



An
Bord
Pleanála

Inspector's Report ABP-307510-20

Development	Whether the erection of a concrete post and rail fence along a coast road is or is not development or is or is not exempted development, at Kilmichael East, Myrtleville, Co. Cork
Planning Authority	Cork County Council
Planning Authority Reg. Ref.	D/232/20
Owner/Occupier	Brendan Mullins
Planning Authority Decision	Development that is not exempted development
Referrer	Brendan Mullins
Type of Case	Section 5(3)(a) Referral
Observer(s)	None
Date of Site Inspection	16th September 2020
Inspector	Fergal Ó Bric

1.0 Introduction

This reference has been referred to the Board by Mr Brendan Mullins on behalf of the land owners, the Mullins-Colins family, who have requested a determination of same under Section 5(3)(a) of the Planning and Development Act 2000 (as amended). The referral relates to the proposed erection of a post and rail fence on private lands along the southern side of a coastal route (R612) in the Myrtleville area. Within the Cork County Development Plan 2014, this area is designated as a scenic route, and is also designated as an area of High Landscape Value.

The lands are currently used as a car park area along the side of the road. The lands are located between two residential properties, Atlantic House to the East which is a white washed low level dwelling and a newly constructed two-storey contemporary style dwelling to the west, the R612 carriageway to the north and the seashore is to the south. On the lands in question it is proposed to erect a fence, to demarcate between the car park area and the seashore.

2.0 Site Location / Description

The site is located within the designated boundary of Crosshaven and Bays, as set out within the Bandon Kinsale District Local Area Plan 2017, south of Myrtleville, west of the Bunnyconnellan bar and restaurant. The car park is open to the road and mainly has a gravel type surface with a grassed strip closer to the edge with the seashore. There is a pathway from the south-east of the site/car park which leads to the seashore. A number of cars were parked within the car park at the time of my site inspection from which people were walking along the coastal road, using the pathway/ to access the seashore to the south and others admiring the southerly views over the coastal area.

The fence would be approximately forty metres in length and 1,2 metres tall and would be set back approximately six metres from the edge of the carriageway so that it would still provide for a car park area on the southern side of the R612 but close off the site from the seashore. A galvanised steel field gate, three metres in length and 1.2 metres tall is proposed at the western end of the fence. The site is open to the R612 at present, people use the lands for car parking and accessing the seashore.

3.0 The Question

3.1 The question before the Board are:

Whether the erection of a concrete post and rail fence on privately owned lands is or is not development or is or is not exempted development at Kilmichael East, Myrtleville, Cork.

4.0 Planning Authority's Reports

4.1 Planning Report

An initial report was prepared by the Planning Authority and further information was sought in relation to: The siting of the proposed fence and maps identifying lands within the ownership of the land owner; To verify the materials to be used within the proposed fence and its intended height; To clarify if the proposed fenced area has been open to or used by the public as a recreational/amenity area or as a means of access to the seashore within the ten years preceding the erection of the fencing; Clarify if there are public rights of way over the lands.

Within the response to the further information, the Planning Officer stated that she was satisfied that the erection of the post and rail fence constituted

development. The Planning Officer noted that the fence would not fall within the curtilage of a dwelling house. The landowner confirmed that there are no public rights of way over the property and stated that the established footpath and official right of way is located east of Atlantic House to the rocky foreshore. The Area Planner stated that the lands had been used by the public for the last ten years. The Area Planner stated that this matter was confirmed with the local Area Engineer, by means of a telephone conversation.

In relation to access to the foreshore the Area Planner outlined the following within her report: To my knowledge, the subject area is often referenced as a car park, having been habitually used for this purpose for years/decades, to facilitate access to the foreshore, even if people were availing of the pathway from the subject land or accessing the seashore for recreational purposes via the Right of Way to the east.

Although ordinarily, the fence could come within the scope of exempted development under Class 11 (a) , Schedule 2, Part 1, of the Planning and Development Regulations 2001, as amended, but this could be de-exempted under the provisions of Article 9 (1) (x) of the Regulations if the development would endanger public safety by reason of a traffic hazard, would consist of fencing or enclosure of land habitually open to or used by the public during the ten years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore or other place of natural beauty or recreational utility., or if the development would obstruct any public right of way.

5.0 Planning Authority Declaration

5.1 Cork County Council issued a declaration in accordance with Section 5(2) (a) of the Planning and Development Act, 2000 (as amended) in respect of the development and determined that the post and rail fence would be development and would not be exempted development.

6.0 The Referrer's Submission

6.1 The submission by Mr Mullins can be summarised as follows:

- The Planning Authority did not apply the provisions of the Planning and Development Act correctly In respect of the use of the subject lands and in particular Article 9 (1) (a) (x) which relates to the enclosure of lands habitually used by the public during the ten years preceding the fencing. The Executive Planner was aware that the subject lands were completely fenced off to accommodate a builders compound between August 2018 and April 2020. This fact does not seem to have been taken into account by the Planning Authority. This was part of an agreement with the Planning Department and the Executive Area Planner was party to this agreement. Therefore, the subject lands were not habitually open to, or used by the public, during the ten years preceding such fencing.
- The Planning Authority did not properly address the original question raised by Mr. Owen O'Brien where he queried the exempted status of a safety fence that he stated was to restrict access to a car park. The Planning Authority relied on an erroneous sketch provided by Mr. O'Brien regarding the line of the fence. The erroneous map was not made available to the referrer (Mr. Mullins), and therefore he was not in a position to comment on the erroneous nature of the map.

- The referrer provided a map as part of his further information response including a scaled map and illustrated the correct location of the fence, six metres back from the edge of the public road. This location was chosen so as to allow the continuance of car parking on the lands, adjacent to the R612, while eliminating a serious safety risk.
- The Planning Officer did not clarify within her second report (assessment of the further information response) that access to the car park area would remain.
- The further information response submitted was not fully taken into consideration within the assessment by the Planning Authority.
- The description of the subject site by the Planning Authority is misleading. The lands are not hard surfaced. The lands were covered in grass and to a large extent, still are. The grass has been eroded by cars turning and parking on the lands. The reinstatement and re-seeding of the lands has not taken place as of yet, since the removal of the builders compound.
- The Planning Authority made reference to a pathway which is in fact a rough and dangerous animal track and dry watercourse which extends from the south-east of the lands to the seashore. The designated public right of way is located east of Atlantic House and the referrer has marked the right of way on a map submitted as part of his further information response.
- There is no right of way over the subject lands. A Consultant Engineers report has been submitted by the referrer who describes this track as extremely dangerous, overgrown and impassible, on a steep incline with loose stone cover and a scout or minor animal track. Neither has Mr. O'Brien made reference to this track in his submissions, he only makes reference to the car park.

- The landowners are concerned that visitors to the area may attempt to use this watercourse/animal track to access the seashore in the mistaken belief that it is safe and is the official access to the seashore. To prevent this from happening, the land owners plan to erect signage on the proposed fence, re-directing people to the official pathway east of Atlantic House and to warn people of the dangerous edge and steep slope.
- The Planning Authority has dismissed the reason for the proposed fence and has ignored the safety risk to the public. The erection of the proposed fence is about eliminating a traffic hazard and improving public safety.
- The Executive Planner confirms within her report that the Area Engineer has acknowledged that the erection of the fence would not result in the creation of a traffic hazard, but seems to dismiss safety in her considerations. This is, despite acknowledging in her report the significant risk to the public and the very dangerous edge of the lands and the very steep and dangerous slope from the lands to the foreshore.
- The land owners are prepared to invest in this fence for the good of public safety. The location of the fence has been specifically chosen so as to ensure that parking is safely available adjacent to the public road and the fence is to be sited on a stable section of ground at an appropriate distance from the dangerous edge. Once the fence is erected, a significant public safety risk will be eliminated and the area greatly improved.
- He requests that the safety aspects of the fence be considered as part of the appeal.
- There is no planning history pertaining to the subject lands.

7.0 Response to Referrer's Submission

7.1 Response of adjoining property owner, Mr Owen O'Brien received by the Board on the 27th July 2020.

The response is summarised as follows:

- The land owners are proposing to erect a concrete fence on a car park containing a pathway route to the seashore which has been in use for one hundred years or more.
- There have been two pathways leading from the car park to the seashore and used for four generations by humans with unencumbered access.
- One of these pathways (to the south-west of the car park) has been blocked off in the last eighteen months by builders following the erection of a compound in the car park area to construct a new dwelling to the west of the car park. This pathway has not been reinstated.
- However, the other pathway to the south-east of the car park has remained open, even during the construction of the dwelling to the west of the lands.
- There is no evidence of the southern edge of the lands being a safety issue as to his knowledge no car has gone over the edge at this particular location.
- The drawings and maps submitted by the third party were supplied by the developer of the dwelling to the west of the car park who in turn had received them from Mr. Mullins. Those drawings show the fence to be constructed three metres back from the road edge and not six metres as now being suggested.
- The car park area is not covered in grass as suggested by the referrer, a site visit would verify this fact. The car park is hard surfaced and has been used for generations by locals and visitors to the area as a sightseeing spot and an important access path to the seashore. To describe the pathway as an animal path or water track is misleading. It is a well-worn

pathway for people to go sunbathing, swimming and fishing along the seashore.

- The alternative pathway, east of Atlantic House, referred to by Mr. Mullins, has been overgrown, un-used and inaccessible for the last eight to ten years and the only access to the seashore has been from the two pathways that lead to the seashore from the car park area and these have been in use constantly during that time, and for a long time before that.
- These pathways have been the main access points to Poulgorm (a noted swimming spot) for generations.
- The pathway to the seashore was not completely closed off between August 2018 and April 2020. One pathway to the seashore (to the south-east of the lands) remained open throughout that period. A photograph to demonstrate this has been included. There always remained an area east of the compound, where, two cars could park and several people accessed the pathway to the seashore even during the period when the builders compound was in place. Access to the seashore has been continuous for over one hundred years from these pathways.
- To fence off this area would be a clear attempt by the land owners to deny access to a pathway to the seashore. This is the principal public access to the seashore for the public and residents.

8.0 Planning History

I am not aware of any planning history pertaining to the site in question the property.

9.0 Statutory Provisions

9.1 Planning and Development Act 2000 (as amended)

Section 2(1)

In this Act, except where the context otherwise requires—

“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.

Section 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.

Section 4(1)

The following shall be exempted development for the purposes of this Act - ...

- (h) 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;

9.2 **Planning and Development Regulations, 2001 (as amended)**

PART 2 - Exempted Development.

Article 6(1) 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.

Class 11 of Part 1 of Schedule 2

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.

The conditions and limitations attached to this Class are as follows:

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.

Article 9(1) 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:

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

(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,

10.0 Assessment

10.1 The Question of ‘Development’

Having regard to the question before the Board I propose to undertake my assessment by considering the following:

1. Is the erection of a 1.2 metre post and rail fence on privately owned lands development?
2. Is the erection of a post and rail fence on privately owned lands exempted development?

10.2 Is the erection of a post and rail fence on privately owned lands development?

Section 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.

Given that the fence comprises works on the land in question, comprising a series of concrete posts driven into the ground and connected by a series of concrete rails (three), it is considered, that the fence is development.

10.3 Is the erection of a post and rail fence on privately owned lands exempted development?

The next element of the question is whether the development is or is not exempted development. In this regard I would refer the Board to Class 11(a) of Part 1 of Schedule 2 of the Regulations which states that the construction,

erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –
any fence (not being a hoarding or sheet metal fence) is exempted development. The fence in question is not within or bounding the curtilage of a house and is not a hoarding or sheet metal. Therefore, the fence would comply with Class 11(a). The conditions and limitations attached to Class 11 provide that 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. The fence in question is approximately 1.2 metres in height so therefore would comply with the limitation attached to the Class.

The next test in respect of Exempted Development is the consideration of Article 9(1). Article 9(1) 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 meet one or more of a series of matters arising. While Article 9(1)(a) includes a number of considerations, I would suggest to the Board that the 3 sub-articles highlighted by Cork County Council within its reports are the only ones which require consideration. I will address each in turn.

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

I note that the referrer is proposing to develop the concrete post and rail fence six metres back from the edge of the public road so that the lands could continue to be used as a car park. The referrer has set out that he is proposing to allow the parking area to remain adjacent to the public road but in a safer, more secure environment with the erection of a safety fence that will prevent vehicles from getting too close to a very dangerous edge and a very steep and dangerous slope.. The six metre set back, in my opinion allows sufficient space for most

vehicles to safely park off the carriageway of the adjoining roadway, the R612, and therefore, in principle, would be acceptable as the established use would remain.

I note the verbal comments of the Local Area Engineer of Cork County Council (referred to in the Planning Officers second Report) who was of the opinion that the proposals would not result in the creation of a traffic hazard.

(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.

I consider that this provision may be applicable as it relates specifically to the lands being habitually open to or used by the public for recreational purposes. I note that the referrer, Mr. Mullins and the third Party, Mr. O'Brien acknowledge that the land in question has been used as a car park area by people seeking to gain access to the seashore, for people seeking to walk locally along the coastline and by others seeking to admire to southerly views over the coastal area. There is photographic and written evidence on file to support the claim that the land in question is used and has been used habitually over the last ten years and longer as an access pathway to the seashore for people involved in recreational pursuits.

I note the referrer makes reference to the land being used as a builders compound from August 2018 to May 2020 and photographic evidence to this effect has been submitted. However, it is clear from the photographs submitted

by the third party, that even when the compound was at its greatest scale, there remained a small area , to the west of the land, adjacent to Atlantic House, that was available for visitors to park on, and therefore at least, part of the site was open (particularly the section of land to the south-east of the holding containing the access to the pathway to the seashore) 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 the seashore, or other place of natural beauty or recreational utility, and as a car park area. This is especially important, given that the public right of way (east of Atlantic House) is currently inaccessible and overgrown, and does not appear to have been usable/accessible for all or part of the previous ten years, as set out within the submission received from by Mr. Owen O'Brien. The referrers engineer, Mr Padraig Murphy states in his report: It (the land in question) was almost totally taken up with the building compound. This clearly indicates that not all of the lands were taken up by the builders compound, as supported within the submission (text and photographs) made Mr. O'Brien.

Having regard to the consideration set out above in respect of Article 9(1)(a)(x) I it is outlined within the submissions received from the Planning Authority and from the third party (Mr. Owen O'Brien) that the proposed fencing would obstruct a pathway to the seashore which has been used for generations as a means of access to the seashore for recreational purposes. During my site inspection, I observed people using this pathway to the seashore, for the purposes of swimming, bathing and recreational purposes, The Planning Authority noted within their reports: that: A pathway was also noted as extending from the subject area towards the coastline to the south. This pathway appears to be one (not surfaced or specifically designated within the Development Plan) that has been established as a means of access to the seashore at Poulgorm over the years/decades, as set out within the reports from the Planning Authority and the

third party, Mr. O'Brien. I also noted that the designated public right of way referred to in the submissions by Mr. Mullins and Mr. O'Brien, which is located to the east of Atlantic House is overgrown, and therefore is no longer accessible at that particular location. That may explain the rationale for people using the pathway to the seashore from the car park area. This pathway is located to the west of Atlantic House, is steep, but was nevertheless being used by visitors/locals on the day of my site inspection, despite the reservations expressed by the referrer regarding the use of this pathway to access the seashore.

(xi) obstruct any public right of way,

Having regard to the consideration set out above in respect of Article 9(1)(a)(xi) it is outlined within a number of the submissions received from the Planning Authority and from the third party (Mr. Owen O'Brien) that the proposed fencing would obstruct a pathway to the seashore which has been used for generations as a means of access to the seashore for recreational purposes. This seems to be a credible stance, having regard to the information contained within the submission from the third party and from the Local Authority and indeed from the referrer himself, Mr. Mullins. Although, it is what would appear to be an established pathway to the seashore, it is not a designated public right of way, as per the provisions of the Cork County Development Plan, and therefore the fencing would not be considered to obstruct access to a public right of way, but would restrict access to a pathway instead, which provides access to an area used for recreational activity.

11.0 CONCLUSION AND RECOMMENDATION

The fence in question is development for the purposes of Section 3 of the Planning and Development Act 2000, as amended. The development comprises exempted development under Class 11(a) of Part 1 of Schedule 2 of the Planning and Development Regulations 2000, as amended. However, the development would not be exempted development having regard to Article 9(1)(a)(x) as it would consist of the fencing or enclosure of land habitually open to or used by the public during the ten years preceding such fencing or enclosure as a means of access to the seashore or other place of natural beauty or recreational utility. Therefore, the erection of a concrete post and rail fence on the privately owned land is development and is not exempted development.

WHEREAS the following question has arisen as to whether:

The erection of a concrete post and rail fence on privately owned land is or is not exempted development at Coast Road, Kilmichael East, Myrtleville, Co. Cork

AND WHEREAS Mr. Brendan Mullins, Number 27, College Grove, Ennis, Co. Clare, requested a declaration on the said question from An Bord Pleanála on 6th day of July 2020.

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to -

- (a) section 3 of the Planning and Development Act, 2000, as amended,
- (b) Article 6(1) & Article 9(1)(a)(iii), (x) & (xi) of the Planning and Development Regulation's 2001, as amended,
- (c) Class 11(a) of Part 1 of Schedule 2 of the Planning and Development Regulation's 2001, as amended,
- (d) the submissions on file,

AND WHEREAS An Bord Pleanála has concluded that –

- The fence in question is development for the purposes of Section 3 of the Planning and Development Act 2000, as amended.
- The development comprises exempted development under Class 11(a) of Part 1 of Schedule 2 of the Planning and Development Regulations 2000, as amended.
- The development would not be exempted development having regard to Article 9(1)(a)(x) as it would as it would consist of the fencing or enclosure

of land habitually open to or used by the public during the ten years preceding such fencing or enclosure of a means of access to the seashore or other place of natural beauty or recreational utility.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that:

- (a) the erection of a post and wire fence along a road is development; and
- (b) the erection of a post and wire fence along a road is not exempted development

at Coast Road, Kilmichael East, Myrtleville, Co. Cork

Fergal Ó Bric
Planning Inspectorate