

The Secretary,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1,
D01 V902.

57 Doseil Drive,
Grange Heights,
Douglas,
Cork.
T12 H7 K3

27th July 2022

Re: Referral as per Section 5(3)(a) of the Planning and Development Act, 2000.

Planning Authority Reg. Ref.: R724/22 , No.11 Arbour Court, Grange, Douglas, Cork.

Planning Authority: Cork City Council

Dear Sir/Madam,

Enclosed please find a request as per Section 5 (3) (a) of the Planning and Development Act, 2000 for review of the Section 5 Declaration **Ref.: R724/22** issued by Cork City Council on 20th July 2022.

Also please find enclosed the required R1 fee of €220.

Thanking you.

Yours Sincerely,


Alan Duggan

AN BORD PLEANÁLA	
LDG-	<u>056711-42</u>
ABP-	
28 JUL 2022	
Fee: € <u>220</u>	Type: <u>Cheque</u>
Time: _____	By: <u>Reg - post</u>

Referral to An Bord Pleanála as per Section 5(3)(a) of the Planning and Development Act, 2000.

Question: Whether the gateway means of access to a public road that was formed in the shared boundary wall between Dosel Drive and the rear of No. 11 Arbour Court, Grange, Cork, is or is not development or is or is not exempted development.

Location: No. 11 Arbour Court, Grange, Douglas, Cork.

Declaration Planning Authority: Cork City Council

Planning Authority Reg. Ref.: R724/22 11 Arbour Court, Grange, Douglas, Cork.

Applicant for Declaration: Mr. Alan Duggan

Planning Authority Decision: Is Development and is Exempted Development.

Referral Referred by: Mr. Alan Duggan

Date: 27th July 2022

1.0 Overview of Referral Question

This document constitutes a Referral to An Bord Pleanála as per Section 5(3)(a) of the Planning and Development Act, 2000 of a Declaration by a Planning Authority in relation to a question as to what is or is not development or exempted development.

The subject of the referral question a gateway means of access to a public road that was formed on Saturday 22nd May 2021 in the shared boundary wall between Dosel Drive and the rear of No. 11 Arbour Court, Grange, Cork.

The subject gateway access was formed by physically cutting through the existing brickwork boundary wall, that acts as a dividing wall between the residential property known as No. 11 Arbour Court and the established grass verge forming the shared residential amenity space of Dosel Drive, a residential street comprising a row of semi-detached houses dating from the mid-1970s. The existing boundary wall stands at a height of approx. 1.5 metres above the ground level of the adjacent grass verge amenity space at Dosel Drive.

2.0 Planning Authority Declaration

On 17th June 2022 Mr. Alan Duggan submitted an application for a Section 5 Declaration on exempted development to the Planning Authority, Cork City Council. The subject of the Section 5 Declaration is a gateway means of access to a public road that was formed on Saturday 22nd May 2021 in the shared boundary wall between Dosel Drive and the rear of No. 11 Arbour Court, Grange, Cork.

On 20th July 2022 the Planning Authority issued their declaration under Section 5 of the Planning and Development Act 2000, as amended (**Referral Reference R724/22**) setting out the view of the Planning Authority that:

"It is considered that the construction of a pedestrian access gate in an existing rear boundary wall is DEVELOPMENT and IS EXEMPTED DEVELOPMENT."

It is our assertion that in assessing the subject development and reporting on the Section 5 Declaration Ref. R668/21 the Planning Authority has somehow overlooked the provisions of Art.9(1)(a)(i) (ii) and (iii) of Part 2 of the Planning and Development Regulations, 2001. Article 9 of the Planning and Development Regulations, 2001 sets out certain circumstances in which development to which Article 6 of the Regulations relates shall not be exempted development.

It is our considered view that the subject gateway means of access to a public road constitutes development that is not exempted development for the purposes of the Planning and Development Act, 2000. Our rationale is set out below.

3.0 Planning History

3.1 Enforcement Case File E8320:

Upon noticing, on Saturday 22nd May 2021, that a new gateway opening had been formed in the dividing wall between the residential property known as No. 11 Arbour Court and the established grass verge forming the shared public amenity space of Dosel Drive, several residents of Dosel Drive lodged written complaints to the Planning Enforcement Section of Cork City Council, the relevant Planning Authority, on the week commencing 24th May 2021. A Planning Enforcement Complaint Form was forwarded to Cork City Council on 25th of May 2021.

The complainants received correspondence dated 27th May 2021 from the Planning Enforcement Section of Cork City Council advising that the written complaint had been received.

As per the letter dated 7th September 2021, the Planning Enforcement Section of Cork City Council then wrote to the complainants with a *"wish to advise that following an investigation file E8320 is now closed as the development is considered exempt under Class 5, of Part 1, of Schedule 2 of the Planning and Development Regulations, 2001 as amended."*

The Planning Authority provided no further details or information to the complainants concerning the nature or extent of the said investigation of file E8320.

3.2 Section 5 Declaration R668/21:

A Section 5 Declaration Ref. R668/21 from the owner/occupier of No. 11 Arbour Court was received by the Planning Authority, Cork City Council, on 25th May 2021.

The subject of the Section 5 Declaration was stated by the applicant as follows: *"Is the construction of a pedestrian access gate, in an existing brick boundary wall, to the rear of 11 Arbour Court, Grange, development, and if so is it exempted development."*

As per the Section 5 Declaration Ref. R668/21 Cork City Council, as the Planning Authority with jurisdiction over the subject location, in its decision dated 21st July 2021 advised as follows:

"It is considered that the construction of a pedestrian access gate in an existing rear boundary wall is Development and is Exempted Development."

The Planning Authority's Executive Planner in her report dated 17th June 2021 on the Section 5 Declaration Ref. R668/21, states as follows: *"There is an existing wooden door with glazing in this rear wall which adjoins the Dosel Road (the rear of the property in question)."*

We respectfully note the typographical inaccuracies in this statement and query how long the subject development, which may be considered as unauthorised, should be in situ before it is considered by the Planning Authority as *"existing"* for the purposes of the Planning and Development Act, 2000.

We duly note that the Executive Planner in her report dated 17th June 2021 on the Section 5 Declaration Ref. R668/21 makes no reference to the Enforcement Case File **E8320** relating to the subject site, No.11 Arbour Court, or to the concerns of the residents of Dosel Drive regarding the

formation of a gateway access in the established rear shared boundary wall between No.11 Arbour Court and Dosel Drive.

Furthermore we invite you to share our view that the Planning Report on the Section 5 Declaration Ref. R668/21 neglects to consider the potential for the creation of a precedent in the formation of any means of access onto the public road at Dosel Drive and the associated risk of endangerment to public safety by reason of traffic hazard or obstruction of road users.

It is our considered view that in assessing the subject development and reporting on the Section 5 Declaration Ref. R668/21 the Planning Authority somehow overlooked the provisions of Art.9(1)(a)(i) (ii) and (iii) of Part 2 of the Planning and Development Regulations, 2001. Article 9 of the Planning and Development Regulations, 2001 sets out certain circumstances in which development to which Article 6 of the Regulations relates shall not be exempted development.

3.3. Planning History - T.P. 18/4149:

Planning permission was granted on 22nd January 2018 for extension and alterations to No.11 Arbour Court as per planning reference number T.P. 18/4149.

There were no conditions attached to T.P. 18/4149 relating to boundary treatment of the site. It is noted that in the planning assessment conducted on application T.P. 18/4149, no reference is made to the original planning permission (T.P.2266/77) pertaining to the overall residential development now known as Arbour Court, or to any relevant conditions precedent.

3.4 Planning History - T.P.2266/77:

Planning permission was granted by the Council of the County of Cork (the Planning Authority at the time of application) by order dated 6th October 1977 for the Erection of bungalows (Change of Plans) at Grange, Douglas (Sites 1 – 19).

This is the original governing planning permission pertaining to the overall residential development now known as Arbour Court.

We respectfully submit that Conditions Nos. 7 and 8 attached to T.P. 2266/77 constitute the relevant conditions precedent to the consideration of any proposed amendments or alterations to the established boundary treatment between Dosel Drive and the rear of Arbour Court.

Conditions Nos. 7 and 8 attached to T.P. 2266/77 are detailed below:

Condition No.7 of T.P.2266/77:

A line of mature or semi-mature trees shall be planted in grass verge between Dosel Drive and eastern screen wall of proposed development at 30' maximum intervals.

Reason for Condition No.7 of T.P.2266/77:

In the interests of amenity.

Condition No.8 of T.P.2266/77:

Screening of the development from Dosel Drive and from proposed access road shall be effected by means of a 4'6" high grassed bank topped with a 1 ft. high timber plank with hedging at 2 ft. intervals to the rear of the planks and no other boundary wall, fence or railing shall be erected on the grassed bank. All other screening shall be of the timber fence type.

Reason for Condition No.8 of T.P.2266/77:

In the interests of amenity.

In attaching Conditions Nos. 7 and 8 to T.P. 2266/77, it is our considered view that the Planning Authority sought to protect the residential amenities of both the existing residents of Dosel Drive and the future residents of the then proposed development of bungalow style houses now known as Arbour Court. The objective of the Planning Authority to protect the amenity and character of the existing residential road, Dosel Drive, is detailed in the wording of Condition No.7, which specified that *"A line of mature or semi-mature trees shall be planted in grass verge between Dosel Drive and eastern screen wall of proposed development at 30' maximum intervals"*.

4.0 Statutory Provisions - Definition of Development & Exempted Development

In defining 'Development' Section 2(1) of the Planning and Development Act, 2000, as amended, states the following:

'Development' has the meaning assigned to it by Section 3 of the Act;

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

Section 3(1) of the Act states that:

'development' means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land'.

'Exempted Development' is detailed in Section 4 of the Planning and Development Act, 2000 as development of a nature and class outlined in the S.I. No. 600/2001 Planning and Development Regulations, 2001 as amended.

Section 6 of Part 2 of the Planning and Development Regulations, 2001 defines 'Exempted Development' as follows:

6. (1) *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 (The Planning and Development Act 2000), 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.*

4.1 Restrictions on Exempted Development

In determining the nature of exempted development we respectfully note the provisions of Article 9(1) of Part 2 of the Planning and Development Regulations, 2001, whereby it is clearly stated that development to which Article 6 of Part 2 of the Planning and Development Regulations, 2001 relates

shall not be exempted development in certain circumstances. Of particular relevance in assessing the subject case are the de-exemptions detailed as per Article 9(1) of the Planning and Development Regulations, 2001 as set out below.

Ref. S.I. No. 600/2001 – Planning and Development Regulations, 2001 Part 2 Article 9(1) which refers to Restrictions on Exemption:

Article 9 Excerpt:

9. (1) *Development to which article 6 relates shall not be exempted development for the purposes of the Act—*

(a) if the carrying out of such development would—

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

(ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width,

(iii) endanger public safety by reason of traffic hazard or obstruction of road users,

4.2 Article 9(1)(a) of Part 2 of the Regulations, 2001 – Access to a Public Road

We invite the Board to share our view that the subject gateway access that was formed in the existing boundary wall, a brickwork structure that divides the rear garden of No. 11 Harbour Court from the established grass verge forming the shared public amenity space serving the residents of Dosel Drive, comprises a means of access to a public road. In the subject case the surfaced carriageway of the public road, Dosel Drive, measures approximately 9.2 metres in width.

We respectfully submit that the formation of any new means of access to a public road, the surfaced carriageway of which exceeds 4 metres in width, should always be subject careful consideration by the responsible Planning Authority. Any such new access to a public road may serve to endanger public safety by reason of traffic hazard or obstruction of road users. It is apparent furthermore that the nature and intensification of use of any such means of access to a public road, and the associated potential for traversing across an established section of shared residential amenity space, creates the issue of public liability in the event of any unforeseen incident.

The issue of the legality, nature and/or extent of any consequent informal right of way or easement across an established area of shared residential amenity space is worth perusal. The subject gateway provides a means of access onto the public road at Dosel Drive, which involves traversal by parties unknown across the established shared residential amenity space serving the residents of Dosel Drive. This same shared amenity space is, as has been the case for decades, carefully tended and regularly landscaped at an annual financial cost to the residents of Dosel Drive and the Grange Heights estate.

We respectfully submit that the formation of a means of access onto the public road at Dosel Drive, as per the subject gateway, serves to change the nature of the use of the established shared residential amenity space and creates the potential for associated traffic hazard, parking of vehicles, noise, disturbance, anti-social activity and overall detriment to the residential amenity and proper planning and sustainable development of the area.

5.0 Conclusion – The formation of a means of access onto the public road at Dosel Drive is Development and is not Exempted Development

In the subject case, we invite the Board to share our view that the declaration of *Exempted Development* by the Planning Authority as per the Section 5 Declaration Ref. **R724/22** - 11 Arbour Court, Grange, Douglas, Cork – amounts to a misinterpretation of the Planning and Development Act, 2000, as amended.

We respectfully submit that the formation of a means of access onto the public road to the rear of 11 Arbour Court, Grange, Douglas, Cork is Development and is not Exempted Development. It is our assertion that the subject development creates a dangerous precedent for the formation of other means of access onto the public road at Dosel Drive via similar breaches in the established boundary wall, the particulars of which were clearly detailed in Conditions Nos. 7 and 8 of the governing residential planning permission ref. **T.P.2266/77**.

It is our considered view that the development of the subject gateway access to the public road at Dosel Drive is not exempted development. The development rather, is development in contravention of conditions attached to the governing planning permission T.P.2266/77 (as detailed in Art.9(1)(a)(i) of the Planning and Development Regulations, 2001); comprises the formation of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width (as per Art.9 (1)(a)(ii) of the Planning and Development Regulations, 2001); and would serve to endanger public safety by reason of traffic hazard or obstruction of road users (as per Art.9 (1)(a)(iii) of the Planning and Development Regulations, 2001).

Accordingly, we respectfully submit that the Planning Authority, Cork City Council, has in this instance mis-interpreted the Exempted Development provisions of the Planning and Development Regulations, 2001 and has omitted due consideration of Article 9 (1) of the Regulations. Thereby it is our considered view that the Section 5 Declaration Ref. **R724/22** issued by Cork City Council be reviewed by An Bord Pleanála in accordance with section 5 (3) (a) of the 2000 Act.

We respectfully invite An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, to share our view that the formation of a means of access onto the public road at Dosel Drive, as per the subject gateway access in the rear boundary wall of 11 Arbour Court, Grange, Douglas, Cork is development and is not exempted development.

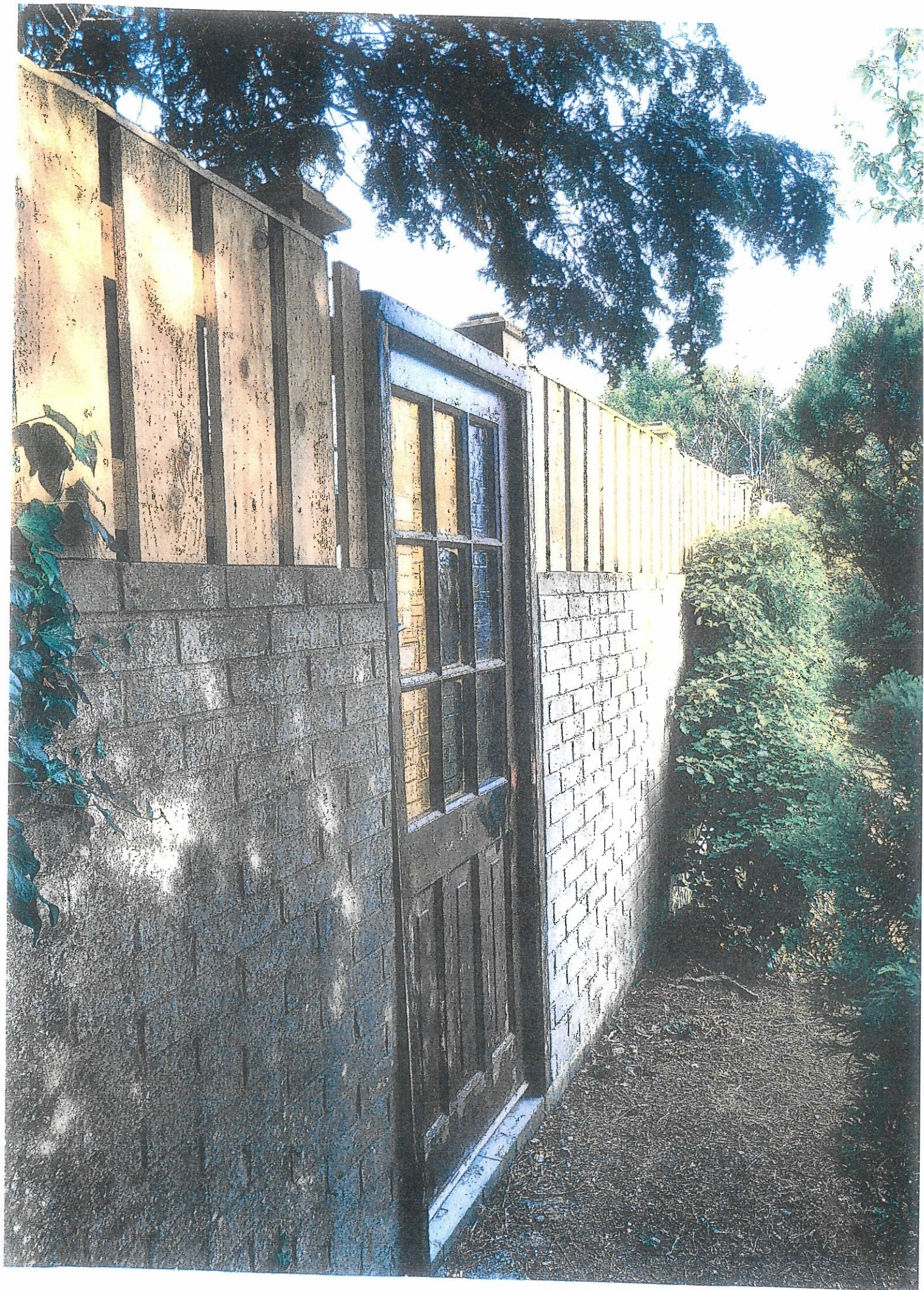


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OSi PLACE Map



National Mapping Agency

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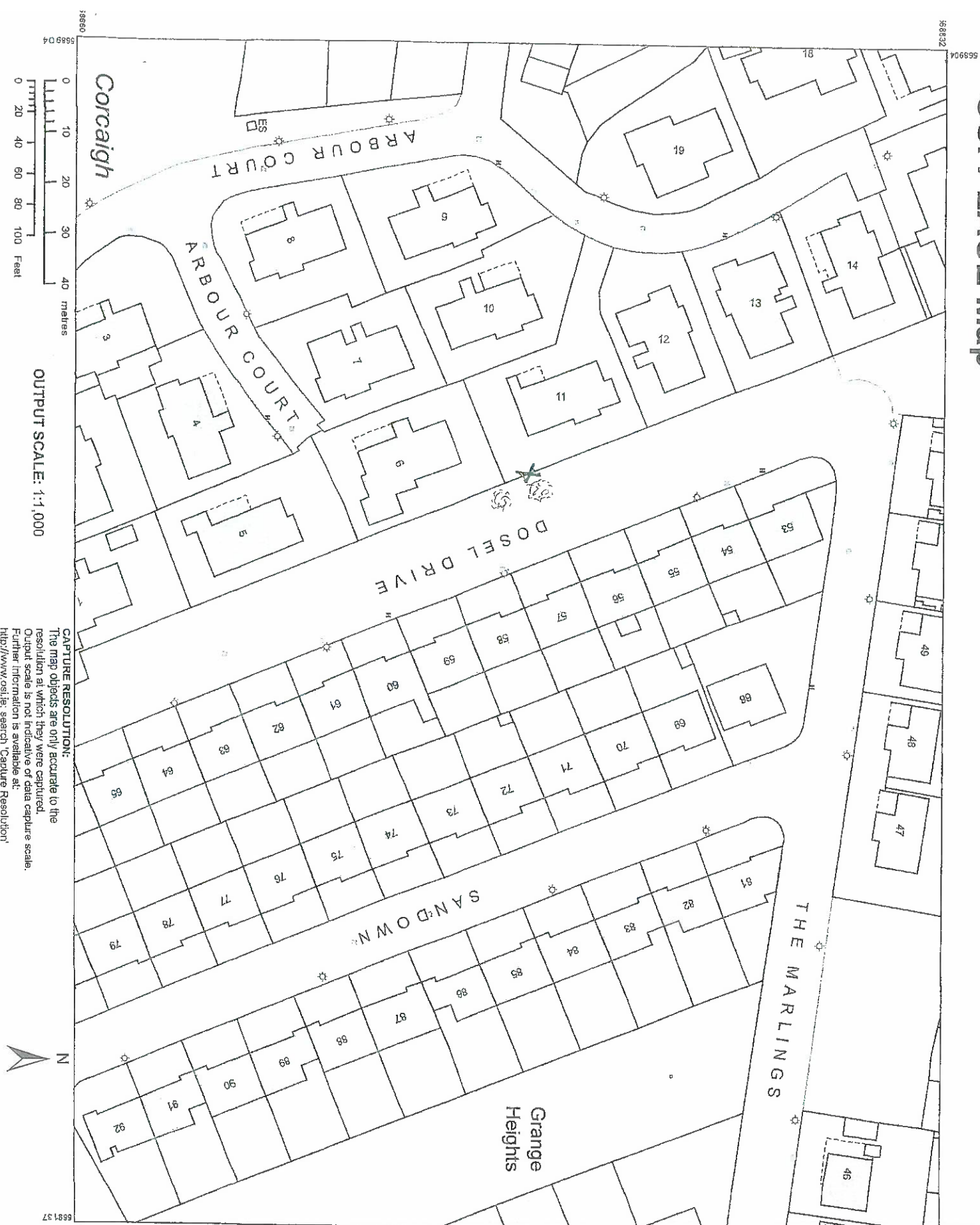
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