



An  
Bord  
Pleanála

## Inspector's Report ABP-305540-19

### Question

Whether the installation of a box culvert/animal underpass for the purposes of moving animals, installation of animal holding tank and all associated site works in compliance with Section 12 Notice is or is not development and is or is not exempted development.

### Location

Beagh, (Crosslare), Carrickmacross, County Monaghan.

### Declaration

Planning Authority

Monaghan County Council.

Planning Authority Reg. Ref.

EX1922.

Applicant for Declaration

Donal Gerard McDaid.

Planning Authority Decision

Is Development Is Not Exempted Development.

### Referral

Referred by

Donal Gerard McDaid.

Owner/ Occupier

As above.

**Observer(s)**

Monaghan County Council.

**Date of Site Inspection**

7<sup>th</sup> day of May, 2020.

**Inspector**

Patricia-Marie Young.

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## 1.0 Introduction

- 1.1. This is a referral made by Ger Fahy, Consultant, on behalf of a Mr. Donal Gerard McDaid, under Section 5(3) of the Planning and Development Act, 2000, as amended, which is made on foot of a review of a declaration on a similar question to that set out under Section 3 of this report below which was issued by Monaghan County Council on the 5<sup>th</sup> day of September, 2019 (Note: P.A. Reg. Ref. No. EX 19/22). In this regard, the Planning Authority concluded that these works were 'not exempted development', but the referring party is not satisfied with the outcome of this determination and thus has referred this matter alongside an amended question to that originally posed to the Planning Authority under P.A. Reg. Ref. No. EX 19/22 to the Board for its determination.
- 1.2. The referrer in their submission has also raised a number of procedural concerns in relation to the Planning Authority's handling of this determination and the development to which the question relates in their submission. For clarity purposes I note that the Board does not have an ombudsman type role on such matters and these matters are outside of its jurisdiction to decide upon.
- 1.3. I also note to the Board that there is a concurrent appeal with the Board for its determination, i.e. ABP-306374-20. This appeal case essentially seeks retention permission for the construction of the subject underpass which is stated to be for the movement of cattle, effluent holding tank and ancillary site works together with planning permission for the completion of these works on the subject appeal site.

## 2.0 Site Location and Description

- 2.1. The appeal site relates to a 0.023ha parcel of land that forms part of a larger agricultural landholding, which is stated to comprise of c200 acres of land, that is located in the Townland of Beagh, c0.3km to the south east of Lough Nagarnaman, c7km to the north of the centre of Carrickmacross, c2.3km to the west of the N2, both as the bird would fly, in the rolling drumlin landscape of rural County Monaghan. In addition to this the subject site lies immediately to the west of a number of farm buildings and associated spaces that are traversed by local road LT81012. The surrounding area is open countryside characterised by pastureland with a number of farmsteads and a peppering of one-off dwellings.

### **3.0 The Question**

3.1. The question before the Board in this case, is whether or not the following comprises of development and is exempted development:

- Installation of an animal underpass; and,
- Installation of an animal effluent holding tank.

### **4.0 Planning Authority Declaration**

#### **4.1. Declaration– EX 19/22**

On the 5<sup>th</sup> day of September, 2019, the Planning Authority decided that the installation of a cattle underpass, animal effluent holding tank culvert and its associated works is development and is not exempted development for the following stated reasons:

- Schedule 2, Part 1, Class 41(c) of the Planning and Development Regulations, 2001, as amended;
- Schedule 2, Part 3, Class 9 of the Planning and Development Regulations, 2001, as amended; and
- Section 4(1), of the Planning and Development Regulations, as amended.

#### **4.2. Planning Authority Reports**

##### **4.2.1. Planning Reports**

The Planning Officer's report is dated the 4<sup>th</sup> day of September, 2019; and, it includes the following considerations:

- Reference is made to a similar application for an exemption certificate under P.A. Reg. Ref. No. 19/14 which was for a culvert and all associated site works. In relation to this, it is noted that a decision was issued to the referrer on the 26<sup>th</sup> day of July, 2019, advising him that the development was not considered to be 'exempted development' under Schedule 2, Part 3, Class 3 of the Planning and Development Regulations, 2001, as amended. It is noted that this exemption development application contains amendments including the inclusion of a slurry

holding tank to the south of the underpass; minor alterations to the surface and changed grounds for contesting that the structure is exempted development.

- It is contended that the background of this application arises from a visit by the Planning Authority to the subject site where it was noted that a structure was being built under the road and it was advised that an underpass was being constructed and against their advice to stop works, restore the road and being informed that the works observed being carried out required planning permission these works continued. This therefore resulted in enforcement proceedings being commenced by them.
- The subject road has remained closed as a result of the subject works.
- An overview of the enforcement action carried out in relation to the unauthorised development is provided including the Circuit and High Court proceedings as well as outcomes. In relation to the High Court, it is noted that Justice Meehan determined by that the development could not be construed as being a 'culvert'; *"that it was not exempted development and so planning permission was required"*; and, affirmed the decision of the Circuit Court to remove the underpass.
- Under this application the referrer is again seeking that the development is exempted development.
- In relation to the matter of ground works constitute compliance with a notice under Section 12 of the Local Government (Water Pollution) Act, 1977, as amended by Section 9 of the Local Government Act (Water Pollution) Act, 1990, dated the 11<sup>th</sup> day of August, 2008, it is noted that a Section 12 notice was issued to Donal McDaid Senior, the then owner of the farm on the 11<sup>th</sup> day of August, 2008, during which time it was noted that: 1) silage effluent was discharging from Mr. McDaid's farmland to roadside drains; 2) a large silage pit was constructed on gravel/grass base with no containment; and, 3) a drain and stream adjacent/near to McDaid's farm were contaminated. It is clear that this notice was issued in respect of water pollution with no reference made to the public road or the construction of an underpass. It also required these works to be carried out in 4 months after it was issued. Works commenced on the structure in or around December, 2017, almost 9 and a half years after the issue of the notice and it is unreasonable to link the construction of the underpass with the concerns raised in it.

- Planning permission was obtained for the now constructed covered slatted shed and milking parlour immediately adjacent to the cattle underpass through P.A. Reg. Ref. No. 07/1311. The construction of that shed and parlour would have offered the applicant an appropriate opportunity to carry out related works in the notice should they have been inclined to do so.
- The inclusion of a slurry tank within the development was never previously indicated by the applicant at any stage.
- The Planning Authority is of the opinion that the underpass as constructed and the proposed slurry tank are not exempted development under the provisions of Schedule 2, Part 1, Class 41 (c) of the Planning and Development Regulations, 2001, as amended.
- The nature and character of development to which Schedule 2, Part 3, Class 9 of the Planning and Development Regulations, 2001, as amended, relates is a type such as a barn, shed, glass house and the like. It is considered that an underpass is clearly not a type or character of structure identified under this class and consequently cannot be considered as an 'other structure'.
- Column 2, Point No. 3, of Schedule 2, Part 3, Class 9 limits such exemptions to development which are located more than 10 metres from a public road and Article 9(a)(v) of the Planning and Development Regulations, 2001, as amended de-exempts works being carried out under a public road.
- Reference is made to Section 11(5) of the Roads Act, 1993, which stated that a certificate of a road authority, that a road is a public road, shall be prima facie evidence thereof. A certificate has been issued for the LT81012.
- Section 4(1) of the Planning and Development Act, 2000, as amended, states that development consisting of the use of land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used shall be exempted development. This section of the Act refers to use and not to works. As such the development cannot be considered to be exempted development under these provisions.
- This report concludes that:

- It is untenable to suggest the works carried out are to satisfy the requirements of a Section 12;
- The underpass is constructed under and immediately adjacent to a public road as certified under Section 11(5) of the Roads Act, 1993;
- The development is considered to be 'works' and not 'use';
- The development is not considered to be exempted development under the provisions of Schedule 2, Part 1, Class 41 (c) of the Planning and Development Regulations, 2001, as amended; Schedule 2, Part 3, Class 9 of the Planning and Development Regulations, 2001, as amended; and, Section 4(1) of the Planning and Development Act, as amended.

## 5.0 Planning History

### 5.1. Site and Farmstead Adjoining to the West

**P.A. Reg. Ref. No. 94/610:** Retention permission **granted** for roofed feeding yard and slurry tank.

**P.A. Reg. Ref. No. 94/609:** Planning permission **granted** for a slatted house, calving box's, and calf house.

**P.A. Reg. Ref. No. 02/561:** Retention permission **granted** for storage facility, cattle shed, slurry tank, feeder area, shed, cubicle house with straw bed and feeding passage with ancillary slurry storage tank together with all ancillary site works.

**P.A. Reg. Ref. No. 03/292:** Planning permission **granted** for changes and revisions of plans of a cubicle house, feeding passage and ancillary tank originally permitted under P.A. Reg. Ref. No. 02/561.

**P.A. Reg. Ref. No. 07/1311:** Planning permission was **granted** for a development consisting of the demolition of an existing silage pit; construction of a covered slatted shed and milking parlour together with all associated site works. In relation to this application the Planning Authority notes that a significant portion of the agricultural building was built on the site was outside of the time period and they did not conform to the drawings submitted with the application. It is further noted at the present time there is on-going enforcement proceedings in relation to the same.



## 5.2. Relevant Section 5 Declarations

**P.A. Reg. Ref. No. Ex 19/14:** An application was made under Section 5 for an exemption certificate for a culvert and all associated site works and that following due consideration it was determined that the development was for an underpass for the movement of cattle under the public road from one side of the applicants farm to the another. That is the development was not a culvert as stated. The Planning Authority determined that the development therefore did not fall within the provisions of Schedule 2, Part 3, Class 3 of the Planning and Development Regulations, 2001, as amended and was considered not to be exempted development. A declaration to this effect was issued to the appellant on the 26th day of July, 2019.

**P.A. Reg. Ref. No. Ex 19/22:** An application was made under Section 5 in respect of an *“installation of a box culvert/animal underpass for the purposes of moving animals, installation of animal effluent holding tank and all associated works in compliance with Section 12 Notice issued by Monaghan County Council”*. The Planning Authority determined that the development was not exempted development.

## 5.3. Enforcement

5.3.1. Of relevance to this case is a Notice that was issued by Monaghan County Council on the 11<sup>th</sup> day of August, 2008 (P.A. Reg. Ref. No. E97/08). This notice indicates that it was issued under Section 12 of the Local Government (Water Pollution) Act, 1977, as amended by Section 9 of the Local Government (Water Pollution) (Amendment) Act, 1990. It required a stated Mr. Donal McDaid of Beagh Td, Donaghmoyne, County Monaghan, to take the following actions:

1. Upon receipt of this notice, immediately cease the discharge of silage effluent and soiled waters his farmyard to adjacent field and watercourse as well as to clean out any ditch, drain or watercourse that has received polluting matter;
2. Within a period of 4mths to cease making silage on a gravel/grass base and prior to further silage making on site, upgrade the silage effluent collection facilities and provide effluent collection channels and tank to the Department of Agriculture and Food Standards; and,
3. Within the same stated period as 2 above divert all silage effluent and slurry to leak proof storage facilities and ensure all slurries and effluent are land spread

in accordance with European Communities (Good Agricultural Practice for Protection of Waters) Regulations 2006, SI No. 378 of 2006.

- 5.3.2. The documentation with this case includes a Notice served under the Roads Act, 1993, Section 76, Subsection 6, for lands at Beagh adjacent to a public road to carry out all works necessary. With these works described as: *“(a) to prevent water, soil or other material from flowing or falling onto a public road from the aforementioned land within 14 days from the Service of this Notice”*.

## **6.0 Policy Context**

### **6.1. Local Planning Policy Provisions**

- 6.1.1. The appeal site is not zoned under the Monaghan County Development Plan, 2019 to 2015, and there are no local objectives, road proposals and/or other designations affecting it.

### **6.2. Natural Heritage Designations**

- 6.2.1. There are no European sites within a 15km radius of the appeal site.

## **7.0 The Referral**

### **7.1. Referrer’s Case**

- 7.1.1. This Section 5 referral has been made by an agent on behalf of Mr. Donal Gerard McDaid, Beagh, Donaghmoyne, County Monaghan, the owner of the subject lands. The referrer’s case can be summarised as follows:

- Reference is made to a Section 5 declaration which is purported to be based on the same question for which Monaghan County Council concluded upon under P.A. Reg. Ref. No. EX19/22.
- The cattle graze the surrounding fields and travel the local road twice daily.
- The local road is referred to as having the following road number LT81011 which is indicated as running through the referrer’s farmyard with slatted sheds on either side with this road having a steep gradient at this point.

- An overview of the planning history of the farmyard from c2002 is provided.
- An overview of legislative background is given.
- Reference is made to SI No. 605/2017 – European Union (Good Agricultural Practice for Protection Waters) Regulations, 2017, in respect to the requirements of farmers on the matter of protection of waters. Particular reference is made to farmyard management, collection and holding of certain substances.
- The referrers family have farmed these lands since the 1800s and the roadway traversing their farmyard is a public right of way and not a public road.
- The works carried out are in compliance with a Notice under Section 12 of the Local Government Water Pollution Act, 1977, as amended by Section 9 of the Local Government (Water Pollution) Act, 1990, and is therefore exempted development.
- These works also constitute exempted development under Class 9 of the Planning and Development Regulations, 2001, as amended.
- The works also constitute exempted development under Section 4(1) of the Planning and Development Act, 2000, as amended.
- Over the years there have been a number of complaints and issues arising from the animals traversing the road and animal manure on the road.
- In order to comply with the subject Section 12 notice the culvert/underpass was constructed to create a new route for cows to traverse from the grazing land to the new milking parlour avoiding the need to use the subject road.
- There are considerable differences in ground levels within the site.
- A number of reasons are cited as to why there was substantial delays in carrying out the works permitted under P.A. Reg. Ref. No. 07/1311.
- The works carried out are exempted development under Schedule 2, Part 1 of the 'Exempted Development – General' 'Miscellaneous' category, Class 41(c).
- The works constitute exempted development under Class 9 Schedule 2 – Part 3 of the Planning and Development Regulations, 2001, as amended.
- The referrers legal opinion confirms that this road is not a public road and therefore the restrictions of Condition No. 3 of Class 9 Schedule 2 – Part 3 of the Planning

and Development Regulations, 2001, as amended, does not apply. This provision allows for other structures.

- At this time there is no judgement on whether or not this is a public road.
- It is requested that the Board seek a copy of the notice published pursuant to Section 11(1) of the Roads Act 1993 and the resolution, minutes of the Council Meeting of the elected members which declared the said road a public road pursuant to Section 11(2) of the Roads Act, 1993. If these procedures have not been followed correctly then the certificate issued by the Council dated the 14<sup>th</sup> day of August, 2019, may be subject to a judicial review.
- A critical determinant in whether this structure is or is not exempted development is whether or not this roadway is a public road or is merely a roadway which is a public right of way.
- The works constitute exempted development under Section 4(1)(a) of the Planning and Development Act, as amended. On this point it is argued that the culvert/underpass shall be used for the purposes of agriculture.
- The Planning Authority's decision is prejudiced and relies heavily upon a previous Section 5 as well as the Section 160 action taken.
- The question of whether or not this underpass is or is not exempted development is not a matter for the courts.
- The installation of a box culvert/animal underpass for the purposes of moving animals, installation of animal effluent holding tank and all associated works is exempted development.
- Additional documents in support of the referrer's submission are attached and noted.

## **7.2. Planning Authority Response**

7.2.1. The Planning Authority's response can be summarised as follows:

- A significant written commentary has been provided with this referral and it is noted also that significant parts of it were not provided to the Planning Authority with the request for a declaration for which P.A. Reg. Ref. EX/19 relates.

- Significant parts of the commentary provided by the referrer in their submission to the Board is not considered relevant and are immaterial to the determination of the question posed. Therefore, the Planning Authority wish to restrict their comments to the main matters raised.
- The Planning Authority has already considered the development under the exemption application sought under EX19/14 and as such does not intend to comment on them further. In respect of the grounds of exemption submitted under this application
- At all times, the Planning Authority have acted professionally, transparently, impartially, and objectively in relation to this matter. To say otherwise is incorrect and disingenuous.
- Accounts are given on conversations between employees of Monaghan County Council and the referrer where it is contended by them that verbal consent was given for the development to proceed without planning permission. This is not the case. This is a new assertion that the referrer is now making. In any event any verbal exchanges between employees of the Council and members of the public cannot confer a benefit of planning permission or render a development exempted.
- The grounds of this referral are indicated as works that constitute works in compliance with a Notice under Section 12 of the Local Government Water Pollution Act, 1977, as amended, by Section 9 of the Local Government (Water Pollution) Act, 1990. This is not accepted to be the case.
- The referrers agent references a notice issued to the referrer on the 11<sup>th</sup> day of January, 2008, under Section 76 of the Roads Act, 1993, "*requiring him to 'prevent water, soil, or other material from flowing onto a public road from the aforementioned land within 14 days'*". The referrer contends that these works relate to this notice and an attempt to link the same is considered to be unsubstantiated and speculative. The Planning Authority have employed powers available to it under the Roads Act to address matters relating to the public road. In addition, matters relating to water pollution were addressed completely independently under the Section 12 Notice which was issued under the Water Pollution Act.
- Reference made to the notice issued under Section 76 of the Roads Act is a tacit acceptance that the road traversing the referrers farm is a public road.

- Reference is made to Schedule 2, Part 3, Class 9 of the Planning and Development Regulations, 2001, as amended, in particular Column 2 which sets out the conditions and limitations of agricultural development stating that: “*no such structure shall be used for any purpose other than the purpose of agriculture or forestry, but excluding the housing of animals or the storing of effluent*”. On this point it is noted that the submitted drawings clearly annotate the inclusion of a proposed 40N concrete slurry holding tank with slatted cover and an animal effluent holding tank in the description of development for the question posed. This excludes the development from being exempted development under Class 9 and this is irrespective of whether the LT81012 road is public or not.
- In relation to the submissions made for two planning applications that were invalidated it is indicated that these did not meet the statutory requirements with the first of these applications submitted in 2018 not containing any effluent storage facility and the second including in the description a controlled sewage system yet containing no drawings for the same.
- A third application was submitted on the 14<sup>th</sup> day of October, 2019; and, was withdrawn by the applicant the next day. The development contained in that application was the same as that which forms the basis of this referral to the Board.
- A fourth application was submitted for the retention and completion of underpass for the movement of livestock, including the installation of an effluent holding tank and ancillary site works underneath the LT81012 road. This is subject to a concurrent appeal with the Board.
- The Planning Authority remains of the view that the development is not exempted development for the reasons outlined in this response and alongside the reasons outlined in their Planning Officer’s report dated the 4<sup>th</sup> day of September, 2019.

## 8.0 Statutory Provisions

### 8.1. Planning and Development Act, 2000, (as amended).

- Section 3(1) of the Act states as follows: “*Development means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land*”.

- Section 2 of the Act defines works as: *“includes any act or operation of construction, excavation, demolition, extension, alteration, repair, renewal”*. Structure is defined as *“any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined and where the context so admits, includes the land on, in or under which the structure is situate”*.
- Section 2 of the Act defines structure as meaning any building, structure, excavation or other thing constructed or made on, in or under any land, or any part of a structure so defined and where the context so admits includes the land on, in or under which the structure is situate.
- Section 2(1) of the act defines, agriculture as including horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and “agricultural” shall be construed accordingly;
- Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act. Section 4 (2) provides for the making of Regulations. The main Regulations are the Planning and Development Regulations, 2001. Section 4(1) (a) states: *“development consisting of the use of any land for the purpose of agriculture and development consisting of the use for the purpose of any building occupied together with land so used”*.
- 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.

## 8.2. Planning and Development Regulations, 2001, (as amended).

- Article 6 of the Regulations.
- Article 6.3 states that subject to Article 9, in areas other than a city or a town or an area specified in Section 19(1)(b) of the Act or the excluded areas as defined in Section 9 of the Local Government (Reorganisation) Act, 1985, development of a class specified in Column 1 of Part 3 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 3 opposite the mention of that class in the said Column 2.

- Part 1, Schedule 2, Class 9 of the Regulations states:

*“(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 or traffic hazard or obstruction of road users”*

- Class 9 - Works consisting of the provision of any store, barn, shed, glass house or other structure not being of a type specified in Class 6, 7 or 8 of this Schedule and having a gross floor area not exceeding 300 square metres. The conditions and limitations in respect of Class 9 are as follows:

1. No such structure shall be used for any purpose other than the purpose of agriculture or forestry but excluding the housing of animals or the storing of effluent.
2. The gross floor area of such elements together with any other structures situated within the same farmyard complex or complex of such structures within 100 metres of that complex shall not exceed 900 square metres gross floor area in aggregate.
3. No such structure shall be situated within 10 metres of a public road.
4. No such structure within 100 metres of any public road shall exceed 8 metres in height.
5. No such structure shall be situated within 100 metres of any house (other than the house of the person providing the structure) or other residential building or school, hospital, church or building used for public assembly, save with the consent in writing of the owner and as may be appropriate the occupier or person in charge thereof.
6. No unpainted metal sheeting shall be used for roofing or on the external finish of the structure.

- Schedule 2 Part 3 Exempted Development – Rural - Classes 1-17.



## 9.0 Precedent

### 9.1. Board Referral Cases

- **ABP - 304569 - 19**

Question as to whether the carrying out of drainage works, namely field drainage for agriculture and the laying of a culvert as part of such drainage works, and the upgrading of internal access by laying of hardcore to facilitate access to uplands, including agricultural lands and forestry at Ballyoonan, Omeath, is development and is not exempted development.

- **ABP Ref. No. RL2339:**

Question as to whether the construction of a bridge in replacement of an existing bridge/culvert at Gortagass, Kenmare, County Kerry, is development and is not exempted development.

- **ABP Ref. No. RL2587**

Question has arisen as to whether: (a) the excavation of lands up to a depth of over five metres to accommodate drainage works, (b) removal of excavated material from the lands and delivery of that material to another property some distance away and (c) excavation works which reduce the extent of the adjoining lands and which make access to those adjoining lands no longer possible at Scariff, Middleton, County Cork is development and is not exempted development.

## 10.0 Assessment

### 10.1. Is or is not development

10.1.1. The principle works are referred to the Board:

- Installation of a box culvert/animal underpass for the purposes of moving animals;
- Installation of animal effluent holding tank; and,
- All associated site works.

10.1.2. I am cognisant that Section 3(1) 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 addition, the term ‘works’ is defined under Section 2(1) of the said Act as *“any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal”*.

10.1.3. Having regard to both definitions, I would conclude that the acts referred to under Section 10.1.1 above comprise of ‘works’ within the meaning of Section 2(1) of the said Act. Thus, it is therefore ‘development’ within the meaning of Section 3 of the said Act, as a consequence of the works already undertaken and proposed to be undertaken to completion at the subject site.

10.1.4. I note to the Board that this finding is not contested by either the referrer or by the Planning Authority in their response received by the Board. There are no observers to this case and I consider that there are no further planning considerations in terms of concluding that the ‘works’ consist of and are development as defined under the Section 3(1) of the Planning and Development Act, 2000, as amended. As a result, the remaining two questions which need to be determined are:

- Whether the installation of a box culvert/animal underpass for the purposes of moving animals and its associated works is ‘Exempted Development’.
- Whether the construction of animal effluent holding tank and its associated works is ‘Exempted Development’.

10.1.5. I therefore propose to deal with these particular questions in turn in my assessment below.

## 10.2. **Is or is not exempted development**

10.2.1. I am cognisant that Section 4(1) of the Planning and Development Act, 2000, as amended, sets out the provisions in relation to exempted development and is separate to and has primacy over the exempted development provisions of the Regulations.

10.2.2. I further note that there are no applicable specific exemptions under the said Act for the development the subject matter of the Question posed to the Board in this referral.

Therefore, I propose to consider this matter under the relevant provisions of the Planning and Development Regulations, 2001, (as amended).

### 10.3. **The installation of a box culvert/animal underpass for the purposes of moving animals.**

10.3.1. In relation to whether the installation of a box/culvert animal underpass for the purposes of moving animals together with its associated works is or is not exempted development I note the following:

- The subject lands at the time of site inspection were fenced off from the road to one side (east) and from a farmyard to the other side (west) with its central area containing a self-seeded surface of native grass and the like over hard core with indications of work having been undertaken below it.
- The indications of work included but are not limited to the presence of a large mound of excavated material adjoining the southernmost boundary and indications of formed concrete structures adjoining as well as in the western portion of the modest in area site.
- Approaching the site in a westerly direction along the subject roadway access to it is blocked by the said fencing and there are traffic cones present. Should one journey in an easterly direction towards the site area from the local road that is situated in close proximity to the west (Note: c118m) one encounters the said fencing and there is signage indicating that the road is closed within the area of the subject site itself.
- Thus, the central area which the site is comprised of what appears at ground level the former route of a local road which at this location had an east to west orientation providing connection to a local road that lies c118m to the west of it for a number of dwellings and parcels of farmland. Journeying in an easterly from the site direction one eventually loops back to the local road to the south east (c1.8km). Along this road there are a number of houses, parcels of agricultural land and the presence of farmsteads. According to the information the subject roadway has the following road identifier number: LT81012.
- The land on the northernmost and southernmost portion of this modest in area site, i.e. excluding the former road and its associated spaces such as roadside verges

and the like appears to form part of the Referrers farmyard complex which is located in the Townland of 'Beagh'.

- It would appear from available historical maps that over time this farmyard developed alongside the roadside boundary and extended in a northern and southern direction away from the road on what was agricultural land.
- At the time of inspection, the farmyard was in use for agricultural purposes with the consolidation of buildings on the southern side of the LT81012 including a dwelling house purported to belong to the referrer's family. This dwelling house is located in excess of 100m from the appeal site. There is evidence also of a 2-storey residential building that is located within the complex of buildings on the southern side of the farmyard, but this is in a derelict state for what appears to be some considerable amount of time.
- The c118m stretch of the subject road that extends from the western side of the site through the referrer's farmyard complex appears to form the main circulation space between their agricultural buildings. There are no physical boundaries along what would have been the roadside edge and the ground levels slope considerably from the site to the where the subject road adjoins the other local road to the west. In places there are rock outcrops evident, there is no discernible road surface presence and it is extremely uneven, there are large quantities of various detritus and manure associated with the agricultural use which appears to relate to the day to day use of the farmyard, the surface is extremely poor and there is no evidence to suggest that local traffic has in recent times been able to access properties and land to the east of the site through it for these reasons and the array of fencing present.
- Access was made available to underpass from a building adjoining the northern portion of the site. This structure internally at this point is a large slatted structure. What is visible of the structure does not appear to correlate with the design details and specifications provided with the box culvert/animal underpass structure included with this case. The Board could, if it deemed it necessary, that these details could be obtained by way of a Section 132 notification.
- There is no substance evidence provided, visible during site inspection and/or publicly available to suggest that the location of the box culvert itself is positioned

in a location determined by any pre-existing drain, stream, or other water source flow at this location.

- 10.3.2. Having regard to the above, I am cognisant that Section 4(1)(a) of the Planning and Development Act, 2000, as amended provides an exemption for the use of any land for agriculture. Notwithstanding, the Planning and Development Regulations, 2001, as amended, under Part 3 Article 6, Class 9 indicates that '*works consisting of the provision of any store, barn, shed, glass-house or other structure, not being of a type specified in Class 6, 7 or 8 of this Part of Schedule*', which I note that these works are not, and '*having a gross floor space not exceeding 300 square meters*' is subject to a number of limitations including.
- 10.3.3. This includes that '*the gross floor space of such structures together with any other such structures situated within the same farmyard complex or complex of such structures or within 100 metres of that complex shall not exceed 900 square metres gross floor space in aggregate*'. In this case, having calculated the gross floor space of buildings in aggregate within 100m of the location of the box culvert/animal underpass there is significantly in excess of 900m<sup>2</sup> of gross floor space of buildings already present.
- 10.3.4. It also includes that '*no such structure shall be situated within 10 metres of any public road*'. The referrer contends that the section of the LT81012 that comprises the central area of the site is not a public road as well as the road that extends in a westerly direction from it to where it meets another local road c118m to the west. If one is to accept that this is the case it does not overcome the fact that this road immediately adjoining the eastern boundary of the site is clearly a local road in available mapping and it lies outside of the referrers landownership and there is nothing to support that it is in private ownership of another party.
- 10.3.5. In addition to this the Planning Authority have provided evidence that the subject road has its own local road number, i.e. the LT81012 and I acknowledge that under Section 11(5) of the Roads Act it states that a certificate of a road authority, that a road is a public road, shall be *prima facie* evidence thereof.
- 10.3.6. Any civil disputes in relation to the same or indeed question marks over the manner in which the LT81012 were designated with a local road number are not matters for the

Board to determine in this case and should be dealt with through other more appropriate channels.

- 10.3.7. I do however accept based on the information on file and that publicly available that the site in any case is within 10m of the LT81012, a road that meets the definition of Section 11(5) of the Roads Act.
- 10.3.8. It also includes Class 9(1)(a)(iii) of the Planning and Development Regulations, 2001, as amended, which indicates that 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 'endanger public safety by reason of traffic hazard or obstruction of road' users'.
- 10.3.9. Having inspected the site, its setting and having regard to the information on provided together including that in relation to the construction of the box culvert and underpass which do not appear to correspond with what is in situ, that the subject road has been left in a hazardous state and by virtue of the works that have been carried out has resulted in this road now being obstructed from active use alongside having its use changed to a circulation space serving the Referrers farmyard complex.
- 10.3.10. It also includes Class 9(1)(a)(viii) of the Regulations indicates that 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 consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure a structure the use of which is an unauthorised use.
- 10.3.11. Having inspected the site, its setting and having had regard to the planning history of the farmyard complex, in particular having regard to the grant of permission P.A. Reg. Ref. No. 07/1311, it is clear that the permitted building, its envelope through to its footprint do not correlate with what is present on site and has not been regularised to date. As the site area of this previous application overlaps with the northern portion of this modest in area site I accept that the Planning Authority's contentions that the box culvert and animal underpass as constructed which links into the building permitted under P.A. Reg. Ref. No. 07/1311 and as proposed to be completed would consist of an extension and alteration of an unauthorised structure at this location.

- 10.3.12. Arguably as a result of the above one could further argue that Class 9(1)(a)(i) is also applicable as it de-exempts development that contravenes a condition attached to a permission. Having inspected the site and its setting it is evident that the building permitted under P.A. Reg. Ref. No. 07/1311 is not compliant with condition number four of the notification to grant permission. This condition in part required that the finished floor level of the proposed development shall match that of the adjoining farm shed with the stated reason give '*to secure a satisfactory standard of development*'.
- 10.3.13. Moreover, condition number 5 also required that the development permitted under this grant of permission be carried out strictly in accordance with the plans and documents submitted. On a separate note it would also appear that there is merit to the Planning Authority's contention that this development was substantially completed after this grant of permission expired.
- 10.3.14. Whilst this is an enforcement matter it further adds to concerns previously raised in relation to the limitation set out under Class 9(1)(a)(viii) above.
- 10.3.15. Further if one were to accept the Referrers argument and that the subject road is a private road with established use by other parties than the Board could consider that Article 9(1)(a)(xi) of the Regulations applicable. Notwithstanding, I consider that there is a lack of clarity in the documentation provided that would support that this is the case and I refer to the fact that the LT81012 meets the definition of what is a public road under the Roads Act and as such I consider that Article 9(1)(a)(v) of the Regulations are applicable as these works consist of the carrying out under a public road of works that does not fall under the scope of connection to a wired broadcast relay service, sewer, water main, gas main or electricity supply line of cable, or any works to which Class 25, 26 or 31(a) specified in Column 1 of Part 1 of Schedule 2 applies.
- 10.3.16. On the matter of drainage, I am cognisant that Article 8B of the Regulations provides an exemption for '*works consisting of field drainage for agriculture, other than drainage and/or reclamation of wetland*'. However, based on the information available with this case, having inspected the site and its setting I found no substantive evidence that the box culvert and underpass have been provided as a consequence of waterlogging of soils or the like. It is also clear that the box culvert and underpass is of a size significantly over and above that which would be required in any event if that

were the case in this locality. That is, it has a stated 2.1m height from floor-to-ceiling and 2.7m width from one side to the other in its east west section through it. Its exact length in a north south direction is unclear (Note: potentially 3.8m based on the submitted drawings) and there is no apparent coherent relationship with drainage provisions within the Referrers farmyard as well as their associated farmland adjoining and neighbouring it.

10.3.17. Indeed, I observed that the drainage provisions in this drumlin landscape around it do not have such significant engineered infrastructure to deal with a localised drainage issues and problems including where it would appear that farmyards that include housing through to milking parlours are separated from parcels of grazing land.

10.3.18. Whilst it could be accepted that it may provide some level of drainage associated with the Referrers use of the farmyard and buildings it adjoins, in my view, its functional purpose is for the movement of cattle, which I do acknowledge has the potential to limit their movement at this particular point over the subject road.

10.3.19. Notwithstanding, its design, location and its relationship with the road itself as well as the Referrer's farmyard complex is such that it would only result in manure deposited during the movement of cattle at one localised point and due to the topography of the road to the west of it alongside the Referrers use of the subject road as part of the circulation space around his farm buildings this does not fundamentally or robustly deal with any adverse issues that arise from such deposits on land that forms part of an inner catchment area related to Lough Nagarnaman and a group water scheme that it serves.

10.3.20. I am cognisant that field drainage works are generally provided to remove excess soil water to reduce through to eliminate waterlogging. The box culvert and underpass would not result in any real substantive drainage improvements at this location and it would not deal with similar in nature deposits along this stretch of road that lies to the west of the subject site.

10.3.21. I therefore consider that the exemptions provided for under Section 4(1)(a) of the Act and Article 8B of the Regulations which provides an exemption for drainage works to not be applicable in this case.



10.3.22. In conclusion, based on the above considerations it is my view that the installation of a box culvert/animal underpass for the purposes of moving animals is development and is not exempted development.

#### 10.4. **The installation of an animal effluent holding tank.**

10.4.1. As previously indicated above Section 4(1)(a) of the Planning and Development Act, 2000, as amended provides an exemption for the use of any land for agriculture. Notwithstanding, the Planning and Development Regulations, 2001, as amended under Part 3 Article 6 Class 9 indicates that '*works consisting of the provision of any store, barn, shed, glass-house or other structure, not being of a type specified in Class 6, 7 or 8 of this Part of Schedule*' which I note that these works are not and '*having a gross floor space not exceeding 300 square metres*' is subject to limitation of not storing effluent. The purpose and function of the subject tank is to store effluent. It would also appear that within 100m of the proposed effluent tank that are other structures that also store effluent, including slatted sheds and the like. This is sufficient basis for these works to be considered as not being exempted development.

10.4.2. Based on an examination of the planning history of this farmyard complex and having inspected the site it is my view that these structures exceed 300m<sup>2</sup>. The Board may wish to clarify this matter by way of additional information should they consider it necessary to do so. If this is indeed the case, then this would also de-exempt these works in addition to this structure's proposed use.

10.4.3. Furthermore, the proposed tank like the box culvert and underpass previously discussed would be located within 10m of a public road, note the LT81012.

10.4.4. In conclusion, based on the above considerations it is my view that the installation of a slurry holding tank with slatted cover for the purposes of storing effluent **is development and is not exempted development.**

#### 10.5. **Compliance with Section 12 Notice**

10.5.1. The reasons as to why these works were carried out by the Referrer does not negate the above conclusions. The referenced Section 12 Notice which I am cognisant was issued in 2008 had a limited duration of time to comply with it. Compliance with the notice referred to dealt with water pollution has expired over a decade ago and there is little tangible evidence that would connect the subject matter of this question with this notice. In any

event, compliance and enforcement matters are outside of the Boards remit to deal with in their adjudication of this case.

## 11.0 **Appropriate Assessment Screening**

11.1.1. The site is not designated for any nature conservation purposes and is not located proximate to, and is not connected to, any European site. The question before involves works adjoining a farmyard and land that is traversed by a road. Having regard to the nature and scale of such works through to the significant lateral separation distance of the site from any European site and lack of any connectivity between the two, it is considered that no Appropriate Assessment issues arise and it is not considered that the works would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

## 12.0 **EIA Screening Determination**

12.1.1. The development in question does not fall within a class of development for which EIAR is required and as such an Environmental Impact Assessment is not required in this instance.

## 13.0 **Recommendation**

13.1. 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 installation of a box culvert/animal underpass for the purposes of moving cattle and the installation of effluent holding tank is or is not development or is or is not exempted development:

**AND WHEREAS** a Donal Gerard McDaid of Beagh D.E.D, Crosslare, Carrickmacross, Co. Monaghan, requested a declaration on the question from Monaghan County Council and the Council issued a declaration on the 5<sup>th</sup> day of October, 2019, stating that the matter was development and was not exempted development.

**AND WHEREAS** referred this declaration for review to An Bord Pleanála on the 2<sup>nd</sup> day of October, 2019:

**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)(a) of the Planning and Development Act, 2000, as amended,
- (d) Article 6(1) and Article 9(1) of the Planning and Development Regulations, 2001, as amended, and Class 9 as described in Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended,
- (e) Part 1 and Part 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) The planning history of the site,
- (g) The nature of land uses and the pattern of development in the area surrounding the site, including the topography and watercourses.

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) The installation of a box culvert/animal underpass for the movement of animals and the installation of an effluent tank together with their associated works constitutes works;
- (b) The works constitute development pursuant to Section 3 of the Planning and Development Act, 2000, as amended;
- (c) The works constitute development to which the exempted development provisions of the Act do not apply;

(c) The development does not come within the scope of Class 9 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2000, as amended, as the restrictions set out in (i) (ii) and (iii) are applicable in this instance;

(d) The restrictions on exemptions outlined in Article 9(1)(a)(i), (v) and (viii) are applicable in this instance; and,

(e) The development does not come within the scope of works for agriculture within the scope of Article 8B of the Regulations.

**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 installation of a box culvert/animal underpass for the purposes of moving cattle and the installation of effluent holding tank is development and is not exempted development.

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Patricia-Marie Young

Planning Inspector

16<sup>th</sup> day of June, 2020.