



An
Bord
Pleanála

Inspector's Report ABP-300479-17

Question Whether the erection of two signs and a gate is or is not development or is or is not exempted development.

Location Barnarobin, Drumcliffe, Co. Sligo

Declaration

Planning Authority	Sligo County Council
Planning Authority Reg. Ref.	ED318.
Applicant for Declaration	Marita McMorrow
Planning Authority Decision	GRANT certificate of exemption

Referral

Referred by Marita McMorrow

Owner/ Occupier Tom Devaney

Observer(s) None

Date of Site Inspection 15/03/18

Inspector John Desmond

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1.0 Site Location and Description

- 1.1. The application relates to an agricultural laneway off a local road (L-74031-0) in the western of the Dartry Mountains, County Sligo, including Benbulbin peak, c.1.5km to northeast and Kings Mountain peak, c.2.1km to the southeast. An agricultural-type steel gate, supported by timber posts has been erected across the lane, setback a distance (c.30m) from the public road, with two signs erected along the lane on the approach to the gate from the public road.

2.0 The Question

- 2.1. I consider the questions to be addressed in this referral to be as follow:
- (i) Whether the erection of a gate structure across a road is or is not development, and is or is not exempted development?
 - (ii) Whether the erection of 2no. signs on lands adjacent a road is or is not development, and is or is not exempted development?

3.0 Planning Authority Declaration

3.1. Declaration

IS development and IS exempted development on the basis that:

- (i) the signs come within the scope of Class 13 of Part 2 of Schedule 2 of the Act of 2000, as amended;
- (ii) the gate comes within the scope of Class 9 of Part 1 of Schedule 2 of the Act of 2000, as amended;
- (iii) and the gate and signs do not come within the scope of the restrictions on exempted development under A.9(1)(a)(vi, x or xi) of the Regulations, 2001, as amended.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The detailed report of the Council's Planning Officer is consistent with the declaration issued by the Planning Authority. In particular, the report refers to the definitions of 'works' and 'structure' under S.2(1) and the definitions of 'development' and 'material' change of use under S.3(1) and (2)(a) of the Planning and Development Act 2000, as amended, (the Act), and the provisions for exempted development under A.6(1) and the restrictions and limitations on same under A.9(1) of the Planning and Development Regulations 2001, as amended (the Regulations).

The report, consistent with the decision, references Class 9 and Class 13 under Parts 1 Exempted Development – General and under and Part 2 Exempted Development - Advertisements, respectively, of Schedule 2 of the Regulations, as the pertinent classes of exemption.

The report considered the restrictions on exemption under A.9(1)(a)(vi) relating to interference with the character of the landscape or a view or prospect designated under the Development, (x) enclosure of land, or (xi) obstruction of a public right of way, did not arise.

The report screened out Appropriate Assessment.

3.2.2. Other Technical Reports

None.

4.0 Planning History

No planning history referred to by the Planning Authority or parties. The following referrals are relevant:

RL3525: The Board's determination (26/06/17) that the subject development **IS development** and **IS NOT exempted development** concerning the question of:

Whether or not the erection of a gate across a laneway in Fossa, Killarney is or is not development or is or is not exempted development;

was **QUASHED** (13/02/18) by **2017 JR 647**. The Board **CONCEDED** that it does not have the power to establish or declare public rights and this is a function solely of the

Courts. The Board misunderstood the meaning of Article 9(1)(a)(x) which related to enclosure of land and has erred making a finding which is equivalent to the existence of a public right of way which the Board was not entitled to have recourse.

RL3310: The Board determined (27/02/15) that the erection of posts and a gate on a *private* right-of-way to a property **IS development** per S.3 of PDA, 2000 and **IS NOT exempted development** pursuant to Schedule 2 Part 1 Class 9 of the Regulations by reason of the restrictions on exemption as set out under article 9 of same.

RL3078: The Board determined (15/07/13) that the erection of a gate **IS development** under s.3 of the Act and **IS NOT exempted development** by reason of the restrictions imposed by Article 9 (1)(a)(vi) and 9 (1)(a)(x) of the Regulations as the gate interferes with the character of landscape whose preservation is an objective of the development plan and encloses land that was habitually open to and used by the public during the 10 years preceding such enclosure for recreational purposes and as a means of access to a place of natural beauty and recreational utility. The Board did not issue a decision concerning the additional issues raised in the referral on the basis that insufficient detail had been provided.

5.0 Policy Context

5.1. Development Plan

Sligo County Development Plan 2017-2023

The site is not zoned.

5.2. Natural Heritage Designations

I consider the relevant designated sites to be as follows:

Sligo / Leitrim Uplands SPA site code 004187 (c.290m to north at nearest distance). It is the Conservation Objective *to maintain or restore the favourable conservation condition of the Annex I habitat(s) and/or the Annex II species for which the SAC has been selected*, that is the *Features of Interest* for which the site has been designated, namely:

- Peregrine (*Falco peregrinus*)

- Chough (*Pyrrhocorax pyrrhocorax*)

Ben Bulbin, Gleniff And Glenade Complex SAC site code 000623 (c.290m to north at nearest distance). It is the Conservation Objective '*to maintain or restore the favourable conservation condition of the Annex I habitat(s) and/or the Annex II species for which the SAC has been selected, that is the Features of Interest for which the site has been designated, namely:*

- Water courses of plain to montane levels with the *Ranunculus fluitans* and *Callitriche-Batrachion* vegetation;
- Northern Atlantic wet heaths with *Erica tetralix*;
- European dry heaths;
- Alpine and Boreal heaths;
- *Juniperus communis* formations on heaths or calcareous grasslands;
- Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco-Brometalia*) (* important orchid sites);
- Species-rich *Nardus* grasslands, on siliceous substrates in mountain areas (and submountain areas, in Continental Europe);
- Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels;
- Transition mires and quaking bogs;
- Petrifying springs with tufa formation (*Cratoneurion*); Alkaline fens;
- Siliceous scree of the montane to snow levels (*Androsacetalia alpinae* and *Galeopsietalia ladani*);
- Calcareous and calcshist screes of the montane to alpine levels (*Thlaspietea rotundifolii*);
- Calcareous rocky slopes with chasmophytic vegetation;
- *Vertigo geyeri* (Geyer's Whorl Snail);
- *Lutra lutra* (Otter).

Crockaune / Keelogyboy Bogs NHA site code 002435. Located c.5.4km to the southeast.

6.0 The Referral

6.1. Referrer's Case

The main points of the referrer's (Martina McMorrow, Barnaribbon, Drumcliffe) case (19/12/17) may be summarised as follow:

- The referral question relates to the erection of 4no. very large signs in two pairs alongside an old famine road and the erection of a gate over the road.
- The enforcement letters issued to Tom Devaney and John Flanagan, however the latter owns no property in Barnarobin at this location. If he is taking ownership of one of the signs, it is not on his property.
- The referrer, who runs a B&B adjacent the roadway, and her guests and the public have always used this road as a scenic walk and to access the mountain, which is part-owned by her family.
- The subject road has been used without hindrance by the public for generations to access Benbulbin.
- One of the signs refers to 'Guests of B&B'. The referrer believes *'this is an attempt to defame [her] in the eyes of [her] guests and that of the public, and therefore an attempt to sabotage [her] livelihood'*.
- Impact on residential amenity and on the property rights of the referrer, her family and of others who live in the area.
- Visual impact of the signs, as reduced following enforcement by Sligo County Council, on the scenic area visible from local road L7403, a designated scenic road in Sligo County Development Plan, and on public visual amenity, Sligo's most iconic feature.
- The signs are positioned c.3m above centre line of adjacent public road.

- The signage is misleading and malicious as the referrer's family part own property to which this road leads and they do not condone any attempt to stop people using this wonderful amenity.
- The development does not represent the plans/development for the area and wider Sligo area as one that welcomes all and promotes enjoyment of natural resources.
- Not in keeping with the letter or spirit of the planning acts.

6.2. Planning Authority Response

No further comment to make (12/01/18).

6.3. Owner/ occupier's response

The main points of the response submitted by Tom Devaney and John Flanagan (Barnaribbon, Drumcliffe) (11/02/18) may be summarised as follow:

- The laneway is not subject of any registered rights of way, public or private.
- The respondent, Thomas Devaney is the full owner of the laneway (Land Registry details attached to submission since 1963).
- The respondent reinstated the gates on the property, 70m from the public road in 2010, replacing a wooden barrier previously used to keep in stock, as was also maintained by the previous owners.
- The gate is essential in order to maintain the respondent's property and prevent livestock accessing the public road.
- Alleges that Michael Hennigan (brother of Marita McMorrow) cut down the gate with a consaw on 12th March 2012 and was prosecuted by the Gardaí for criminal damage in the Sligo District Court (pleaded guilty) on 16th January 2014.
- The respondent has always facilitated three neighbouring farmers, including Michael Hennigan, to bring sheep to commonage by this route and the gate has never been locked.

- The referrer has sought to promote exclusive access their guests and the general public to Benbulbin Mountain from their B&B since May 2012 despite that they have no access to the mountain except over the respondent's property and never sought nor were granted access rights or permission.
- Letter to Sligo Champion from Rose Hennigan, sister of referrer, dated 16/07/13) attached, which refers to safe walking routes to Benbulbin and the issue of blocking gates and keep out signage.
- Arising from the access campaign by the respondent and extended family commenced 2012 via social media, etc., and by complaints to the County Council, the respondent had to erect signage to protect their interests, their property and their property rights.
- Tom Devaney erected one sign and John Flanagan another, which were reduced on advice from Sligo County Council, with the wording altered following advice from a solicitor and from the respondent's insurance company to meet the unfolding situation (the referrer and family allegedly directing and accompanying their guests and passing tourists onto the respondent's property).
- It is a private road of which full ownership belongs to the respondent, and permission to use it has never been given by the respondent for anyone other than the three landowners concerned – Michael Hennigan, John Flanagan and Brendan Flanagan - and Sligo Co.Co. determined (EnF.1907) there was no evidence of a public right of way.
- There is no attempt to defame the referrer, Martina McMorrow, only to inform hillwalkers and guests of local B&B operators that access is not permitted.
- The sign on the respondent's land is on the left-hand side of the road, is 13m from the centre of the public road, is 5ft high and 0.3-sq.m in area and is not overbearing or obstructive of views. The adjoining road is a cul-de-sac and not a designated scenic route under the Sligo CDP, unlike the L7403 (from which the signs are not visible) 75m away.

- It has been necessary to erect the signs as a result of her attempts to establish rights for the guests of local B&Bs to access Benbulbin through the respondent's farm.
- The respondent has a duty and a right to protect his property and not to do so would show negligence towards the safety and welfare of others (notes the Occupiers Liability Act 1995). It is disingenuous to suggest that children from the local school are now prevented from using the laneway as they have never used it in the first place.
- Sligo Co. Co. have made significant progress in developing walks in Sligo, including Benbulbin Forest Walk, but these were planned and developed with the consent of the property owners and stakeholders concerned.
- The photographs submitted to the Board on 03/01/17 give an inaccurate impression of the situation on the ground and there was never the combination of signs as depicted in the photographs which were taken before and after the signs were reduced in size. Photographs of the actual signs are attached to the respondent's submission.

6.4. **Observers**

The main points of the submission from Michael Hennigan (Barnaribbon, Drumcliffe) received 09/04/18, may be summarised as follow:

- Refers to the road concerned as 'an old famine road', which is the access point to Benbulbin, part of which is in commonage ownership registered to Mr Tom Devaney, Mr John Flanagan, the Irish Land Commission and Michael Hennigan in 25% equal shares.
- He was not consulted or informed before the gate was erected across the right of way.
- This access to Benbulbin has been used for generations by locals, tourists, general sightseers and even the local primary school children.
- Sligo Co. Co. did not consult with or inform Michael Hennigan on the issue of the exemption certificate.

- If Mr Devaney owns the road, why has Mr Flanagan been granted exemption to erect a sign on it?
- Should not the structures have been removed pending the making of the decision?
- The photographs demonstrate the signs are an intrusion on the character of the landscape.
- The structures were erected out of cussedness and serve no purpose only to make life awkward for Mr Hennigan, necessitating two people to bring up sheep (one to open the gate), and to frustrate walkers.
- Was exemption sought under the Habitats Directive?
- Development is within high amenity area, is visible from designated scenic route L7403 and questions whether it interferes with character of landscape 9(vi).
- Signs are too high over the public road (P&D Regulations Part 5(2)).
- P&D Regulations Part 6(2)(b)(iii) is relevant concerning Habitats Directive, and Part 9(1)(a)(iii) is raised in context of situation on bad bend, which is a hazard causing distraction to road users.
- Part 9(a)(x) 'prohibits the fencing / enclosure of land habitually open to or used by the public for the 10 years. The public have been using this mountain road habitually for generations. A large number of people indicated that they have used this route to Benbulbin Mountain, some for over 50 years (Enf.1907).
- Part 9(b) Special Amenity Area. Sites prescribed under 10(2)(c) of Act also relates.
- Negative impact on Mr Hennigan's free-range farm produce business from perception that he is involved in blocking access.
- This route has always been known locally as the way to the summit, but now that it is blocked off it will result in people gaining access through dangerous means or over enclosed lands.

6.5. Further Responses

Planning Authority (25/04/18) – No further comment.

Referrer, **Marita McMorrow** (30/04/18) re Michael Hennigan's submission -

- Fully supports the submission of Michael Hennigan, the referrer's brother.
- Re point 3 - The referral relates to the original signage erected, not the revised signage that subsequently replaced them.
- Re point 6 – Any unsightly development at this location infringes on the Habitats' Directive.
- Re point 8 – Part 9(a)(x) prohibits fencing or enclosure of land open to or used by the public in the preceding 10 years. The guests from the referrer's guesthouse have used this access for the past 40 years and the general public for generations. The land has been registered to the current owners for over 50 years and they have not raised any objection until recent times.

Owner / occupier, **Tom Devaney** (08/05/18) –

- The latch to the gate is user friendly and can be operated with ease.
- Ownership of the commonage is 25% Michael Hennigan, 25% John Flanagan and 50% Tom Devaney (land registration now fully completed).
- The road is in the ownership of Tom Devaney (copy of solicitor's letter attached stating the '*access to the commonage is over land registered on folio SL13175F which is registered to Thomas Devaney of Barnaribbon, Carney, County Sligo.*').
- Gate erected summer 2010, necessary, for health and safety reasons, to replace a rotten wooden barrier that was dangerous to manoeuvre.
- The referrer and her family are trying to develop access to Benbulbin over Mr Devaney's property without permission, consultation or regard for Mr Devaney's rights.
- The road has certainly not been used for generations by tourists and sightseers and the local primary school certainly has never asked Mr Devaney's family or him about access for a picnic or any other event.

- Tourists are often looking for Benbulbin Forest Walk, which is clearly signed. Tourists are welcome to the area and provide important business to the northwest but they cannot be directed onto his property against his wishes.
- Does not believe the signs and gate should be removed pending determination.
- Not an intrusion on the landscape any more than other signs in the area (photos of similar attached) and the signs are not overly high.
- It is total nonsense and a complete fabrication that the gate was erected out of cussedness and serves no purpose and necessitates two people to bring sheep to / from the commonage. A gate and at least two people are essential (four people are preferable) in order to bring sheep down and separate them from the other farmers' sheep, without sheep running out onto the public road.
- There is another gate onto the commonages which is always kept closed which Mr Hennigan has raised not issue with at all.
- The lane is not part of the SAC.
- Sligo County Council concluded there is no public right of way.
- The Hennigan family only acquired a share on the commonage in the early 1980's and had no prior involvement with the lane or mountain.
- Disputes that there is any effect on Mr Hennigan's egg business.
- The only place where the route is advertised as access to Benbulbin is on the Benbulbin Farm website, which causes confusion when no designated safe walk is available other than Benbulbin Forest Walk.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2 Interpretation – including definition of '*agriculture*' and '*road*' (same meaning as Roads Act, 1993).

Section 3 Development

Section 4 Exempted Development

7.2. Planning and Development Regulations, 2001

Article 5 Interpretation for [Part 2 Exempted Development] – definition of ‘*business premises*’.

Article 6 Exempted Development

Article 9 Restrictions on Exemption

Schedule 2, Part 1 Exempted Development – General: Class 9 - *The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway. Limitation: The height of any such structure shall not exceed 2 metres.*

Schedule 2, Part 2 Exempted Development – Advertisements: Class 13 - *Advertisements for the purposes of identification, direction or warning with respect to the land or structures on which they are exhibited. Limitation - No such advertisement shall exceed 0.3 square metres in area.*

7.3. Roads Act, 1993

Section 2 Interpretation – including definition of ‘*road*’, ‘*roadway*’ and ‘*public road*’.

8.0 Assessment

8.1. Is or is not development

- 8.1.1. **Gate** - The erection of a gate across a road falls within the definition of “*development*” under s.3(1) of the Act, being ‘*the carrying out of any works on, in, over or under land*’ where the definition of “*works*” under s.2 of the Act ‘*includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...*’ and therefore **IS development**.
- 8.1.2. **Signage** - Similarly, the erection of advertisement structures also falls within the definition of development under s.3(1) and within the scope of material change of use of land under s.3(2) and **IS development**.

8.2. Is or is not exempted development

Neither development falls within the exemptions provided under s.4(1) of the Act.

The erection of a gate falls within the scope of Class 9 (column 1) of Part 1 Exempted Development General under Schedule 2 of the Regulations:

*'The construction, erection, renewal or replacement, **other than** within or bounding the curtilage of a house, of any gate or gateway.'* [bold is my emphasis]

8.2.1. Although I did not measure the gate and no scaled drawings are submitted on file, it is evident that the gate does not exceed the 2m height limitation applicable under column 2 conditions and limitation to Class 9. The respondent stated that the gate structure does not exceed the aforementioned limit. No other limitations are applicable to Class 9.

8.2.2. The existing signs erected in place adjacent the road fall within the scope of Class 13 of Part 2 Advertisements under Schedule 2 of the Regulations:

Advertisements for the purposes of identification, direction or warning with respect to the land or structures on which they are exhibited.

8.2.3. The said class refers to *advertisements*, plural. The limitation to that class sets a limit of 0.3-sq.m per advertisement (singular), which equates to a sign measuring, say 500mm x 600mm (a little less than 3no. A3 sheets). The respondent stated that the existing signs do not exceed the said limit. The referrer, in response to submissions, clarifies that the referral relates to the original signage, rather than the replacement signs measured by Sligo County Council enforcement officers as compliant with the aforementioned size limit.

8.2.4. The details of the original signage are not clear, but are stated as *'four very large signs erected in two pairs on either side of an old famine road'*. Photographs attaching to the referral submission (19/12/17) include one photograph of the original signage (third photograph in the order attached to that submission). Whether the earlier signage complied with the 0.3 square metre limit, it is not possible to determine as the signs are not in place and the referrer has not provided and cannot now provide the relevant measurements. I would therefore advise the Board that it

cannot make a decision on that question, but should confine itself to considering the later signage.

8.3. Restrictions on exempted development

8.3.1. A.9(1)(a) of the Act sets restrictions on exempted development to which A.6 of the Regulations relate. Those relevant to the case at hand, in order, are as follow:

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

8.3.2. The rural lane, across which the subject gate has been erected, is a 'road' and includes a 'roadway' as defined in the Roads Act, 1993, but it is not a 'public road'. The said road is recorded on the historic maps for the area, has been referred to as 'a famine road' by the referrer and observer and the long-time presence of the road has not been disputed by any party. It could be argued that the erection of a gate across the road could 'endanger public safety by reason of ... obstruction of road users' - the restriction does not discriminate between a road and a public road - however I do not consider this to be the case, generally, given the nature and width of the road. The restriction under A.9(1)(a)(iii) does not therefore apply.

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

8.3.3. The site of the development is within the 'normal rural landscape' defined under the Sligo County Development Plan 2017-2022 (Landscape Characterisation Map, refers). The gate and signage, setback a maximum of 70m from the centre of the public road (L7403-0, a cul-de-sac off L7403) according to the respondent and landowner, is not a designated scenic route but is located within the yellow highlighted area associated with the designated scenic route along L7403. However, the said highlighting is indicative and does not define an area of specific control extending either side of the road notwithstanding that the designation of Scenic Routes provides a basis for protecting views and prospects of certain visually

vulnerable features under the Plan. In this regard, views of Benbulbin, Knocknarea, Sligo Bay, Ox Mountains from L7403 are listed in Appendix 3 of the Plan for preservation. I do not consider the subject gate or signage erected along the lane to be such as to interfere with the said preserved view due to the relatively small scale of the structures concerned and the distance from the receptor (i.e. the L7403). The restriction on exempted development imposed by A.9(1)(a)(vi) does not therefore apply.

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site;

- 8.3.4. Having regard to the nature and small scale of the proposed development, and the nature of the receiving environment and the proximity to the nearest European sites, Sligo / Leitrim Uplands SPA (site code 004187) and Ben Bulbin, Gleniff And Glenade Complex SAC (site code 000623) located a distance of c.290m and uphill of the subject development, no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site. The restriction on exempted development imposed by A.9(1)(a)(viiB) does not therefore apply.

(viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.

- 8.3.5. The subject development is not located within, or in close proximity to a designated NHA, with the nearest such designated area located c.5.4km to the southeast. I am satisfied that the subject development does not comprise development likely to have an adverse impact on a NHA. The restriction under A.9(1)(a)(viiC) does not therefore apply.

(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,

- 8.3.6. The Planning Authority determined that the erection of a gate did not equate to the fencing or enclosure of land as it relates to only a part of the land in question and the fencing and enclosure implies the creation of an enclosed area on four sides. Referring to the Collin's Dictionary definition of enclosure as '*an area of land that is surrounded by a wall or fence*', the Planning Officer concluded that an enclosed area has not been created by the erection of a gate across a laneway. Furthermore, the Planning Authority concluded that even where it to be considered fencing or enclosure, it would not be accurate to describe the land to which the laneway leads as '*habitually open to or used by the public*'.
- 8.3.7. I would disagree with the Planning Authority's position on enclosure. It is apparent from every day experience that a gate, or gates, can be used to enclose space or land and, in particular they are typically essential to provide access to the enclosed space in lieu of leaving a permanently open gap in the enclosure such that the land or space would not be fully enclosed. I am therefore satisfied that a gate can enclose land within the context of this referral.
- 8.3.8. As to whether the subject land has been '*habitually open to ... the public during the 10 years preceding such...enclosure*' or '*habitually ... used by the public during the 10 years preceding such...enclosure*', it is not possible for the Board to determine this matter definitively. I see no option for the Board other than to arrive at a decision on the basis of balance of probability through application of reasoned logic.
- 8.3.9. The respondent and landowner submits that the erected gate replaces a wooden barrier used by the landowner and by previous landowners to keep stock in, which it was necessary to replace for health and safety reasons as it was rotten and difficult to manoeuvre. In his further response the owner clarifies that the gate is necessary to prevent sheep straying onto the public road when transferring them from the commonage and separating herds in different ownership.
- 8.3.10. The landowner does not state that the wooden barrier was permanently in place, rather than put in place on an occasional basis. Based on the information on file, in particular the landowner's reference to it as a wooden barrier, rather than a wooden gate, one would surmise that the wooden structure was an occasional barrier used

during transfers of stock from the commonage. That the timber barrier was difficult to manoeuvre would suggest it would have been a hindrance to the landowners concerned and unlikely to have been left in place, unless necessary for transfers on occasion. That there is a *'permanent'* gate to the commonage proper (according to Mr Devaney) and, one can reasonably assume, also to the individually enclosed fields located either side of the subject road, for a length of at least 340m, would have made the provision of a permanent wooden barrier superfluous. I would therefore conclude that the road was *'habitually open'* in the 10 years preceding the erection of the gate in 2010. In this regard it is not relevant that the road is wholly within lands owned by the Mr Devaney. The folio within which the road is contained (attached to his submission 08/05/18) also encompasses the public road which is evidently habitually open.

8.3.11. As to whether the road was *'habitually open to or used by the public ... for recreational purposes or as a means of access to any ... mountain ... or other place of natural beauty or recreational utility'*, again, the Board can only make a decision on the basis of the balance of probability. The referrer submits that the road has been used without hindrance by the public for generations to access Benbulbin, that the guests of her guesthouse have used same for the past 40 years and that this has only recently become an issue for the current landowner (in possession of the land for over 50 years). The observer, Michael Hennigan (the referrer's brother), supports the referrer's position, submitting that it has been used for generations by locals, tourists, general sightseers and local primary school children and that this route is known locally as the way to the summit. This is strenuously disputed by the landowner who claims that the referrer is trying to develop access to Benbulbin over his property, without permission, consultation or regard for his rights.

8.3.12. Benbulbin is an iconic mountain, with strong visual, historical and cultural associations at a county (Yeats is buried in the townland of Drumcliff) and national level and is therefore a significant attraction for hillwalkers (local, national and international), being members of the public. There are limited routes up to Benbulbin (and Kings Mountain to the southeast). The subject road leads to one of the more gentle inclines and more direct routes to Benbulbin, with the west, north and northeast sides providing a more difficult ascent based on the OS Discovery Series

maps. This would strongly suggest that this route has been used by the public to access Benbulbin mountain.

- 8.3.13. There is no access to Benbulbin mountain from Benbulbin Forest Park¹ and I could locate no current official tourist information for access to the mountain. Ascent for the mountain via the subject road is recorded by a number of hikers / climbers on the mountainviews.ie website², including March 2006, May 2010 but also subsequent to the carrying out of the development concerned. I therefore consider the position put forward by the referrer, that the route has been habitually used by the public to access Benbulbin, to be most likely.

(xi) obstruct any public right of way,

- 8.3.14. The landowner submits that there is no public right of way over the subject road. The apparent existence of *private* rights of access for at least two other parties (including Michael Hennigan) with rights to the mountain commonage is not relevant to the restriction under A.9(1)(a)(xi). The report of the Planning Authority states that there is no public right of way at this location based on a determination to this effect by Sligo County Council in 2014 in relation to enforcement case ENF.1907.

9.0 Recommendation

- 9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the erection of a gate across a road, not being a public road, is or is not development or is or is not exempted development:

AND WHEREAS a question has arisen as to whether the erection of advertising signage adjacent a road, not being a public road, is or is not development or is or is not exempted development:

¹ According to <https://sligowalks.ie> operated by Sligo Walks, Sligo Tourist Office (accessed 03/07/18).

² <https://mountainviews.ie/summit/402/> (accessed 03/07/18)

AND WHEREAS Martina McMorrow requested a declaration on these questions from Sligo County Council and the Council issued a declaration on the 24th day of November, 2017 stating, in the case of both questions, that the matter is development and is exempted development:

AND WHEREAS Martina McMorrow referred this declaration for review to An Bord Pleanála on the 19th day of December, 2017:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) and (2) of the Planning and Development Act, 2000,
- (c) Section 4(2) and (4) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and (2) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 1 and 2 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) Relevant planning history;

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The erection of a gate across a road:
 - (i) **IS** development under section 3(1) of the 2000 Act;
 - (ii) **IS** exempted development to which article 6(1) relates, under Class 9 of Part 1 of Schedule 2 of the Regulations;
 - (iii) **IS NOT** exempted development by virtue of the restrictions on

exemption under article 9(1)(a)(x) of the Regulations;

(b) The erection of advertising signage adjacent a road:

(i) **IS** development under section 3(2) of the 2000 Act;

(ii) **IS** exempted development to which article 6(2) relates, under Class 13 of Part 2 of Schedule 2 of the Regulations;

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Act, hereby decides that the erection of a gate across a road **IS** development and **IS NOT** exempted development; the erection of advertising signage adjacent a road **IS** development that **IS** exempted development.

John Desmond
Senior Planning Inspector

4th July 2018