



An
Bord
Pleanála

Inspector's Report ABP-304134-19

Question

Whether works consisting of the creation of an access road and entrance is or is not exempted development.

Location

Rathmoylan, Dunmore East, Co. Waterford.

Declaration

Planning Authority

Waterford City & County Council

Planning Authority Reg. Ref.

D5 2019/2

Applicant for Declaration

Ciaran & Jane Bailey

Planning Authority Decision

None issued.

Referral

Referred by

Ciaran & Jane Bailey

Owner / Occupier

Janice Murphy & Paul Lenehan

Observer(s)

None.

Date of Site Inspection

12th & 26th October, 2019

Inspector

Robert Speer

1.0 Site Location and Description

1.1. The site in question is located in the rural townland of Rathmoylan, Co. Waterford, approximately 2km southwest of Dunmore East and c. 650m north of the coastline, where it occupies a position on the seaward side of a minor coastal road between Dunmore East and Ballymacaw. It is accessed via a narrow private roadway that extends from the apex of a bend in the public road to serve 4 No. existing dwelling houses and adjacent farmland. The site itself would appear to have previously formed part of a larger agricultural field, however, it is presently characterised by a narrow access track / road, which has been excavated into the land and surfaced in loose gravel / hardcore, that serves to bypass a stretch of the existing laneway located further west. The new section of roadway extends for a distance of approximately 100m and serves as a private access for use by the occupants of the dwelling house permitted under PA Ref. No. 16/21 further south.

2.0 The Question

- 2.1. On 1st February, 2019 Ciaran & Jane Bailey submitted a request to Waterford City & County Council for a declaration in accordance with Section 5 of the Planning and Development Act, 2000, as amended, to determine whether or not works consisting of the creation of an access road and entrance at Rathmoylan, Dunmore East, Co. Waterford, constituted exempted development.
- 2.2. The Planning Authority subsequently failed to issue a formal declaration on the matter within the statutory period and, therefore, pursuant to Section 5(3)(b) of the Act, Ciaran & Jane Bailey have now referred the matter to the Board for a determination.
- 2.2.1. Having conducted a site inspection, and following a review of the submitted information, in my opinion, the question before the Board can be formulated as follows:

'Whether the construction of an access road and associated entrances at Rathmoylan, Dunmore East, Co. Waterford, is or is not development and is or is not exempted development'

2.3. Planning Authority Reports

2.3.1. Planning Reports:

Given that the Planning Authority failed to make a determination on the initial request for the Section 5 declaration, it would appear that no planning report was prepared in respect of same. Instead, the Planning Authority has sought to rely on the contents of correspondence issued on 29th January, 2019 with regard to a Warning Letter (Ref. No. WL 2867) served on J. Murphy & P. Lenehan concerning the alleged unauthorised nature of the works in question. The contents of this letter can be summarised as follows:

- The minor readjustment of the entrance drive was necessary to overcome a legal obstacle to passage over a small section of the existing laneway.
- The newly adjusted section of access drive does not impede the continued use of the existing laneway for any user.
- The readjusted section of access driveway is located entirely within the applicant's landholding. The remainder of the access drive (south of the existing laneway) is also located within the applicant's landholding. The readjusted section of the access drive does not impact on the sightlines available at the junction with the public road, does not interfere with drainage onto the public road, and does not create a traffic or public safety hazard for users of the public road.
- The substantive development (being permission for a dwelling house located approximately 350m from the public road) accords with PA Ref. No. 16/21 and the access drive exits onto the public road at the location permitted by Condition No. 6 of that grant of permission. The other requirements for the entrance construction - Condition No. 6(a)-(g) - have been complied with.

On the basis of the foregoing, the Planning Authority subsequently determined that the readjusted section of the access drive did not constitute unauthorised development.

2.3.2. Other Technical Reports:

None.

3.0 Planning History

3.1. On Site:

None.

3.2. Other Relevant Files:

PA Ref. No. 16/21. Was granted on 14th April, 2016 permitting Janice Murphy and Paul Lenehan permission for a dwelling house and garage with wastewater treatment system and access road together with all ancillary site works at Rathmoylan, Dunmore East, Co. Waterford.

4.0 Policy Context

4.1. Development Plan

4.1.1. **Waterford County Development Plan, 2011-2017 (as extended):**

Chapter 4: County Settlement Strategy:

Section 4.8: Rural Housing Policy

Section 4.9.1: Areas Under Urban Pressure:

Policy SS3: To cater for the housing requirements of members of the local rural community who have a genuine local housing need in areas under urban pressure as set out in the Criteria in Section 4.10.

Section 4.10: Genuine Local Housing Need

Chapter 7: Infrastructure:

Section 7.2.3: County Roads

Policy INF 3: To protect the efficient and safe operation, and facilitate the ongoing development of National, Regional and County Roads throughout Waterford in accordance with the National Development Plan 2007-2013 and Transport 21. The Planning Authority shall have regard to the Spatial Planning and National Roads (Draft) Guidelines for Planning Authorities and any subsequent guidelines on road planning that may be issued from the DoEHLG or the Department of Transport during the

lifetime of this Plan. The Planning Authority shall consult with the NRA in the preparation of any Masterplan which may affect the carrying capacity of a National Road.

Chapter 8: Environment and Conservation:

Section 8.1: Landscape

The subject lands are located in an area which has been designated as 'Normal' in Appendix A9: 'Scenic Landscape Evaluation' of the Development Plan.

Section 8.2: Landscape Protection

Policy ENV 4: The Council will assess all proposals for development in terms of the Scenic Landscape Evaluation map, the Development Management Standards (Chapter 10) and the Rural Housing Design Guidelines (that will be prepared within one year of the adoption of the Plan).

Policy ENV 5: Development in areas outside of settlements, along the coast road (from Youghal to Cheekpoint) and in upland areas, will only be considered where such proposals do not have an adverse impact on the landscape and where they satisfy the criteria set out under the settlement strategy policy contained in Chapter 4 County Settlement Strategy.

Chapter 10: Development Standards

4.2. Natural Heritage Designations

4.2.1. The following Natura 2000 sites are located in the general vicinity of the proposed development site:

- The Tramore Dunes and Backstrand Special Area of Conservation (Site Code: 000671), approximately 3.2km northwest of the site.
- The Tramore Back Strand Special Protection Area (Site Code: 004027), approximately 3.2km northwest of the site.
- The Hook Head Special Area of Conservation (Site Code: 000764), approximately 5.7km southeast of the site.

5.0 The Referral

5.1. Referrer's Case

- The works in question (i.e. the creation of an access road and entrance) constitute development and are not exempted development.
- Pursuant to Article 6(1) and Classes 9 & 13 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, the construction of entrances and paved roads (of a width not exceeding 3m) on privately owned lands constitutes exempted development unless it would '*endanger public safety by reason of traffic hazard or obstruction of road users*' by reference to Article 9(1)(iii) of the Regulations.

It is considered that the subject works have the potential to result in a traffic hazard or the obstruction of road users and in this regard the accompanying photographs demonstrate that the new entrance / junction arrangement is hazardous and would likely give rise to collisions between vehicles using the two roadways.

- Notwithstanding the site location in a rural area, given the absence of public transport it is considered that there are sufficient vehicular movements along the laneway for the new entrance to give rise to genuine concerns as regards the safety of road users.
- The new entrance and roadway were constructed to access the dwelling house previously granted permission under PA Ref. No. 16/21, however, that property can already be accessed from the existing laneway given that there is a right of way over same. Furthermore, in the event that there is any doubt as to whether the existing right of way extends to all the occupants of the house then the referrers are amenable to clarifying this position. Accordingly, there is no need for the new entrance and roadway.

5.2. Planning Authority Response

None.

5.3. Owner / Occupier's Response

- By way of background, the Board is advised that Janice Murphy and Paul Lenehan were granted permission on 14th April, 2016 for a *'dwelling house and garage with a wastewater treatment system and access road together with all ancillary site works'* at Rathmoylan, Dunmore East, Co. Waterford (please refer to PA Ref. No. 16/21). That grant of permission included for the provision of an access road to serve the proposed dwelling house. At the time, the application site was in the joint ownership of Ms. Janice Murphy and nine of her cousins who had jointly inherited an extensive landholding. Access to the site was to be obtained over a section of existing private roadway (in similar joint ownership) in addition to a new section of roadway extending from same.

The first section of the existing private access road (outlined in red on the accompanying aerial photograph) originally formed part of the public roadway (prior to its realignment in the 1950s) and is jointly owned by Ms. Murphy, her cousins, and another landowner. During the site transfer process (in reference to PA Ref. No. 16/21) it was discovered that the aforementioned section of roadway was not a public road and did not have a public right of way over it and, therefore, its co-owners opted to grant each other a reciprocal right of way over the roadway which was, in turn, granted to Ms. Murphy & Paul Lenehan as part of the site transfer.

A second section of the existing access road (outlined in yellow on the accompanying aerial photograph and shown in pink on the folio map extract) comprises a small parcel of land contained in Folio Ref. WD21533F which is jointly owned under a 'Tenants in Common' partnership between Ms. Murphy & her cousins (50% ownership) and the referrers, Ciaran & Jane Bailey (50% ownership). All of the joint owners (and the owners of the house to the south of the Bailey's residence) have an unregistered right of way over this parcel of land.

The remaining third section of the existing private access road (outlined in blue on the accompanying aerial photograph) is in the sole ownership of Ms. Murphy and her cousins, although Ciaran & Jane Bailey and another party

have a registered right of way over same to access their respective properties.

Following the receipt of the grant of permission issued in respect of PA Ref. No. 16/21, as part of the site transfer process, Janice Murphy & Paul Lenehan set about trying to secure the necessary 'right of way' over the small parcel of land contained in Folio Ref. WD21533F from the shared owners i.e. Ciaran & Jane Bailey. This was deemed necessary to perfect the title in order to allow Ms. Murphy & Mr. Lenehan to access their home along the laneway (on the basis of legal advice, the option of transferring Ms. Murphy's 1/20th part ownership into joint ownership with Mr. Lenehan was not considered sufficient to perfect the title). However, Ciaran & Jane Bailey advised that they were not prepared to agree to the change sought and, therefore, in failing to achieve the required right of way, it was necessary for Ms. Murphy & Mr. Lenehan to explore an alternative means of access to the approved dwelling house.

- In response to the impasse in obtaining a right of way over the entirety of the existing private roadway, Ms. Murphy & Mr. Lenehan sought to undertake a minor modification to the development permitted under PA Ref. No. 16/21 by slightly adjusting the private access road to the proposed dwelling. This involved a new access arrangement through lands in the sole ownership of Ms. Murphy and her cousins thereby circumventing the parcel of land in common ownership. On 5th January, 2018 the Planning Authority agreed to the aforementioned adjustment which was deemed to be an immaterial deviation from PA Ref. No. 16/21.

The term '*immaterial deviation*' stems from a judgement which provides for planning permission to be interpreted flexibly so as to allow for tolerances in respect of changes to the details provided in the plans and particulars (please refer to *O'Connell v. Dungarvan Energy Ltd. & Lever Finance Ltd. v. Westminster Corporation*).

On foot of the decision of the Planning Authority that the revision proposed formed part of the development permitted under PA Ref. No. 16/21, works commenced on the new section of access road on or about 23rd April, 2018, however, in October, 2018 the Planning Authority received a complaint

alleging that the new section of roadway constituted unauthorised development which culminated in the service of a Warning Letter. In response, Ms. Murphy & Mr. Lenehan reminded the Council that the works had already been deemed to comprise an immaterial deviation from the grant of permission. The Council subsequently considered the matter to be of a trivial / minor nature and recommended that the enforcement file be closed. The complainants were then advised that the re-adjusted section of roadway did not constitute unauthorised development.

- For reasons relating to contradictory statements, misleading information and time delays in raising concerns about the development of the access road, it is considered that the subject referral is of a vexatious nature.
- Section 5 of the Planning and Development Act, 2000, as amended, is not a mechanism by which to interpret a planning permission. Any such interpretation is a question of law which can only be determined by the Courts.
- Being unable to use Section 5 of the Act to challenge the decision by the Planning Authority that the adjustment of the section of private access road in question accorded with PA Ref. No. 16/21, the referrers have sought to challenge that decision by suggesting that the works constitute an act of development separate from the grant of permission.

In terms of the question posed, firstly, with respect to Class 9 of Schedule 2 of the Regulations, no gateway has been constructed. Secondly, in the context of developing new structures, Class 13 of the Regulations relates only to the construction of private footpaths and pavements, not roads.

In correspondence addressed to the referrers dated 29th January, 2019, the Planning Authority made no reference to the roadway in question having been constructed as exempted development but rather stated that it accorded with PA Ref. No. 16/21. Therefore, the question posed in the referral is irrelevant as the subject works were undertaken in accordance with PA Ref. No. 16/21.

- In the correspondence dated 29th January, 2019, the Planning Authority details its reasons why the new section of access road is not considered to represent a traffic hazard. These reasons were based on its review of the

roadway as constructed. It is further stated that the section of road in question does not impact on sightlines at the junction with the public road, does not interfere with drainage on the public road, and does not create a traffic or safety hazard for users of the public road.

5.4. Further Responses

5.4.1. *Response of the Planning Authority to Circulation of the Owner / Occupier's Submission:*

None.

5.4.2. *Response of the Referrers to Circulation of the Owner / Occupier's Submission:*

- The suggestion that the subject referral is of a 'vexatious' nature is rejected as complaints with regard to the construction of the roadway were made without delay.
- The claim that the subject referral is '*designed to frustrate Janice Murphy and Paul Lenehan [from] completing the development of their house*' is without foundation and should be disregarded. The referral was lodged in response to advice contained in correspondence received from the Planning Authority dated 29th January, 2019.
- In the interests of clarity, the referrers' rationale for not acceding to the request by Ms. Murphy & Mr. Lenehan as regards the right of way primarily stems from concerns relating to possible future development along the laneway. The principle concern remains that the area should not be 'overdeveloped' through the construction of too many inappropriately sited dwelling houses.

In support of the foregoing, the Board is referred to the accompanying documentation (including the proposed contract of transfer) appended to this submission. In particular, Schedule C of the transfer document seems to imply that all nine of Ms. Murphy's cousins, by virtue of being 'Registered Owners' would be able to exercise the same 'rights and privileges' as would be granted to Ms. Murphy. In effect, by signing the transfer document it appeared to the referrers that the same access rights would be granted to all nine cousins and

not just Ms. Murphy & Mr. Lenehan. On seeking legal advice, an opinion was obtained that this interpretation may be correct thereby potentially opening the way for 9 No. additional dwellings on the common landholding retained by Ms. Murphy's cousins.

- The referrers are willing to facilitate an easement of the right of way to Ms. Murphy & Mr. Lenehan provided it does not extend to any of the other landowners.
- The works required to construct the access road and entrance are substantial and should not be considered an 'immaterial deviation' from any previous grant of planning permission.
- There does not appear to be any engineer's report available as to the possible impact of the access road on safety and drainage considerations.
- In support of the position that the works do not constitute an 'immaterial deviation' from PA Ref. No. 16/21, it should be noted that the application site only comprises those lands in the immediate vicinity of the proposed dwelling house. The site of the development did not include the referrers' laneway or the existing agricultural roadway that was to be used to access the house. The fact that the location of the access road and entrance is c. 200m from the approved dwelling must add weight to the contention that the subject works do not amount to a 'immaterial deviation' from PA Ref. No. 16/21.

Furthermore, the entrance referred to in Condition No. 6 of PA Ref. No. 16/21 relates to the existing entrance from the referrers' laneway onto the public road. Accordingly, no aspect of Condition No. 6 (or any other condition attached to PA Ref. No. 16/21) can be construed as granting permission for the works subject of this referral.

- It is not the role of the Planning Authority to make a final legally-binding determination as to whether a deviation is material or not. Indeed, it is submitted that there must be considerable doubt as to whether the access road and entrance is consistent with PA Ref. No. 16/21. Therefore, the conflicting views concerning PA Ref. No. 16/21 should not be seen as an impediment to the Board making a decision on the issue i.e. whether the access road and entrance constitutes exempted development.

- The suggestion that the referral is flawed on the basis that it relates to *‘the construction of footpaths and pavements’* is rejected as it is clear that the works in question involve an entrance onto the referrers’ lane and a stretch of road within those lands owned by Ms. Murphy and her cousins. The subject matter is clearly defined.
- The reference to Classes 9 & 13 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, was included on the basis that these were the only instances found by the referrers in the schedule of exempted development that might include entrances and roads. Specifically, the term *‘gateway’* could include entrances, while *‘paving’* could include the paved surface of a road. There may be other classes that encompass entrances and roads.
- In the event the road and entrance were to fall into one or other of the classes of development set out in Schedule 2 of the Regulations, those works would not constitute exempted development if they would *‘endanger public safety by reason of traffic hazard or obstruction of road users’* by reference to Article 9(1)(iii) of the Regulations.
- If the works do fall into any of the classes set out in Schedule 2 of the Regulations then they do not constitute exempted development and require planning permission.
- It has not been claimed that the entrance and access road would pose a hazard for users of the public road. Instead, it has been submitted that the works would give rise to a hazard for users of the referrers’ laneway. Furthermore, there is no restriction in Article 9(1)(iii) to users of public roads. Therefore, it is clear that Article 9(1)(iii) applies to all roads, including the referrers’ laneway.

5.4.3. *Response of the Planning Authority to Circulation of the Referrers’ Submission:*

- The paved surface in question does not exceed 3m in width and, therefore, constitutes private paving as per Class 13 of Schedule 2 of the Planning and Development Regulations, 2001, as amended.

- The issue of '*endangering public safety by reason of traffic hazard or obstruction of road users*' is not relevant in this instance as the laneway in question is not a public road or right of way. If any other interpretation were to be taken in this respect, the Planning Authority would be required to regulate the development of every driveway / private access in order to avoid '*endangering public safety*'.
- Access to adjacent farmland is obtained via the existing laneway and it would be logical that access to any other development associated with the farm business would be via this laneway. Therefore, had the applicant / Planning Authority known of the legal obstruction to the use of the access laneway during its assessment of PA Ref. No. 16/21, the Planning Authority would have insisted that the existing public road entrance be used and the '*legal obstruction*' bypassed.
- It remains the position of the Planning Authority that the minor adjustment of the access lane (on lands in private ownership) will not endanger public safety by reason of traffic hazard or obstruction of road users and is an immaterial deviation from the grant of permission issued in respect of PA Ref. No. 16/21.

5.4.4. Response of the Owner / Occupier to Circulation of the Referrers' Submission:

- In the interests of clarity, it should be noted that the referrers' initial complaints with regard to the subject works were not addressed to the planning department of the Council. When the referrers did make their complaint known to the Planning Authority, the entirety of the road (as far as the permitted house) had been completed to base level.
- The referrers' willingness to facilitate Ms. Murphy & Mr. Lenehan with an easement / right of way has never been expressed to them.
- Ms. Murphy's family are the legal owners of the landholding & laneway and they are entitled to access their land. That entitlement over the existing road has been in place since before any application was made for a dwelling house.
- In the event of future planning applications being lodged by any of Ms. Murphy's family, the referrers statutory right to object to same would not be

affected by their providing an easement of right of way to Ms. Murphy & Mr. Lenehan. Indeed, it has been confirmed by the solicitor acting on behalf of Ms. Murphy & Mr. Lenehan that the right of way would only extend to allow them to access their own site.

- It is reiterated that the Planning Authority has already determined that the adjustment of the access arrangement constitutes an immaterial deviation to the grant of permission. It is a matter for the Courts to determine if the Planning Authority has erred in its decision or if the access is not an immaterial deviation.
- The Board will determine whether the referral is flawed or not.
- Contrary to the assertion by the referrers, the section of road in question does not represent a traffic hazard.
- Article 9 of the Regulations is only relevant in assessing whether the works are or are not exempted development. On the basis that the subject works accord with PA Ref. No. 16/21 the provisions of Article 9 are irrelevant.
- The accompanying appendix seeks to correct certain inaccuracies / errors contained in the referrers' earlier submission.

6.0 Statutory Provisions

6.1. Planning and Development Act, 2000

6.1.1. Section 2(1) of the Act defines "works" as follows:

"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.

6.1.2. Section 3(1) of the Planning and Development Act, 2000, as amended, states the following:

“Development” in this Act 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 use of any structures or other land.

- 6.1.3. Section 4(2) of the Act states that the ‘Minister’ may by Regulation provide for any class of development to be exempted development for the purposes of the Act.

6.2. Planning and Development Regulations, 2001

- 6.2.1. Article 6(1) of the Regulations states the following:

‘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) of the Regulations states as follows:

‘Development to which article 6 relates shall not be exempted development for the purposes of the Act –

(a) If the carrying out of such development would –

- i. contravene a condition attached to a permission under the Act, or be inconsistent with any use specified in a permission under the Act,*
- ii. consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width,*
- iii. endanger public safety by reason of traffic hazard or obstruction of road users . . .*

6.2.3. *Part 1 of Schedule 2: Exempted Development – General:*

Class 13:

Column 1: Description of Development	Column 2 Conditions and Limitations
The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving.	The width of any such private footpath or paving shall not exceed 3 metres.

6.3. **Roads Act, 1993:**

6.3.1. Section 2(1) of the Act defines the following:

“public road” means a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority

“road” includes-

- a) any street, lane, footpath, square, court, alley or passage,*
- b) any bridge, viaduct, underpass, subway, tunnel, overpass, overbridge, flyover, carriageway (whether single or multiple), pavement or footway,*
- c) any weighbridge or other facility for the weighing or inspection of vehicles, toll plaza or other facility for the collection of tolls, service area, emergency telephone, first aid post, culvert, arch, gully, railing, fence, wall, barrier, guardrail, margin, kerb, lay-by, hard shoulder, island, pedestrian refuge, median, central reserve, channelliser, roundabout, gantry, pole, ramp, bollard, pipe, wire, cable, sign, signal or lighting forming part of the road, and*
- d) any other structure or thing forming part of the road and-*

- i. *necessary for the safety, convenience or amenity of road users or for the construction, maintenance, operation or management of the road or for the protection of the environment, or*
- ii. *prescribed by the Minister.*

7.0 **Assessment**

7.1. **Is or is not development**

- 7.1.1. Section 3 of the Planning and Development Act, 2000, as amended, defines “*development*” as 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. In my opinion, the construction of the access road and entrances in question, which has involved the excavation of land and the laying of a gravel surface, has clearly involved an act of development having regard to Section 2 of the Act where “*works*” are defined as:

“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 to exterior of a structure.

- 7.1.2. Accordingly, having established that the construction of the access road and entrances constitutes development, the question arises as to whether or not these works constitute exempted development.

7.2. **Is or is not exempted development**

- 7.2.1. From a review of the available information, and having conducted a site inspection, I would advise the Board at the outset that both the Planning Authority and the site owners have placed a considerable emphasis on the assertion that the construction of the entrances and access road in question amounts to an ‘*immaterial deviation*’ from the terms and conditions of the grant of permission issued in respect of PA Ref. No. 16/21. In this regard, the details provided in response to the circulation of the referral documentation outline the apparent necessity for the new access

arrangement in order to overcome certain legal difficulties arising following the grant of permission for PA Ref. No. 16/21 as regards registering an entitlement to a right of way over a short stretch of the existing access laneway. It has been further asserted by the property owners that Section 5 of the Planning and Development Act, 2000, as amended, is not an appropriate mechanism by which to interpret a planning permission as this would involve a question of law which can only be determined by the Courts. Similarly, the case has been put forward that it is a matter for the Courts to decide if the Planning Authority has erred in its decision or if the works in question do not amount to an immaterial deviation of the permission granted under PA Ref. No. 16/21.

7.2.2. With regard to the foregoing, whilst I would acknowledge the need to avoid transgressing into matters of law which are clearly the responsibility of the Courts, in assessing the subject matter of this referral, I would consider it prudent to review the merits of the argument posed by the site owners that the works in question amount to an immaterial deviation of PA Ref. No. 16/21. In this respect, I would advise the Board that it is apparent from a review of the plans and particulars approved under PA Ref. No. 16/21, with specific reference to the site location map and site layout plan received by the Planning Authority on 19th January, 2016, that the extent of the site area as outlined in red was limited to the immediate surrounds of the proposed dwelling house and did not extend to include either the existing access laneway or any part of the adjacent landholding, including that area over which the subject access road has been constructed. Moreover, it is clear from the submitted particulars that the intent was to access the dwelling house from the public road by way of the existing farm access laneway and that the Planning Authority approved the development on that basis by reference to Condition No. 1 of the grant of permission. Furthermore, although the proposed development site formed part of a larger overall landholding, those lands were retained in the shared ownership of Ms. Murphy and her cousins and, therefore, I would have serious reservations as regards case put forward that the subject works could amount to an immaterial deviation from the terms and conditions of PA Ref. No. 16/21 given the potential impact on third party considerations.

7.2.3. Having considered the available information, and in light of the foregoing observations, in addition to the wider implications of the subject works for third

parties, such as existing residents and road users, it is my opinion that the construction of the new access roadway and its associated entrances cannot reasonably be deemed to involve an 'immaterial deviation' from PA Ref. No. 16/21. In effect, the works in question must be considered as stand-alone from the approved development.

- 7.2.4. Having established that the subject works are distinct from the development permitted under PA Ref. No. 16/21, it is necessary to revert to the question as to whether or not they can be considered to be exempted development.
- 7.2.5. Article 6(1) of the Planning and Development Regulations, 2001, as amended, states that 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. In this respect I would draw the Board's attention in the first instance to Class 6(a) of Part 1 of Schedule 2 of the Regulations which states that *'the construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house'*, subject to the condition and limitation that the level of the ground shall not be altered by more than one metre above or below the level of the adjoining ground, would constitute exempted development. Clearly, the subject lands cannot be considered as forming part of the curtilage of the dwelling house permitted under PA Ref. No. 16/21 due to their physical separation from the approved development. Accordingly, the subject roadway cannot avail of the exemption offered by Class 6(a) (or any other class relevant to works within the curtilage of a dwelling house).
- 7.2.6. Within the classification of 'sundry works', Class 13 of Part 1 of Schedule 2 of the Regulations provides for *'the repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving'*, subject to the limitation that the width of any such private footpath or paving shall not exceed 3 metres. There is no evidence to indicate that there was an existing track / path / road at the location in question prior to the subject works having been carried out and it is apparent from the available information (including aerial photography) that the existing roadway is of a relatively recent construction. Therefore, it is my opinion that the repair or improvement of any private street, road or way does not apply in this case.

- 7.2.7. Whilst Class 13 also allows for the construction of a private footpath or paving subject to the limitation that it not exceed 3m in width, it is evident from the submitted details that the subject roadway was purposively developed to provide for vehicular access as further evidenced by the observation of tyre tread marks during the course of my site inspection. A footpath is commonly defined as a path for use by pedestrians and thus the access road cannot be considered to constitute a private footpath. Similarly, I am inclined to suggest that the context within which the term 'paving' is used in Class 13 is intended to be interpreted as referring to a paved surface or pavement for the use of pedestrians and not as a track / path for vehicular use. In this respect, it is also notable that Column 1 of Class 13 would seem to draw a clear distinction between a private road and a private footpath / paving. Therefore, it is my opinion that the subject works cannot be held to constitute exempted development through recourse to Class 13 of Part 1 of Schedule 2.
- 7.2.8. At this point, I would advise the Board that there has been some degree of inconsistency in the application / interpretation of Class 13 as regards the determination of Section 5 referrals. In some instances, it would appear that a reliance has been placed on Class 13 as providing for the construction of a private road of up to 3m in width as exempted development whereas in other cases (e.g. ABP Ref. No. PL16.RL2207) it has been held that the construction of a private road does not come within the scope of Class 13.
- 7.2.9. On balance, I am inclined to conclude that Class 13 does not allow for the construction of a private road for use by vehicular traffic as exempted development and thus the subject works constitute development which is not exempted development.
- 7.2.10. In the event that the Board does not agree with my interpretation of Class 13 and instead considers the roadway to accord with the description of development provided in Column 1 of that class, cognisance must be taken of the applicable condition / limitation set out in Column 2 i.e. the width of any such paving shall not exceed 3 metres.
- 7.2.11. Given the construction of the roadway and the use of loose gravel / hardcore as a surface treatment, in addition to the evidence of tyre tracks beyond the 'paved' surface of the carriageway, it is difficult to obtain a precise measurement of the road

width. However, it is apparent that whilst much of the surfaced roadway is moderately less than 3m in width, the northernmost section of the construction (in the vicinity of its junction with the original / existing laneway) exceeds 3m and thus fails to satisfy the requirements of Column 2 of Class 13 of Part 1 of Schedule 2.

- 7.2.12. By way of further comment, it should be noted that the purpose of the subject roadway is to provide vehicular access to the dwelling house permitted under PA Ref. No. 16/21 and that there are no other provisions within either the Act or the Regulations by which it could be considered to constitute exempted development (e.g. the exemption provided by Section 4(ia) of the Act relates specifically to the construction of a road that serves forests and woodlands).

7.3. Restrictions on exempted development

- 7.3.1. In the interests of completeness, and in the event that the Board does not concur with my assessment of the subject referral as regards non-compliance with the requirements of Class 13, I propose to review the implications, if any, of Article 9(1) of the Regulations for the development in question.
- 7.3.2. Article 9(1)(a)(iii) of the Regulations serves to 'de-exempt' any development to which Article 6 relates where it would endanger public safety by reason of traffic hazard or obstruction of road users. In this respect, whilst I would accept that the newly constructed roadway is only directly accessible via a private laneway (not a public road or a public right of way), both sections of carriageway are unsecured and open to unobstructed passage. More particularly, the original laneway, whilst retained in shared ownership by a number of private individuals, is utilised by local residents, landowners and visiting parties as a means of access to their respective properties. Therefore, I would suggest that there is merit in considering the implications of the new construction for wider 'public' safety and obstruction of existing road users. In this regard, the substandard nature of the sightlines available to the west at the northernmost junction of the new roadway with the original laneway are of particular concern and thus it could be held that the works in question cannot avail of the exemption offered by Class 13 due to the endangerment of public safety by reason of traffic hazard and the obstruction of road users.

7.3.3. No other aspects of Article 9 of the Regulations are of relevance to the determination of the subject referral.

7.4. **Appropriate Assessment:**

7.4.1. Having regard to the nature and scale of the development under consideration, the nature of the receiving environment, and the proximity of the lands in question to the nearest European site, it is my opinion that no appropriate assessment issues arise and that the development would not be likely to have a significant effect, either individually or in combination with other plans or projects, on any Natura 2000 site.

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 the construction of an access road and associated entrances at Rathmoylan, Dunmore East, Co. Waterford, is or is not development or is or is not exempted development:

AND WHEREAS Ciaran & Jane Bailey requested a declaration on this question from Waterford City & County Council and no declaration was issued by the planning authority:

AND WHEREAS Ciaran & Jane Bailey referred the question for decision to An Bord Pleanála on the 27th day of March, 2019:

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

(a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,

(b) Articles 6(1) and 9(1) of the Planning and Development Regulations, 2001, as amended,

(c) Classes 6 and 13 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended; and

(d) the planning history of the area.

AND WHEREAS An Bord Pleanála has concluded that:

- a) the construction of the access road and associated entrances constitutes development which comes within the scope of section 3 (1) of the Planning and Development Act, 2000,
- b) the construction of the access road does not come within the scope of the exemption provided at Class 6 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, not being development within the curtilage of the dwelling house; and
- c) the construction of the access road does not come within the scope of the exemption provided at Class 13 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, as it does not come within the boundary of any private street, road or way and does not comprise a footpath by reason of its configuration and construction.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(b) of the 2000 Act, hereby decides that the construction of an access road and associated entrances at Rathmoylan, Dunmore East, Co. Waterford, is development and is not exempted development.

Robert Speer
Planning Inspector

8th November, 2019

