section 4(1)(h) of the *Planning and Development Acts 2000 – 2020*. Notwithstanding this, we also address the Classes of development mentioned by FCC in Section 3.5.

2.0 BACKGROUND TO ERECTION OF FENCE AND MAINTENANCE WORKS UNDERTAKEN AT HOWTH CASTLE

The fence surrounding Howth Castle lands was erected in c. 1973 by Dublin City Council and carried out in a number of tranches. Since the fence was erected there have been minor repair works carried out, but over the last number of years substantial damage has been caused to stretches of the fence where it has been trampled down or holes created to provide access to Howth Castle lands. The photographs below illustrate the existing fence (as constructed in 1973) where it is intact and the drawing below highlights the type of fence as constructed, up to a height of c. 2.7m above ground level.

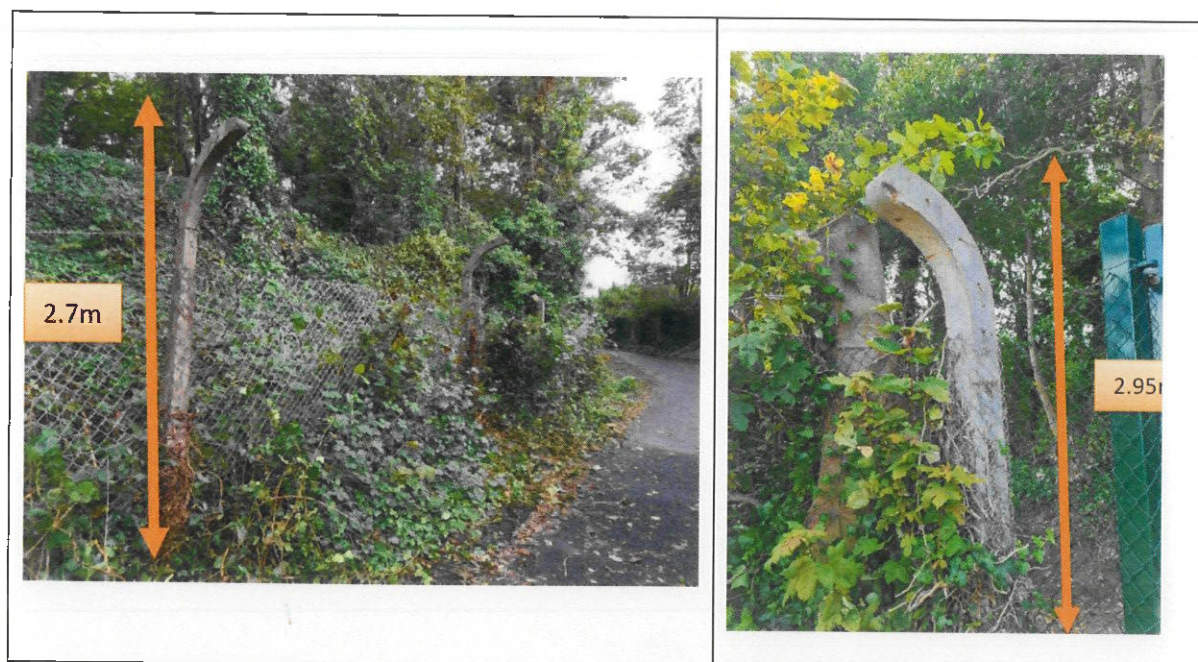


Figure 1: Images of Existing 'Bent Arm Post' Fence Constructed in c. 1973

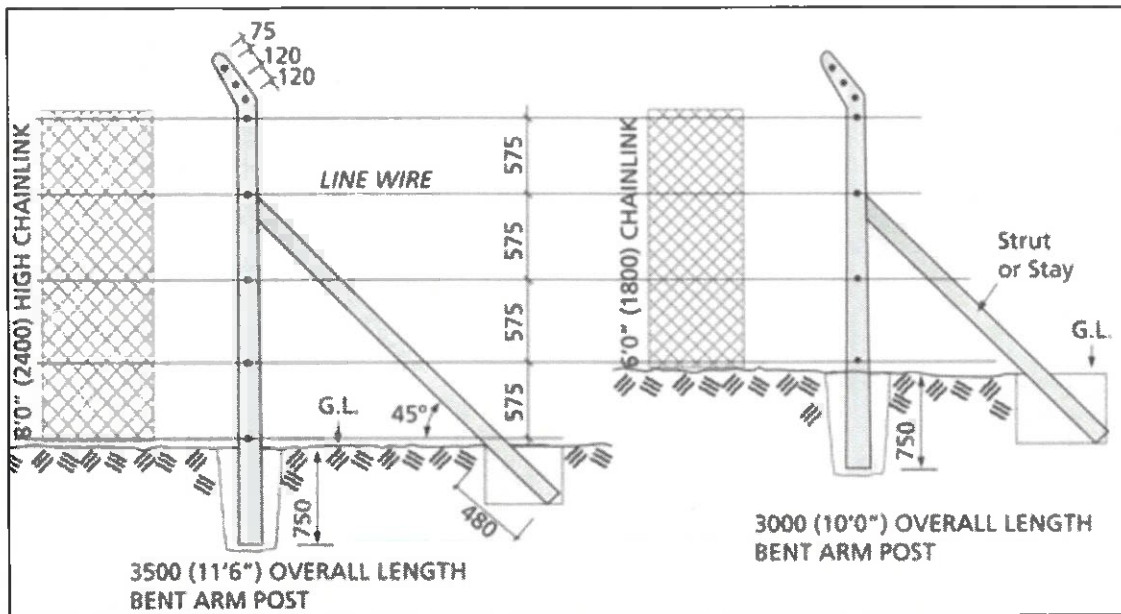


Figure 2: Drawing illustrating the Original Fence Construction

In areas where the existing fence has been damaged, maintenance works have been carried out to improve the fence and fenceposts have been replaced where necessary. These works are all in line with the extent and height of the existing fence on site and provide for a 'bent arm fence post' of between c. 2.3m – 2.7m in height, with the height of the mesh fence element at c. 2m in height.



Figure 3: Fence Improvement and Maintenance Works

We also refer to photographs submitted by the FIE as part of their referral which highlights existing fence posts that have been maintained as part of the improvement works to the overall fence.



Figure 4: Photos from FIE Referral which illustrate existing 1970's fence posts (Annotated by TPA)

Works were also undertaken to improve the pedestrian gateway adjoining Grace O'Malley residential estate with a 4.5m wide pedestrian gate has been provided at this location. The gate provided is wider than that previously at this location but is done so to ensure social distancing protocols can be maintained by persons entering or exiting the lands.



3.0 WORKS AS EXEMPTED DEVELOPMENT

3.1 Legislative Context

'Development' is defined in Section 3 of the *Planning and Development Acts 2000-2020* as follows:

"3.—(1) 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.

(2) For the purposes of subsection (1) and without prejudice to the generality of that subsection—

(a) where any structure or other land or any tree or other object on land becomes used for the exhibition of advertisements, or

(b) where land becomes used for any of the following purposes—

(i) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods,

(ii) the storage of caravans or tents, or

(iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders' waste, rubbish or debris, the use of the land shall be taken as having materially changed.

(3) For the avoidance of doubt, it is hereby declared that, for the purposes of this section, the use as two or more dwellings of any house previously used as a single dwelling involves a material change in the use of the structure and of each part thereof which is so used."

'Works' is defined in the Acts as follows:

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure."

Since the proposal involved the carrying out of works, it clearly constitutes 'development'. The question is therefore whether the development would constitute 'exempted development'.

3.2 'Works': Constitute Exempted Development

Section 4(1)(h) of the Acts states that the following shall be exempted development:

"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;”

The works, as outlined in Section 2.0, are provided along the boundary of the lands, and therefore affect the exterior, however there is no material change to the external appearance of the adjoining lands given the maintenance works and like for like replacement of fencing and fenceposts where required.

The ‘works’ associated with the development therefore clearly comprise ‘exempted development’ under Section 4(1)(h) of the Acts.

3.3 Article 9 Restrictions on Exemption do not Apply

Article 9 of the *Planning and Development Regulations 2001-2020* sets out a number of restrictions which can ‘de-exempt’ development that would otherwise constitute exempted development.

However, the restrictions under article 9 only apply to ‘development to which article 6 relates’. Article 6 solely relates to development of a class specified in Parts 1 to 3 of Schedule 2 of the Regulations.

Since the proposed development would be exempted under section 4(1)(h) of the Acts, and not under a class specified in Schedule 2 of the Regulations, the article 6 ‘de-exemptions’ cannot apply in this instance.

3.4 Appropriate Assessment/Environmental Impact Assessment are Not Required

Section 4(4) of the *Acts* stipulates a further ‘de-exemption’ in circumstances where an Appropriate Assessment (AA) or an Environmental Impact Assessment (EIA) would be required in respect of proposed development:

“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.”

Appropriate Assessment

The development is relatively minor and essentially comprises improvements and maintenance works along the boundary of the land. Having regard to the nature, scale and location of the proposed development it is not considered that a requirement for Appropriate Assessment can arise in this instance.

Environmental Impact Assessment

The various classes and thresholds of development for which EIA is required are listed in Schedule 5 of the *Regulations*. Since the development relates to relatively minor works to a fence, it is not a form of development which would require EIA, nor is it considered likely to have a ‘significant effect on the environment’.



Having regard to the above, it is our professional planning opinion that the restrictions on exemption relating to AA and EIA as set out under the Acts are not applicable in respect of the development which is the subject of this section 5 referral.

3.5 Commentary on Fingal County Council Assessment

The question raised by the FIE in relation to the works undertaken to the fence at Howth Castle was to consider were the works development or exempted development and whether the fencing blocks off public access to the lands.

In its assessment FCC refers to Section 2 and 3 of the Acts to establish the meaning of development (as outlined in Section 3.1 above). FCC then assessed the works having regard to the exempted development provisions of Schedule 2, Part 1 of the *Planning and Development Regulations 2001-2020* and the height of the structure.

FCC did not assess or consider that the works could have been carried out under Section 4 of the Acts, which deals with Exempted Development. Section 4(1)(h) clearly outlines that maintenance, improvement or alteration of a structure are exempted development as long as they do not materially affect the external appearance of the structure so it is inconsistent with its character. The improvement of the fence does not affect how the fence looks in external appearance and is therefore considered to be exempted development.

Notwithstanding the above, and for completeness, we have provided a response to the FCC declaration, we address Class 9 and Class 11 of the Regulations below.

“Class 9

*The construction, erection, **renewal or replacement**, other than within or bounding the curtilage of a house, **of any gate or gateway.**”*

The existing pedestrian gate at this location was replaced by a new wider gate (to comply with social distancing protocols established) to allow more room between persons entering / existing. The height of the gate as provided is in line with the height of the fencing either side and when considered in this context is appropriate at this location.

“Class 11

*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.

Class 11 clearly outlines that the repair of any fence (not within the curtilage of a house) is exempted development, such as the works undertaken at Howth Castle. It is noted that the Conditions and Limitations associated with works to fences under this Class are as follows:



“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.”

In regard to the above, it is noted that the fence as constructed in the 1970’s, which still exists to date, is already in excess of 2m in height. The repairs to this fence which have been implemented provide for the same height as the existing fencing at Howth Castle. Providing repair or maintenance work to the existing fence and to then limit this to 2 metres would seem to be contradictory and we would note that the intention of the legislation to allow for replacement works to an existing fence should be considered acceptable.

Article 9 of the Regulations sets out specific restrictions which can ‘de-exempt’ development that would otherwise constitute exempted development. These have been considered in relation to the works carried out at Howth Castle and do not apply in this instance.

As outlined previously, the works at Howth Castle have been carried out as exempted development under Section 4(1)(h) of the Planning and Development Acts 2000-2020 and the commentary provided in the above section is only provided in response to the assessment of FCC as per their Planning Officers Report (dated 24th August 2020).

4.0 CONCLUSION

The works carried out to the fence at Howth Castle are clearly exempted development as they are considered to be maintenance and improvement works in accordance with Section 4(1)(h) of the *Planning and Development Acts 2000-2020*. We request the Board to overturn the decision of Fingal County Council in this regard and make a declaration that the works are exempted development.

We trust that the issues outlined in this Appeal will be taken into consideration as part of An Bord Pleanála’s assessment. We look forward to receiving an early and favourable response on this matter and would be happy to clarify any issue arising.

Yours faithfully

Stephen Barrett
Associate
Tom Phillips + Associates



APPENDIX A – COPY OF THE FINGAL COUNTY COUNCIL SECTION 5 DECLARATION



Tetrarch Capital Limited
Heritage House,
23 St Stephens Green
Dublin 2

Date: 9th September 2020

PLANNING & DEVELOPMENT ACTS 2000, AS AMENDED

Register Reference: FS5/031/20

Development: i) Erection of fencing which blocks habitually open public accesses
ii) Erection of vehicular gate on a public footpath iii) Trenching/
Earthworks.

Location: Howth Castle, aka Deer Park, Howth, Co. Dublin

Applicant: Friends of the Irish Environment

Application Type: Dec Under Section 5

Date Received: 31-Jul-2020

Dear Sir/Madam

I wish to inform you that in pursuance of its functions under the above mentioned Act, as Planning Authority, the County Council for the County of Fingal did by Order dated 27-Aug-2020, make a decision of DECLARATION and hereby notifies you that the above proposal **IS and IS NOT Exempted Development**. Details of the Planning Authority's decision are available online by entering following address into your browser and inputting the reference number.

Comhairle Contae Fhine Gall
Fingal County Council

**An Roinn um Pleanáil agus
Infrastruchtúr Straitéiseach**
Planning and Strategic
Infrastructure Department



<http://www.fingal.ie/planning-and-buildings/apply-or-search-for-a-planning-application/search-planning-applications-online/searchplanningapplicationsonline/>

Yours Sincerely

Michelle Burke

Michelle Burke
for Senior Executive Officer



Brian Hewson
54 Church Street
Howth
Dublin 13
D13 HW18

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

Decision Order No. PF/1114/20	Decision Date: 27-Aug-2020
Ref: FS5/031/20	Registered: 31-Jul-2020

Area: Howth Malahide

Applicant: Friends of the Irish Environment

Development: i) Erection of fencing which blocks habitually open public accesses ii) Erection of vehicular gate on a public footpath iii) Trenching/ Earthworks.

Location: Howth Castle, aka Deer Park, Howth, 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 31-Jul-2020 in connection with the above, I wish to inform you that the above proposal IS and IS NOT Exempted Development under Section 5(1) of the Planning and Development Act 2000 for the following reason(s):

Schedule 1

1. The earthworks/trenching meets the description of Schedule 2, Part 3, Exempted Development Rural, Class 3 Minor works and Structures and is considered exempt development.

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 www.fingal.ie

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

Schedule 2

1. The development fails to meet the conditions and limitations for exempt development of the gate under Class 9, Planning and Development Regulations 2001 (as amended) as its height is in excess of 2m. Similarly, the applicant fails to meet the conditions and limitations for exempt development of the fence under Class 11, Planning and Development Regulations 2001 (as amended) as its height is in excess of 2m. It is considered therefore that the gate and fence are considered not to be exempt development under Class 9 and Class 11 respectively relating to Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended).

The earthworks/trenching meets the description of Schedule 2, Part 3, Exempted Development Rural, Class 3 Minor works and Structures and is considered exempt development.

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.


for Senior Executive Officer

28-Aug-2020

