

Ronan Megannety

From: Bord
Sent: Friday 25 October 2024 09:09
To: Appeals2
Subject: FW: ABP Ref. ABP-320914-24
Attachments: ABP section 5 referral submission ABP-320914-24.pdf

Follow Up Flag: Follow up
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From: anthony@marstonplanning.ie <anthony@marstonplanning.ie>
Sent: Thursday, October 24, 2024 4:20 PM
To: Bord <bord@pleanala.ie>
Subject: ABP Ref. ABP-320914-24

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To whom it may concern

Please find attached response to the section 5 referral appeal attached that is made in response to the document and referral appeal sent to our clients that was dated the 27 September 2024.

This response is made within 4 weeks of the above letter as was requested by the Board.

I would be grateful if you could confirm on receipt that you have received the attached, and this email.

Many thanks in advance.

Kind Regards

Anthony Marston
Principal – Marston Planning Consultancy

M: 086-3837100
23 Grange Park, Foxrock, Dublin 18, D18 T3Y4

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An Bord Pleanála
64 Marlborough Street
Dublin 1

24th October 2024

Our Ref: 24109

Re: Referral to An Bord Pleanála relation to the decision by Dun Laoghaire Rathdown County Council relating to an Application for declaration under Section 5 of the Planning and Development Act 2000 (as amended) in relation to whether the fencing erect at two locations blocking off an alleged right of way is or is not development or is or is not exempted development at Killiney Golf Club, Ballinclea Road, Killiney, Co. Dublin.

Dún Laoghaire-Rathdown County Council Ref. 9124

An Bord Pleanála Ref. ABP-320914-24

Final date for the making response –on or before end of 24th October 2024

Dear Sir / Madam

We, Marston Planning Consultancy, 23 Grange Park, Foxrock, Dublin 18, D18 T3Y4; have been instructed by Killiney Golf Club, Ballinclea Road, Killiney, Co. Dublin to make this response to a referral taken by Professor Patrick J. Drudy, 95 Ballinclea Heights, Killiney, Co. Dublin in relation to the decision of the declaration issued by Dún Laoghaire-Rathdown County Council under Section 5 of the Planning and Development Act 2000 (as amended) dated 29th August 2024.

We can confirm that this response to the referral has been submitted within 4 weeks of the dated letter of the Board of the 27 September 2024. We can confirm that our client the Killiney Golf Club are the owner of the property on which the alleged unauthorised development works have been undertaken. The question arising in this case is whether the insertion of the fencing in itself amounts to exempted development or not in this instance.

We refer An Bord Pleanála to Dún Laoghaire-Rathdown County Council's determination dated 29th August 2024 which concluded as follows:

"that, having regard to: a) Sections 2, 3, 4(2)(a) and 208 of the Planning and Development Act 2000, as amended the proposed works constitute development, and constitute exempted development. b) Class 9 & 11, Schedule 2, Part 1 Articles 6(1), 9 (1)(a) of the Planning and Development Regulations, as amended that it is considered that the proposed works constitute development and constitute exempted development.

We confirm that we have undertaken research concerning the planning history of the subject property and have also considered the relevant legal provisions of the Planning and Development Act 2000 (as amended), and the Planning and Development Regulations 2001 (SI No. 600 of 2001) (as amended). We confirm that we have visited and are familiar with the property and its local and wider surrounds; and have also examined the nature of the works, and will set out under this submission why they arose.

In addition, we have reviewed the content of the Notification of Declaration on Development and Exempted Development issued by the Planning Authority. Having considered this decision, and the reasons and considerations that led to it, it is clear that the Planning Authority made an informed and correct decision in this instance.

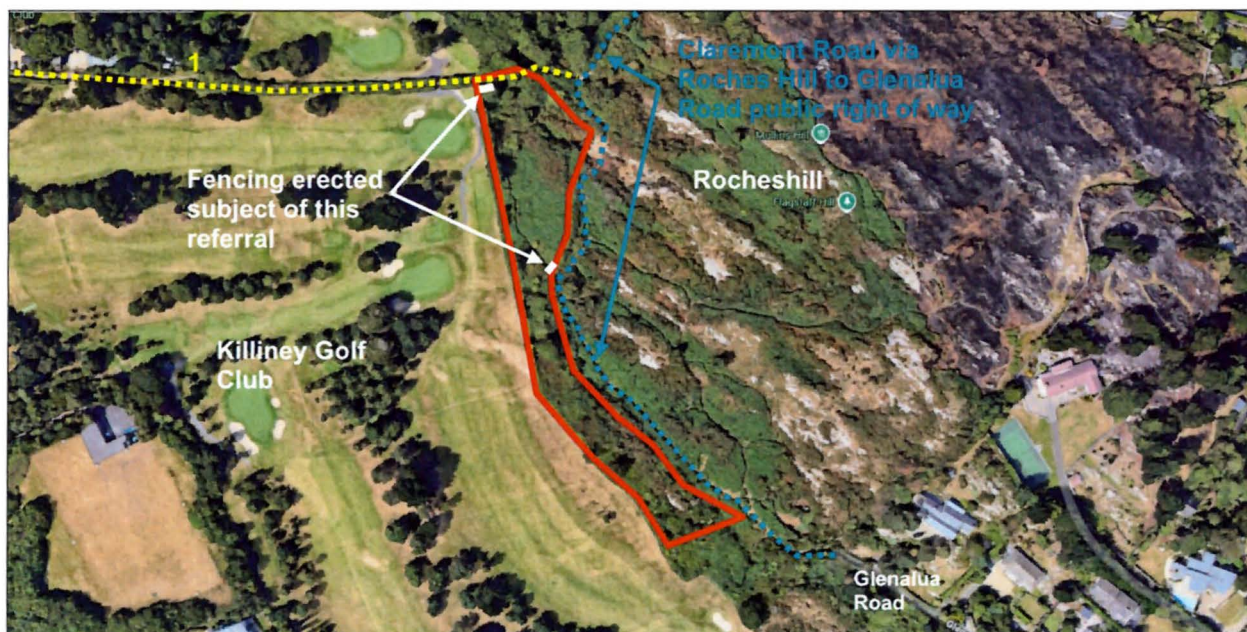
Having examined the notification, based on the contents provided therein and in particular the wording of the planning officer's consideration of matters we consider that the Planning Authority have fully and correctly

considered the relevant facts in this case.

Prior to stating the case for the conclusions outlined above, which we request the Board uphold, it is important that the Board are fully aware of all the relevant planning and development facts in relation to this site. It is our considered opinion having examined the Declaration issued by Dún Laoghaire-Rathdown County Council that the Planning Authority in this case fully considered all aspects of this case in reaching a conclusion that the proposed works constitute development and constitute exempted *development*.

1. Facts presented to An Bord Pleanála

We respectfully submit that it is not in question that the Killiney Golf Club purchased the portion of land that is outlined in red below in c. 1990 that form part of Rocheshill. Dún Laoghaire-Rathdown County Council at the same time purchased the remaining portion of lands on Rocheshill. An irregular dividing boundary was agreed by our clients and the Council that legally defined where their new lands adjoined. This primarily formed the eastern boundary of the new golf club lands and the western boundary of the new Council lands. The alignment of this agreed boundary, between the golf club and Council lands, was to ensure that an existing public right of way was retained almost entirely (apart from a small length at the north of the new golf club lands) within the lands purchased by the County Council and were outside of the lands in private ownership by the golf club.



Aerial View of Killiney Golf Club and lands purchased outlined in red and existing public rights of way outlined in dashed lines with position of fence indicated by white line

The basic facts are that the Golf Club would never have entertained the purchase of the lands, if there was any concern in relation to it functioning as a public right of way. There was none at that time. The primary purpose of purchasing the lands was to act as a natural buffer between the golf club, which is built on a fairly restricted site and the public rights of way on Rocheshill. It is notable that the tee of the 4th hole is located immediately abounding this boundary and the hole forms a dog-leg that follows this boundary, and thus balls can enter into the above identified lands from the golf course.

We submit that the golf club has no interest in seeking to block or modify public rights of way. Indeed, a public right of way extends from Church Road through Killiney Golf Club to Glenalua Road to the south of Rocheshill that is entirely unaffected by the works subject to this matter. A further public right of way exists from Killiney Golf Club Pavilion to Rocheshill (marked 1 above in yellow) that is also entirely unaffected by the works subject to this matter. The Killiney Golf Club Pavilion to Rocheshill connects with Rocheshill via a 'kissing gate'. This is referred to as a 'wicket gate' by the referrer. It is just beyond this gate that the northern fencing has been erected.

The County Council have been entirely correct in interpreting that the public right of way subject to the claims by the referrer are what is defined as the Claremont Road via Roches Hill to Glenalua Road public right of

way (outlined in green on the map on the previous page).

We undertook a site visit on the 18th October 2024, and it was clearly evident that there was a significant number of pathways across Rocheshill. The public rights of way from Church Road and the golf club pavillion to Rocheshill and Glenalua Road that both run through the golf course were easily accessible.

Beyond the gate at the end of the Killiney Golf Club Pavilion to Rocheshill public right of way, it was clearly evident that the most used pathway was that indicated by the green dashed line on the map, which is the established public right of way known as the Claremont Road via Roches Hill to Glenalua Road public right of way. This was a wide and well-defined path that easily facilitate people to pass each other.

The case planner in the County Council noted that there was a path around the fencing at both ends of the recently opened up pathway. This would appear to have been created by the referrer and other members of the proclaimed 'Rocheshill Protection Association'.

Why were the fences erected?

The reasoning as to why the golf club erected the fencing provides an important context to this section 5 referral. The County Council commissioned works to create a firebreak around the perimeter of Rocheshill that resulted in unauthorised access by a large excavator onto the private lands owned by Killiney Golf Club in c. March 2023. This resulted in overgrown vegetation being removed from within the golf club owned lands without the prior consent of the golf club or without consultation with the NPWS, and opened up the pathway.

This opened up access onto the golf club lands, and as soon as the Club became aware and following notification of the Council, the contractor as an ameliorating measure, was requested to erect temporary fencing to stop unauthorised access, and to allow for the vegetation that had been removed, to grow back.

However, this did not deter users in cutting back planting in order to gain access to the lands. The golf club then discussed this matter with the Parks Department of Dún Laoghaire-Rathdown County Council and agreed in December 2023, with the full approval of the Council to erect a more permanent fence at both these locations. It is these fences that are the subject of this section 5 referral, and this response. For the purpose of this response they will be referred to as the northern and southern fence.

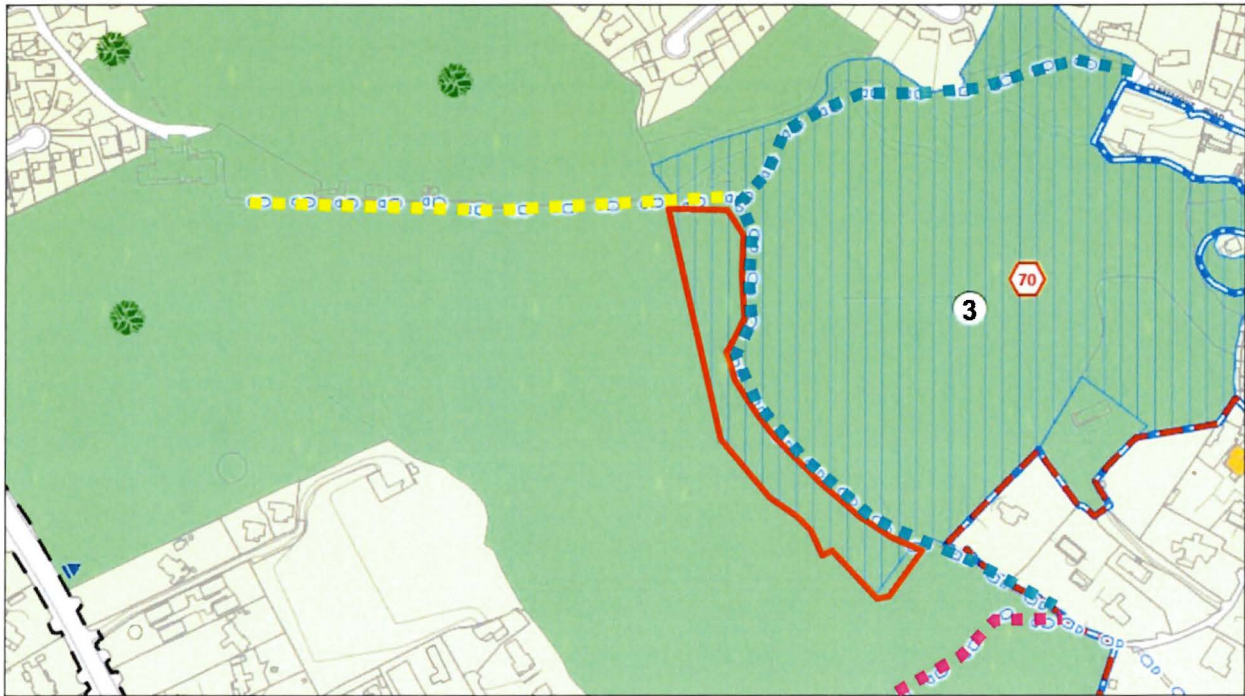


View of the northern (left) and southern fence that are the subject of this referral

Development Plan context

The Dún Laoghaire-Rathdown County Development Plan 2022-2028 sets out public rights of way within its land use zoning maps, as well as listing public rights of way under Appendix 11 of the Plan. An excerpt from Map 7 is replicated below that indicates the "Killiney Golf Club pavillion to Rocheshill" public right of way passing up through the golf course to the 'kissing gate'. This has been marked in a broken yellow line on the map below. This right of way connects into the "Claremont Road via Roches Hill to Glenalua Road" public right of way. This right of way is marked in cyan on the map on the following page for clarity purposes. The other public right of way through the golf club lands from "Church Road through Killiney Golf Club to Glenalua Road" is marked by a pink dashed line on the map below for clarity purposes. All of these are located outside of the land that was acquired by the golf club in c. 1990 (outlined in red for the purposes of clarity).

The Council are correct in interpreting the right of way relative to this case as being the "Claremont Road via Rocheshill to Glenalua Road" public right of way. The excerpt from the Development Plan map clearly indicates that the public rights of way on Rocheshill run outside of the Killiney Golf Club lands that were acquired in c. 1990.



Excerpt from Map 7 of the Dún Laoghaire-Rathdown County Development Plan 2022-2028 indicating new lands (outlined in red) bought by the golf club in c. 1990 and public rights of way

Under the Plan the site is zoned under zoning objective F, which seeks "to preserve and provide for open space with ancillary active recreational amenities." The Rocheshill lands, including the recently opened up path and location of the fencing are within the Dalkey Coastal Zone and Killiney Hill / Rocheshill Natural Heritage area (pNHA) (blue vertical lines overlay on the map above).

Special Local Objective 70 of the County Development Plan seeks to prepare a management plan for Killiney Hill Park and to include the area comprising the entire pNHA of Killiney Hill / Rocheshill / Mullins Hill in consultation and liaison with the National Parks and Wildlife Service, and to retain and preserve the natural environment and biodiversity on Roches / Mullins Hill, Killiney.

2. Planning history

The property that is the subject of this section 5 referral taken to An Bord Pleanála by Professor Drudy is owned by Killiney Golf Club who purchased the land in c. 1990. This section 5 referral case now before the Board follows the alleging of unauthorised development that was made, that generated a Warning Letter under Section 152(1) of the Planning and Development Act 2000 (as amended) and issued to the golf club in April 2024 (Ref. 14224).

It is the alleged works under that Warning Letter that are the subject of this section 5 referral that is now before the Board. This referred to:

"the erecting of mesh fencing without the benefit of a planning permission and that may not constitute exempt development under the Planning and Development Regulations 2001 (as amended) consequent to Article 9(1)(a)(x) in that the development consists of the fencing or enclosure of lands habitually open to or used by the public during the ten years preceding such fencing or enclosure for recreational purposes."

A response setting out the position of the golf club was submitted to Dún Laoghaire-Rathdown County Council and was dated the 20th May 2024. We will further elaborate and clarify this response in this submission. This led to the Council response that was dated the 21st June stating that *"the Planning Authority consider that the fencing as erected does not enclose any land habitually open to or used by the public and as such the Article 9(1)(a)(x) restriction on affording a Class 11 exemption is not applicable and the exemption can be afforded and is now proceeding to close this file"*.

This decision led to the section 5 referral being taken to Dún Laoghaire-Rathdown County Council by Professor Drudy on the 9th August 2024. Following a robust and comprehensive assessment the planning case officer concluded that the fence that was erected constituted development and constituted exempted development under *Class 9 & 11, Schedule 2, Part 1 Articles 6(1), 9 (1)(a) of the Planning and Development Regulations 2001 (as amended)*.

We note that the referer, in their original section 5 referral makes reference to an An Bord Pleanála Order Ref. PL06D.097552 and states that the fencing is in contravention of this Order. Their original referral to the Council makes reference to a map drawn up by Brady Shipman Martin that was submitted as part of an appeal, and has no legal basis, as in some way indicating that the lands in question have habitually been used, and form a public right of way. The facts in this matter are very clear in that the lands do not form a public right of way.

3. Assessment

There are a number of relevant important statutory definitions contained in the Planning and Development Regulations 2001 and Planning and Development Act 2000, (as amended), that are important in the consideration of the nature of the proposed development and works in this case. The principle nature of the definition of works, development and exempted development are provided for under sections 2, 3 and 4 of the 2000 Act and under the Planning and Development Regulations 2001 (as amended).

We note that under section 2(1) of the Act "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

Section 3(1) of the Act defines 'development' as, 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(2)(a) of the Act allows Regulations to provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that they do not offend against principles of proper planning and sustainable development.

We refer the Board to section 208 of the Act also, that specifically refers to public rights of way, and states:

"(1) Where a public right of way is created pursuant to this Act, or where a provision in a development plan F923[or local area plan] in force on the commencement of this section relates to the preservation of a public right of way, the way shall be maintained by the planning authority.

(2) (a) Where a right of way is required by this section to be maintained by the planning authority, a person shall not damage or obstruct the way, or hinder or interfere with the exercise of the right of way.

(b) A person who contravenes this subsection shall be guilty of an offence.

(3) Where, in the case of a right of way required by this section to be maintained by the planning authority, the way is damaged or obstructed by any person, the planning authority maintaining the right of way may repair the damage or remove the obstruction, and the expenses incurred by it in the repair or removal shall be paid to them by that person and, in default of being so paid, shall be recoverable from him or her as a simple contract debt in any court of competent jurisdiction."

In this regard we refer the Board to Article 6 (1) of the Planning and Development Regulations, 2001 (as amended) that states:

"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) of the Regulations state:

"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)....

(x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility,

(xi) obstruct any public right of way"

We refer the Board to the fact that Class 9 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended) that relates to Sundry works and states that the '*construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway*' amounts to being exempted development subject to it meeting the condition and limitation that the height of any such structure shall not exceed 2 metres.

We also refer the Board to Class 11 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended) that "*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.*" Such works amounted to exempted development, subject to meeting the following two conditions, that are:

"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."

We respectfully submit that the referrer in this instance incorrectly argues that Article 9(1)(a)(x) applies in this instance. We submit that it does not as we will set out below, and that the matter for the consideration of An Bord Pleanála in this instance are as follows:

- Do the works amount to development?

We submit to the Board that having regard to sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended) the nature of the works as undertaken, and as outlined in the section 5 referral would constitute the carrying out of works and must therefore be considered as comprising development. This is not contested by the referrer or the County Council.

- Do the works amount to exempted development?

Irrespective of the limitations on exemption, which we will address below, it is clear that these works are not bounding the curtilage of a house. The height of this fence, which is stepped, is 1.2m, and whilst we would disagree that Class 9 does not apply as the nature of the works is a fence and not a gate; it is our considered opinion that Class 11 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended) does apply, as the works amount to the erection of a fence that is 1.2m in height not bounding the curtilage of a house. It is therefore not open to question that the nature of the works must be considered as in principle as being exempted development under Class 11. The question therefore arises as to whether any restrictions arise.

- Do any restrictions on exempted development apply in this instance?

We respectfully submit that it is not contested that there are a number of public rights of way and other pathways on Rocheshill. However, this cannot be interpreted that every single pathway or newly opened up pathways form a public right of way. This would appear to be the ill-informed position of the referrer and there would appear to be no basis for this position.

Appendix 11 of the County Development Plan recognises that there are two public rights of way of relevance in this instance. These are the *"Killiney Golf Club pavilion to Rocheshill"* and the *"Claremont Road via Rocheshill to Glenalua Road"*.

We submit and agree that none of the various iterations of the *"Claremont Road via Rocheshill to Glenalua Road"* public right of way can be considered as being interfered with any way by the fencing, and it is reasonable and correct for the Board to conclude that this right of way is fully intact irrespective of which alignment is considered as forming the public right of way.

In our considered opinion the *"Claremont Road via Rocheshill to Glenalua Road"* public right of way runs along the path outside and to the east of the golf club lands on Rocheshill. The planner, contrary to the claims of the referrer, was correct in interpreting the alignment of this public right of way. The Council were also correct that the claims of the referrer are not backed up by a deed map or a wayleave; and therefore the exact location of the public rights of way have not been proven by the referrer. The County Development Plan clearly identifies the public rights of way paths that are habitually used by walkers on Rocheshill. The claimed path indicated by the referrer is not identified as a public right of way by the Development Plan.

There is no evidence that there is a public right of way on the lands owned by the golf club that are the subject of this referral. However, we refer the Board to the discussions and agreement between our clients and the Council when they were purchasing these lands at the same time, and where the alignment of the golf club lands was made so that the public right of way was located on Council lands.

We also refer the Board to the survey drawing undertaken in 2023 (Appendix A) that indicates the exact boundary of the extent of the Rocheshill golf club lands and the alignment of the public right of way. This is clear in indicating the public right of way as extending outside of the eastern boundary of the acquired golf club lands, and on Council owned lands.

- *Is a public right of way obstructed or fenced as per the restrictions under Article 9(1)?*

We submit that there is therefore no basis for the restriction on exemption under Article 9(1)(a)(x) of the Planning and Development Regulations 2001 (as amended) to apply in this instance. Whilst a fence has been erected at both ends, as described above, this fencing does not fence or enclose the land.

We submit that the referrer in this instance has chosen to interpret matters incorrectly. The fence does not enclose any land at all, which the referrer states is the sole question for the Board to decide on. The fact is that no person is obstructed from walking through the golf club lands at their own risk. It is also clear that the referrer and others have sought to use and facilitate access to the lands in question by cutting back hedgerows and planting within a protected area, with a flagrant disregard to the conservation objectives for the area. This has been witnessed by members of the golf club. The question of whether the path has been used previously prior to the erection of the fencing is simply not relevant as the lands in question have not been fenced off or enclosed. We respectfully request the Board to dismiss this element of the referral as without due grounds in this instance.

Furthermore, the referrer has provided no evidence that this newly opened pathway created by the County Council works in 2023 has been habitually open to or used by the public during the 10 years preceding the erection of the fence.

As I evidenced on our site visit the 'recently opened pathway' through the golf club lands is not obstructed, which is the specific wording. The restriction specifically refers to obstruction, which can only be considered as blocking the path, which it clearly is not. There is also no evidence that the 'pathway' amounts to a public right of way. The referrers claim is based on nothing more than that – a claim.

No evidence is provided that this newly opened up pathway that was opened up by the Council contractor during the fire break works, at both ends of which the fencing has been erected to both protect private property and to protect users from golf balls from the immediately adjacent golf hole, forms a public right of way.

We submit that there is therefore no basis for the restriction on exemption under Article 9(1)(a)(xi) of the Planning and Development Regulations 2001 (as amended) to apply in this instance as this pathway that

has been reopened following the recent Council works and cutting back of planting by the referrer and others has ever formed a public right of way.

4. Conclusion

We respectfully request the An Bord Pleanála in exercise of its powers under section 5(2) of the Planning and Development Act 2000 (as amended), to conclude that having regard to the above, and sections 2, 3, 4(2)(a) and 208 of the Planning and Development Act, 2000 (as amended), that the undertaken works constitute development and constitute exempted development having regard to Class 11 of Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended), and having regard to Articles 6(1) and 9 (1)(a) of the Planning and Development Regulations, 2001 (as amended).

There is no basis for the referrer to claim that the restriction on exempted development apply in this case under Article 9(1)(a)(x) and (xi) of the Planning and Development Regulations 2001 (as amended).

The Planning Authority were therefore correct in their decision in that the undertaken works constitute development and constitute exempted development and we request the Board to uphold the decision of the Planning Authority in this instance.

We trust that the Board will give due consideration to the observations set out in this first party referral submission, and will notify us of its decision on this referral in due course.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Anthony Marston'. The signature is fluid and cursive, with the first name 'Anthony' written in a larger, more prominent script than the surname 'Marston'.

Anthony Marston (MIPI, MRTPI)
Marston Planning Consultancy

Appendix A – survey map indicating the boundary of the golf club lands on Rocheshill (green) and the public right of way (dashed pink line)

