



An
Bord
Pleanála

Inspector's Report ABP-301512-18

Question

Whether the material widening of an existing entrance to facilitate the extraction of timber from a forestry plantation is or is not development or is or is not exempted development.

Location

Attimanus, Kilnagross, Co. Leitrim

Referral

Referred by

Leitrim County Council

Owner/ Occupier

The Fifth Irish Forestry Fund plc

Observer(s)

Adrian McCrann

Date of Site Inspection

20th July 2018

Inspector

Donal Donnelly

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1.0 Site Location and Description

- 1.1. The subject site is located in the townland of Attimanus in southern Co. Leitrim approximately 10km north-east of Carrick-on-Shannon. The village of Kilnacross is approximately 1km to the north-west of the site. The surrounding area comprises a drumlin type landscape with agricultural fields, sporadic housing and forestry plantations.
- 1.2. The site consists of a new access to a forestry plantation off a narrow local road with a straight alignment. The access serves a forestry track that continues a short distance into the plantation. The access and track have a loose stone/ gravel surface.
- 1.3. There is an agricultural access directly opposite the subject access. Immediately to the north thereof is a dwelling with layby to the front.

2.0 The Question

- 2.1. Leitrim County Council is seeking a Declaration from the Board as to whether or not the material widening of an existing entrance to facilitate extraction from a forestry plantation is or is not development or is or is not exempted development.

3.0 Planning History

Leitrim County Council Reg. Ref: 14/111

- 3.1. Permission granted in December 2014 for the proposed construction of 1 no. bell mount entrance with access road so as to facilitate access into the existing forestry plantations for the removal of timber and all ancillary works.
- 3.2. This permission relates to a proposed access located approximately 150m north-west of the subject access to the forestry that has been widened. Condition 6 of this permission required the permanent closing off (fenced backed with native hedgerow), of the existing entrance to the forestry plantation prior to the proposed new entrance becoming operational.

4.0 Policy Context

4.1. Development Plan

- 4.1.1. The site is within the area covered by the Leitrim County Development Plan, 2015-2021.

4.2. Natural Heritage Designations

- 4.2.1. The Cuilcagh - Anierin Uplands SAC is approximately 12km north of the subject site.

5.0 The Referral

5.1. Referrer's Case

- 5.1.1. The referral by Leitrim County Council is summarised as follows:
- Applicant stated in further information response under Reg. Ref: 14/111 that existing access to south-east of proposed access was unsuited to timber extraction and that the location of the proposed entrance was better suited from a harvesting point of view.
 - Existing entrance may have facilitated the planting of the forestry and may have been used for forestry activities.
 - Location of new access is where the pre-existing gated agricultural access was located, which was to be 'permanently closed off in the event of a successful grant of planning permission.'
 - Former agricultural access has been significantly widened to create a bell-mouth entrance – it is not defined by post and rail fencing but roadside drain has been culverted.
 - Material widening does not constitute non-compliance with Reg. Ref: 14/111 – applicant has decided not to implement planning permission and has assumed that works to existing entrance in concert with Forestry Service consent for a forest road are exempted development.

- Planning Authority consider that the material widening and improvement of existing access at this location is not exempted development for the purposes of Section 4(1)(ia) of the Act, as it involves the provision of an access to a public road.
- Owners have been requested to cease all works associated with the unauthorised development and to submit their proposals to regularise the planning status of the property.
- Planning Authority has had regard to RL3079, RL2345 and RL2974; however, there does not appear to be a precedent in relation to the material widening and alteration of an existing agricultural entrance to facilitate the harvesting of trees.

5.2. Owner/ occupier's response

5.2.1. The agent for The Fifth Irish Forestry Fund plc submitted a response which is summarised as follows:

- Reg. Ref: 14/111 has no bearing on the determination or otherwise of this Section 5 referral.
- Precedent cited by Council regarding the creation of a new entrance onto a public road is of limited value as it relates to a previous section of the Act, which has subsequently been amended.
- Cases referred to appear to determine that the developments in question were developments requiring permission on the basis of the secondary legislation (Article 9 of the Regulations) imposing limitations on primary legislation (Section 4 of the Act). Article 9 de-exemptions do not apply to the exemptions provided for in Section 4 of the Act.
- Owner welcomes the Section 5 referral and would request that the Board examines all provisions of the Act and Regulations, in particular, Section 4(1)(h) would apply in this instance.

5.3. Observation

5.3.1. The Board received correspondence from Mr. Adrian McCrann, the resident of the dwelling opposite the subject entrance. The main points raised in this submission are summarised as follows:

- Work to access was conducted despite observer's ongoing communication with VEON (Irish Forestry Fund) representatives that planning permission should be complied with.
- Technical Standards for the Design of Forestry Entrances from Public Roads Booklet states that *"an entrance to a forest road should not be constructed directly opposite any other access to a public road (e.g. not opposite a dwelling) or opposite a road junction..."*.
- There is a private dwelling and an entrance to land directly opposite the newly constructed entrance.
- Access has never been an exit or entrance to this property – previous to the land being planted there was a cattle crush at this location.
- Photos appended showing approximate measurements.

5.4. Planning Authority Response

5.4.1. The Planning Authority responded to above submission by Mr. Adrian McCrann with the following comments:

- Observation was made without sight of the content of the submission to An Bord Pleanála by Leitrim County Council.
- Planning Authority has notified the Board that the matter of the extant planning permission is the subject of an investigation into alleged unauthorised development and a warning letter has issued – substantive matter to be determined is whether in fact development which has occurred is or is not exempted development.
- Planning Authority disagree that 'unauthorised exit' was never an exit onto the public roadway – Google Streetview image clearly demonstrates existence of an entrance.

- Access point was established prior to commencement of SI. No. 219/2013 (28th June 2013) – Article 8G of Planning and Development Regulations 2001-2018 did not therefore apply at the time.
- Creation of access point would have been considered to have been exempted development – it is the material widening of this entrance which the Planning Authority has sought the opinion of the Board.
- Points raised regarding the Technical Standard for the Design of Forest Entrances from Public Roads should be considered – it is not the construction of a new entrance but rather the material widening of an existing entrance.

5.5. Further response

5.5.1. The agent for The Fifth Irish Forestry Fund plc submitted the following comments in response to the submission from Mr. McCrann:

- Owner originally sold the land in 2003 on which observer's dwelling was originally built.
- Forestry opposite was planted in 2000 and entrance opposite observer's house was already in existence.
- Owner was in contact with Leitrim County Council prior to commencement of works and in keeping with the forest service harvesting road approval.

6.0 Statutory Provisions

6.1. Planning and Development Act, 2000

6.1.1. In order to assess whether or not the activity constitutes development that is exempted development, regard must be had to the following items of legislation:

6.1.2. Under Section 2, the following is the interpretation of 'works':

"...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..."

6.1.3. Section 3 (1) states as follows:

“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.”

6.1.4. Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act and includes the following:

“(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;”

“(ia) development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road) or works ancillary to such road development, where the road serves forests and woodlands.”

6.1.5. Section 4 (2) provides for the making of Regulations. The main Regulations are the Planning and Development Regulations, 2001.

6.2. Planning and Development Regulations, 2001

6.2.1. Article 6 (1) states as follows:

“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.”

6.2.2. Article 9 (1) (a) sets out the instances where development, to which Article 6 relates, shall not be exempted development for the purposes of the Act if the carrying out of such development would -

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

- (ii) *consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width,*
- (iii) *endanger public safety by reason of traffic hazard or obstruction of road users.*

6.2.3. Article 8G states that *“development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road), or works ancillary to such road development, where the road serves forests and woodlands, shall be exempted development.”*

7.0 Assessment

7.1. The Question as to whether works are or are not development

- 7.1.1. The first part of the question to be examined is whether or not 'development' has taken place within the meaning of the Act. If no development has occurred, no further question arises but if on the other hand, the material widening of an existing entrance to facilitate extraction of timber from a forestry plantation is considered to be development, the second part of the question arises as to whether or not the development is exempted development by reference to the Act and Regulations.
- 7.1.2. Section 2 (1) of the Planning and Development Act, 2000 (as amended) provides an interpretation of 'works' as including *'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'*. Clearly, the material widening of the access in question, involving acts of construction, extension and alteration, represents 'works' under the interpretation within the Act.
- 7.1.3. Section 3 (1) states that *'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.’* Development has therefore taken place in the form of 'works' on land in this case.

7.2. The Question as to whether or not the development is exempt

- 7.2.1. A former agricultural access onto a public road has been widened and upgraded to facilitate timber extraction from a forestry plantation. In its referral to the Board, the Planning Authority is of the opinion that the development is not exempted development for the purposes of Section 4(1)(ia) of the Planning and Development Act, 2000 (as amended), i.e. *“development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road) or works ancillary to such road development, where the road serves forests and woodlands.”* However, a precedent is not apparent to the Planning Authority in relation to the material widening and alteration of an existing agricultural entrance to facilitate the harvesting of trees.
- 7.2.2. Reference is made to a case in Co. Roscommon (Ref: 20.RL3079) where it was concluded that at the time the works took place, there was no provision of exemption for the creation of an access onto a public road from a forestry plantation. However, there was evidence in this case to suggest that there was no pre-existing agricultural access in place. It would appear, therefore, that this precedent case related to the creation of a new access rather than the material widening of an existing access.
- 7.2.3. In my opinion, the primary issue to be examined under the provisions of Section 4(1)(ia) is the road that has been laid within the forestry plantation and secondly the access to this roadway from the public road. Section 4(1)(ia) de-exempts the construction, maintenance or improvement of a forestry roadway or works ancillary to such road development. However, such a development is only exempt if it does not consist of the provision of access to a public road.
- 7.2.4. In this case, a new roadway within a forestry plantation has either recently been laid or an existing track has been improved. This new roadway commences at an access from the public roadway and in my opinion cannot therefore benefit from the exemption under Section 4(1)(ia). I would also take the view that the access forms part of the roadway in this case and by extension the access, as well as the roadway, are not exempted development under the provisions of Section 4(1)(ia). The rewording of the question put to the Board may therefore be required to reflect same.

- 7.2.5. Similarly, there is no exemption under Article 8G of the Planning and Development Regulations, 2001 (as amended) which also states that *“development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road), or works ancillary to such road development, where the road serves forests and woodlands, shall be exempted development.”*
- 7.2.6. The agent for the forestry owner considers that Section 4(1)(h) of the Planning and Development Act, 2000 (as amended) may apply in this instance. This section exempts *“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”*. In my opinion, this Section is not relevant to the construction of an external access and roadway.
- 7.2.7. Finally, it should be noted that there is a live planning permission (Reg. Ref: 14/111) at a location approximately 150m north-west of the subject access for the construction of 1 no. bell mount entrance with access road so as to facilitate access into the existing forestry plantations for the removal of timber and all ancillary works. Condition 6 of this permission requires the permanent closing off of the subject entrance to the forestry plantation prior to the proposed new entrance becoming operational. It would appear, however, that the applicant is choosing not to implement this permission. As the development does not relate to Article 6 of the Planning and Development Regulations, 2001 (as amended), Article 9(1)(a)(iv) does not apply.

8.0 Recommendation

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

WHEREAS a question has arisen as to whether or not the material

widening of an existing entrance and the laying/ improvement of a roadway to facilitate extraction from a forestry plantation is or is not development or is or is not exempted development:

AND WHEREAS the said question was referred to An Bord Pleanála by Leitrim County Council under Section 5(4) of the Planning and Development Act, 2000 (as amended) on the 20th day of April 2018:

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) of the Planning and Development Act, 2000,
- (c) Section 4(1)(ai) of the Planning and Development Act, 2000, as amended,
- (d) Article 8G of the Planning and Development Regulations, 2001, as amended,
- (e) the planning history of the site,
- (f) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) a new road and access have been developed for the purpose of enabling felled timber from forestry operations to be transported offsite from the forestry lands via the public road network,
- (b) the new road cannot avail of the exemption provision in section 4 (1) (ia) of the Act, as amended, for development consisting of the construction, maintenance or improvement of a road to serve forests and woodlands, as its purpose is to provide access to a public road, which removes the exemption.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the material widening of an existing entrance and the laying/ improvement of a roadway to facilitate extraction from a forestry plantation is development and is not exempted development:

Donal Donnelly
Planning Inspector

21st December 2018