



An
Bord
Pleanála

Inspector's Report

ABP-305612-19

Development

Retention of a café with adjoining childrens depot. Permission is also sought for future development of construction of a new access onto Local Road and new entrance.

Location

Duneany & Rathmuck, Co. Kildare.

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

181585

Applicant(s)

David & Susan Sexton

Type of Application

Retention & Permission

Planning Authority Decision

Grant with conditions

Type of Appeal

First & Third Party

Appellant(s)

David & Susan Sexton

John & Bromwyn Gargan

Laurence Connell

Brian & Yvette Heffernan

Date of Site Inspection

17th December 2019

Inspector

Ciara Kellett

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1.0 Site Location and Description

- 1.1. The appeal site is located in the townland of Rathmuck, Co. Kildare. The site is c.3km south of the M7 motorway and c.4.5km south-west of Kildare Town. It is located in a rural area of Kildare within a large landholding containing the Kildare Farm Foods, Open Farm and Shop. Access to the site is currently via a private laneway off the Local Road L70601. There are sporadic one-off houses and other rural enterprises in the wider area. The topography of the land is relatively low-lying.
- 1.2. The overall landholding is stated as being c.56Ha, but the subject site is stated as being c.2.91Ha in area. The overall site accommodates a number of buildings and other structures and includes car parks, farm shop and café, animal enclosures, open farm/petting zoo, indoor crazy golf and children's party room as well as farmyard buildings.
- 1.3. The Farm Shop and Café are generally open Monday to Friday from 9am to 5pm and Saturday from 9am to 3pm with Sunday openings around various seasons such as Christmas.
- 1.4. Appendix A includes maps and photos.

2.0 Proposed Development

- 2.1. It is proposed to seek retention permission and permission for various elements of the site.
- 2.2. Retention permission is sought for (in summary): 1. An existing single storey café with a floorspace of 218.6sq.m; 2. An adjoining single storey children's train depot with a total floor space of 56.7sq.m which accommodates an electrically powered novelty train; 3. A surface level car park which contains 60 no. car parking spaces and 1 bus bay; and 4. The removal of portions of an agricultural access road which are not required as part of a proposed new entrance arrangement.
- 2.3. Permission is sought for: 1. The construction of a proposed new vehicular access onto the Local Road L3010; and 2. A new/altered access roadway which will lead from the public route to Kildare Farm Foods. This new access will replace the existing access from the L70601 local road.

3.0 Planning Authority Decision

3.1. Decision

The Planning Authority decided to grant permission subject to 22 no. conditions. Condition no.2 states that the permission only refers to development as described in the public notices. Condition no.5 requires that the new access road be constructed within 12 months of the grant of permission and that the developer ensures that all vehicles accessing the development use the new access road and cease to use the existing laneway from the L70601. Condition no.22 (which is being appealed by the Developer) requires payment of a Development Contribution of €49,991.55.

3.2. Planning Authority Reports

3.2.1. Planning Reports

There are two Planning Reports on file due to a request for Further Information. In summary they include:

- Refers to Chapter 10 of the Development Plan and notes that the café and train depot structure are considered small scale and are not highly visible in the wider landscape. Visual impact is considered consistent with that of a large agricultural development.
- Notes that patrons must go through the shop to access the café and train depot. The shop does not form part of the application. In addition, the train depot facilitates other development on site particularly a designated route way around the entire site. Both structures are dependent on other uses and there is a clear link between all development on site.
- All uses are noted as unauthorised and a Warning Letter was issued on 12/01/18. Notes that applicant has not identified what elements on site are statute-barred from enforcement proceedings. Concerned that there may be elements which are statute-barred but the existing unauthorised development in conjunction with the proposed development would result in the consolidation of unauthorised development. The proposed new road would facilitate the existing development on site and until items on the Warning

Letter have been adequately addressed, such a road is considered premature.

- Notes that earlier application (Reg. Ref. 17/258) included retention of all commercial elements as identified on Warning Letter which have now been omitted with the exception of the café and train depot. A piecemeal approach is unacceptable. Applicant to be requested to provide a detailed account of all elements with labelled maps, drawings and a timeline of when developments took place. Includes Google Earth imagery from 2019 and 2013.
- Notes no landscape screening in place for new access road between dwellings.
- Serious concerns noted and a Further Information request is issued in relation to the failure to consider the overall development, address issues raised in the previous planning application and items referred to in Warning Letter.
- The applicant responded attaching drawings of existing buildings and uses. In addition, it is noted that they have undertaken a delivery review over 4 weeks with respect to traffic. Parking layout indicated on the drawing as well as provision of staff numbers. It is clarified that all products sold from the development are supplied by Irish companies. No processing activities are carried out on site – only portion control and packaging.
- In response to the Planning Authority's query why the application does not include the retention of all issues highlighted in the Warning Letter, it is stated that there is no statutory obligation on landowners to do so. It is stated that this is particularly the case given no action can be taken after a 7-year period and the items are statute-barred. Other issues relating to amenity and wastewater are also addressed.
- The response was considered significant and was re-advertised.
- The second Planning Report addressed the response. It is noted that the applicant did not avail of the opportunity to regularise the planning status of the other unauthorised elements including the shop, animal shelter, mock cottage, crazy golf facility and children's party room in addition to the substantial meat processing area.

- Considers there are two types of development taking place on the site: Open Farm & Shop – a day trip destination for children with outdoor and indoor activities, and Kildare Farm Foods which is an industrial facility for the processing of meat products which requires HGV and commercial traffic movements.
- Only the elements in the public notice are considered. The existing operations on the site are unauthorised and operate in an uncontrolled manner, i.e. there is no planning consent in place. The proposed development would allow for some control of existing operations as it relates to the café, train depot, car parking and regulating safe access to the site.
- Addressed type of development and how it complies with the Development Plan – notes many letters of support for the proposal and economic benefit to the area. Notes letters of objection outline valid concerns on the impact on local residential amenities.
- Notes proposal to improve access to lands which will address an ongoing safety issue and considers development is reasonable in the context of Council policy in relation to rural enterprise and subject to conditions which would mitigate potential impacts on residential amenity.
- Concludes that the longstanding unauthorised uses on the site do not form part of the application and the uses remain unauthorised. Notes it is unfortunate that the applicant has not availed of opportunity to regularise the planning status on the landholding.
- Concludes that the development will consolidate an existing unauthorised statute-barred use which is currently operating in an uncontrolled manner without the benefit of planning permission. The new site access will address serious public road safety issue.
- The Planner recommends planning permission is granted subject to conditions which is also supported by the Senior Executive Planner.

The Planning Authority's decision is in accordance with the Planner's recommendation.

3.2.2. Other Technical Reports

- **Transport Dept:** No objection subject to conditions
- **Environment Section:** No objection subject to conditions
- **Heritage Officer:** No objection
- **Water Services:** No objection subject to conditions
- **Fire Officer:** No objection subject to conditions
- **Chief Medical Officer:** No objection

3.3. Prescribed Bodies

- **Irish Water:** No objection subject to conditions

3.4. Third Party Observations

There were a substantial number of submissions made at the FI stage. Initially at application stage, 7 submissions were received objecting to the proposal for reasons similar to those raised in the appeal in section 6 below. At FI stage, 41 submissions were received of which 36 were letters of support.

4.0 Planning History

- **Reg. Ref. 17/258:** Permission was refused in November 2017 for retention of development including; 1. Café and shop; 2. Animal enclosures and walkway; 3. Small scale replica cottage; 4. Train depot; 5. Single storey crazy golf facility (423sq.m) and children's party area (222sq.m); 6. Two parking areas (one overflow); 7. Plant room and cold storage area including dock; and 8. Septic tank and ancillary works.

Permission was refused for four reasons including (summarised): 1. Due to traffic movements and capacity of L70601, the development would endanger public safety by reason of traffic hazard; 2. Applicants have failed to address the necessary improvements for the two existing junctions on the L70601 to accommodate increased traffic movements; 3. Proposal does not meet the criteria set out in the Plan for rural based enterprise and could be more suitably located in a settlement; and, 4. Seriously injure residential amenities.

- **UD6803:** A Warning Letter was issued on 12/01/18 for alleged unauthorised development. The items listed are almost identical to the list described in Reg. Ref. 17/258 above.

5.0 Policy Context

5.1. Kildare County Development Plan 2017 – 2023

- 5.1.1. Chapter 10 of the Kildare County Development Plan refers to Rural Development. Section 10.4.10 of the Plan specifically refers to Rural Enterprise.

The Council acknowledges that the development of rural enterprise and employment opportunities will be vital to sustaining the rural economy. In accordance with the economic strategy for the overall county, employment, servicing the rural areas, should, in general, be directed to local employment centres, small towns and villages (see Chapter 5 Table 5.2 Economic Development Hierarchy, County Kildare), catering for local investment and smallscale industry. Within the rural settlements / nodes and the rural countryside, agriculture, horticulture, forestry, tourism, energy production and rural resources-based enterprise should be facilitated.

It is further noted that key considerations will include (inter alia): Footloose commercial or industrial activities located in towns will not be permitted to relocate to rural areas; Tourism based enterprises will be facilitated in rural areas; expansion of rural based authorised development will be encouraged to locate in serviced zoned lands if expansion proposed would seriously affect rural nature or amenity of surrounding countryside; one-off rural enterprises may be located in open countryside only where the Council is satisfied that the enterprise is suitable for that location in the first place and comply with Table 10.3 criteria; Commercial development may be acceptable subject to proper planning considerations.

Table 10.3 lists criteria for Assessment of One-Off Enterprises in rural areas. This includes that as a 'general' guide, development proposals shall be limited to small-scale business with floor area c.200sq.m; and, development will not be detrimental to amenity of nearby properties.

5.2. **Kildare Development Contribution Scheme 2015 – 2022**

8 (xiv) Miscellaneous Developments

Miscellaneous developments, not listed individually above, will have the following development contribution rates applied –

	<i>BUILT</i> <i>(per sqm)</i>	<i>OPEN</i> <i>(per Hectare)</i>
<i>Rate (€)</i>	<i>27.51</i>	<i>15,000</i>

* *“Built” applies to all developments involving development not specifically defined in the categories of development set out above e.g. smoking areas etc.*

** *“Open” development is defined as development not included in the categories set out above which involves the carrying out of any works on, in, over or under any land or the making of any material change in the use of any land. Examples of “open” development include but is not limited to golf courses, temporary car parking, surface storage, motor trade forecourts, etc.*

5.3. **Natural Heritage Designations**

- The River Barrow and River Nore SAC (Site Code 002162) is c.5km to the west
- Pollardstown Fen SAC (Site Code 000396) is c. 10km to the north-east

5.4. **EIA Screening**

- 5.4.1. Having regard to the limited nature and scale of the development for retention permission and permission and the absence of any significant environmental sensitivity in the vicinity, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

6.0 The Appeal

6.1. Grounds of Appeal

There is a first party appeal and 3 no. third party appeals associated with this proposal. In summary the first party appeal prepared by Vincent JP Farry & Co. Ltd on behalf of the applicant is against the Development Contribution condition and includes:

- Notes that condition no.22 relates to the Development Contribution of €49,991.55 and consider that it is outside the ambit of the Development Contribution Scheme 2015 - 2022.
- Considers that Section 8 of the Scheme sets out the rates to be applied to commercial and residential proposals. Highlights that these charges are based on the internal area of those developments. Subsection (xiv) of the same part entitled 'miscellaneous development' authorises a rate of €15,000 per hectare of 'open' development.
- Confirm that the appeal refers to the charges on the novelty train depot and the car park.
- Notes for the depot the demand is €3,079 and is based on the depot being commercial. Refers to Planning Report accompanying the application whereby it is stated that the shop and café are the commercial elements and the outdoor tourist facility does not charge an entrance fee. Of the view that the novelty train depot is not chargeable under the Contribution Scheme on the basis that it is not a 'commercial' building and falls outside the terms of the document.
- With respect to the 'open' development, notes the Scheme contains a clause which most other Councils have not incorporated into their policies to cover activities of this nature.
- Considers that 'open' developments are not additional to the rates which ordinarily apply to residential or commercial proposals and notes how the introductory line of S8(xiv) only authorises such 'open' contributions where the

proposed development is not otherwise chargeable under any of the previous subsections.

- Suggest that the Council's regime is primarily based on levies which are calculated using rates which apply to the floorspace contained within the principal part of the development in the first place. Costs are linked to the size of the house, factory etc. and it is only where the proposal focuses on outdoor activities that the charge should be based on the 'open' rate. Makes reference to Reg. Ref. 19/526 which was for an industrial building, car park etc. Notes that the levies were based on the floorspace only. Also reference to Reg. Ref. 18/1209 and 18/454 for light industrial workshops and the contribution was based on size of the factories only.
- Considers the levy for 'open' development is at variance with the terms of the Scheme which does not authorise a charge for ancillary development.

The third-party appeals are summarised below. Where there are overlapping or similar comments, I have not repeated for the sake of brevity.

Brian & Yvette Heffernan

- Application did not take into account full nature and extent of overall commercial development
- Decision does not overcome or address Reason no.1 for refusal on earlier application. Decision permits use of the L70601 for a full 12 months after grant. Condition no.5(b) does not prohibit the use of the local road by HGV traffic and will continue to be a traffic hazard.
- The development is ancillary to the overall existing unauthorised industrial wholesale commercial enterprise, and previous reason for refusal no.3 has not been overcome or addressed and materially contravenes the Development Plan as the commercial activity is not subordinate to the agricultural use.
- Serious injury to residential amenities – their property is closest to the development and the electrically powered novelty train and pedestrians pass constantly along the full length of their shared boundary. Decision of the Council will make situation worse as the opening hours are extended.

- Condition 7, 10 & 13 are contradictory to condition 1.

Laurence Connell

- Development does not conform to relevant policies of the Development Plan. Size and scale of development as a whole encompasses a large-scale international export business together with an entertainment nexus. Development is a material contravention of policies for rural enterprise development. Having regard to previous refusal it is patently obvious that the Planning Authority does not consider it a suitable development. It is hard to understand how the Planning Authority's view has changed.
- A Zoo Licence was granted – it is clear that the animal enclosures do not have planning permission, and this is requirement of a zoo licence
- Development will negatively impact on amenities of nearby residents.
- Development does not serve the needs of the rural community, nor does it have locational requirements which necessitate it being located here.
- Development as a whole includes elements which are unauthorised and as such the grant of permission facilitates this unauthorised development which is contrary to national legislation as well as relevant case law.
- Reference made to the recent decision by the Board with respect to PL17.303869 (Tayto Park) whereby the Board refused permission due to noise nuisance. Board should take a similar view on residential amenities here.
- Reference made to recent refusal decision PL08.304584 for Dillon Waste Unlimited regarding the extension of a materials recovery facility in Kerry. It is noted that only a portion of the overall facility was included in the application for permission. The Board concurred with the Inspector whereby any assessment should have regard to the activities on the site in its totality.
- Considers traffic hazard is in no doubt. The development attracts a steady stream of traffic both in respect of the commercial and recreational activities. Notes original Planner attempted to ascertain the level of traffic and requested Further Information but this was not provided. Information provided did not

include dates and chart is a carbon copy of what was submitted for the previous application.

- Query the adequacy of the list of suppliers and consequent deliveries. HGVs attend the site from early morning to late evening.
- The proposed new access is directly on to an 80kph road and will constitute a hazard.
- Hard to understand how a condition relating to access can be complied with without works on third party lands.
- Questions if the Planning Authority were correct in determining an application, that by its own acceptance, would consolidate and facilitate the unauthorised development of the subject site as a whole.
- Reference made to legal cases including *Frank Harrington Ltd V ABP (2010)*. It is stated that the Court concluded that there is clear legislative policy against the facilitation of unauthorised development as can be ascertained by Article 9(i)(viii) of the Planning and Development Regulations. Reference is also made to *Westwood Club Ltd V ABP (2010)* and *Cleary Compost V ABP (2017)* regarding unauthorised use. In this case a Mushroom Composting Facility did not have the benefit of Planning Permission and the Board found it was inappropriate for the Board to consider the application.
- Notes that the Planning Authority consider the remainder of the development to be 'exempt' from planning enforcement but considers there is no such thing. Where development is 'exempt' there is no unauthorised development. Where development is exposed to enforcement there is a limitation period that may protect those from enforcement in Courts – it does not protect them from other consequences – the development remains unlawful but immune from certain enforcement steps.
- Notes that the site advertised its 'newly opened' Indian Creek Crazy Golf in 2015 and this is therefore not immune to planning enforcement.
- Refer to ABP PL04.304107 for further examples of retention of permission whereby unauthorised development was excluded and therefore refused by the Board.

John & Bronwyn Gargan

- Development supports an existing unauthorised development – reference made to the other structures and that this development facilitates continued trading at the commercial food distribution business for which no planning permission is in place – refers to various articles about the business in the Irish Times and an AIB Business article.
- It is the intent to divert all traffic which will facilitate continued business at the unauthorised development.
- It is inconsistent with the Development Plan – previous application was refused for not meeting criteria set out in the Plan for rural enterprise, this case is no different.
- Loss of residential amenity – their dwelling is south of proposed new entrance. Impact caused by traffic noise and light, increased traffic levels, level and type of traffic, visual impact, lack of a landscape plan, and 7 day operation.

6.2. Applicant Response

The applicant was provided an opportunity to respond. Their consultant Vincent JP Farry & Co. Ltd. responded on their behalf and in summary it included:

- Of opinion that Planning Authority's decision to grant permission was wholly appropriate and invite the Board to consider four particular themes when deliberating on the third-party appeals.
- Firstly, note that while the development comprises several elements the objectors were not opposed to many features including the animal enclosures, the crazy golf and children's party room etc.
- Secondly note that none of the objectors made a representation to the Council in relation to the first application.
- Thirdly the key difference between the first and second application is the entrance arrangement which is now to be located near to two appellants' homes and that this is the key issue.

- Fourthly invite the Board to consider the effect of a refusal of permission, specifically in terms of the amenities of local residents and the safety of road users. Submit that given the immunity of unauthorised developments after seven years, a denial of consent would simply expose the applicants to litigation in respect of the removal of features and it is difficult to identify the actual benefit which would stem from such an action.
- Details how development is in compliance with the Development Plan.
- Submits that it is critical for the Board to draw a distinction between proposals which directly facilitate the continuation of an illegal development on one hand and applications which are standalone. Submits that the case referred to by one third party PL08.304585 relates to the link between both existing and appealed.
- Considers that a grant of permission would not confer any legitimacy on the remaining statute-barred developments and refers to High Court Case Murphy V ABP.
- Transport department have endorsed the revised access proposal and if the Board was to refuse permission the applicant would be clearly unable to undertake access improvements.
- Do not believe that the noise impact as a result of the new entrance will impact on amenity to warrant a refusal of permission.
- A denial of consent by the Board is likely to result in the demolition of the farm café and the novelty train depot and the removal of the overflow car park – it is difficult to identify the advantages of such action.

6.3. Planning Authority Response

The Planning Authority responded and in summary it includes:

- Consider Development Contributions calculation to be correct
- The Roads, Transport & Public Safety department have examined the first party appeal and the main comments are outlined in the Roads Report dated 13/09/19 and they have no further comment to make.

6.4. Further Responses

The third parties were provided an opportunity to comment on the applicant's response to their appeals. Two of the appellants responded. In summary the responses include:

John & Bronwyn Gargan

- Prefer applicants would not speculate on why they did not comment on the first application, but for the avoidance of doubt they were unaware of the first application.
- Continue to rely on the Planning Authority's documented concerns in its refusal reasons for the 2017 application.
- No evidence provided that the commercial food distribution business has planning approval.
- Root cause of the loss of amenity is the unauthorised development of a combined commercial food distribution and agri-tourism business.
- Concludes no change to their objection but in the event the Board do grant permission that Condition no.6 of the Planning Authority with respect to planting of mature trees is included.

Laurence Connell

- Any suggestion that issues were not raised about certain parts of the development, including animal enclosure, crazy golf etc is manifestly false and at odds with what was stated in the appeal. Restate objection to all unauthorised development on the site.
- No requirement in European or National law that requires an individual to object to every single application – and no inference can be made as to their standing based on any previous lack of involvement.
- Applicants are asking the Board to ignore the extensive unauthorised development and ignore that the development contravenes the Plan.

- Applicants are already exposed to enforcement action regardless of this appeal based on unauthorised development that is not in existence for greater than 7 years.
- Applicants using a 'loose' definition of shop in order to support their position – the site was originally a turkey farm and turkeys were sold. In or around 2008 the applicant started to develop the site into what it has ultimately become – any suggestion that there was any building which housed a shop since the 1970s is denied.
- 2017 application was refused for four equally important reasons and not just because of traffic. The non-traffic reasons will not be alleviated by the new access road. The shop is now akin to a mini-market or convenience store and not suitable for a rural development under the Plan.
- The development is a material contravention of the Development Plan.
- Issue of nexus addressed – repeat reference to Board files and case law. Clear fact is that to access the café for which permission is sought an individual must walk through the shop as well as new road being the only way for visitors to access the development – there is clear and undeniable connection.
- Disputes applicant's opinion of Murphy V ABP.
- Refute assertion by applicants that they have purchased lands owned by Margaret and Thomas Kennedy and explanation provided of the situation in respect of those lands.
- No Traffic Impact Assessment has been carried out to assess the level of harm nor the impact of the development on residents who live along the local road, despite the Planning Authority's request for one.
- Applicants constructed the development without the benefit of planning permission which leaves them open to enforcement action. Reference made to Meath County Council V Murray case in reference to unauthorised development and hardships faced by developers of a house.

- Works on the proposed entrance gate have been undertaken in November 2019 despite no grant of permission while this appeal is being considered. A new unauthorised development file has been opened in respect of these works.

7.0 Assessment

The main issues in this appeal are those raised in the grounds of appeal and I am satisfied that no other substantive issues arise. The issue of appropriate assessment also needs to be addressed. The issues can be dealt with under the following headings:

- Principle of development
- Impact on residential amenities
- Traffic Hazard
- Unauthorised development
- First Party Development Contribution appeal
- Appropriate Assessment

7.1. Principle of Development

- 7.1.1. The development is located in the rural area of Rathmuck in Co. Kildare c.4.5km south of Kildare Town. It is not located within any settlement or rural node and is located on unzoned lands. Thus, the policies and objectives for rural development apply and in particular Chapter 10 'Rural Development' of the Kildare County Development Plan 2017 – 2023 (the Plan).
- 7.1.2. The information supplied with the application indicates that a farm shop has been established on the site since the 1970's and has grown over the years to now include the development before the Board, as well as the structures and developments that are stated as having been in existence for greater than 7 years. (I note that the use of the site as a shop since the 1970s is disputed by one of the appellants). Section 10.4.10 of the Plan refers to Rural Enterprises and it is acknowledged that development of rural enterprise and employment opportunities are vital to sustain the

rural economy. It is further stated that within the rural countryside *inter alia* tourism, and rural resource-based enterprises will be facilitated. Criteria are listed in Table 10.3 for assessment of one-off enterprises. The appellants consider that the proposal does not comply with the criteria which includes that as a 'general guide' development should be limited to a floor area of 200sq.m. The appellants note that the development on site is significantly in excess of this area. This is clearly the case as the café alone is in excess of 200sq.m. However, this is identified as a general guide and there are many other criteria listed including that the development will enhance the strength of the local rural economy, should be located on an agricultural brownfield site, and will not be detrimental to the amenity of nearby properties etc.

- 7.1.3. I am satisfied having visited the site on a day whereby children were still at school and yet it was busy and thriving, that it does enhance the strength of the local economy. It was clear to see that the development provides employment – there were many staff working. In addition, there were many people enjoying the facilities and the animal farm and thus, it is providing a facility which is a social and economic benefit to the community being located in a rural area.
- 7.1.4. I note that the appellants state that there is importing and exporting business in addition to the café/shop/animal farm type tourist facility. I note that the 2017 application included reference to this activity, however the information on file is lacking in terms of recent traffic associated with this aspect of the development which may not be suitable in a rural area.
- 7.1.5. I address the criteria with respect to rural enterprises not being detrimental to the amenity of nearby properties and traffic hazards below. However, having regard to the criteria listed in Table 10.3 of the Plan, I am satisfied that the principle of the tourist and activity development is acceptable in this area and the development is providing a facility which I do not believe could be easily established in a town or settlement (in particular the animal farm) and I am therefore of the opinion that it is not a material contravention of the Development Plan policies for rural development.

7.2. **Impact on Residential Amenities**

- 7.2.1. The appellants are concerned about the impact on their residential amenities. While the appellants have not identified precisely where they live in relation to the

development, it is stated by one that they live alongside the track that the novelty train takes. They are concerned that the increasing opening hours will exacerbate their concerns with noise and light pollution. I note that there is limited landscape screening and consider that this could be improved by way of condition should the Board consider granting permission. Noise conditions could be appended to a grant of permission.

7.2.2. Furthermore, the proposed revised access will divert traffic away from the laneway thereby improving amenities for residents in that immediate vicinity.

7.2.3. I am satisfied that the residential amenities are not so seriously impacted such as to warrant a refusal of permission.

7.3. Traffic and Transport

7.3.1. Two of the reasons for refusal of permission in 2017 related to the traffic movements along the L70601, and the junction with the L3010. The applicant considers that the revised entrance proposal has been designed and developed working with the Transport Department over the last 9 months. I note that the Transport Department of the Local Authority have no objections to the proposed solution subject to conditions. I concur with the Transport Department and consider this revised proposal to be acceptable and to provide a much-improved solution than the current laneway. During my site visit I noted a substantial number of cars along the laneway with limited areas where two cars can safely pass each other.

7.3.2. However, there is no landscape screening between the proposed new entrance and adjacent dwellings and I consider it imperative that a condition to develop a landscape proposal for screening purposes along the new internal access road is submitted prior to commencement of any development, should the Board be of a mind to grant permission.

7.3.3. I note that one of the appellants lives just south of the proposed entrance and has appealed the decision on the basis of increased traffic along this stretch of road which has an 80kph speed limit. While I accept that there may be an increase in traffic coming from the north, I am satisfied that this stretch of road is already subject to traffic generated by the proposed development. I do not consider that the traffic

volumes are a reason for refusal of permission and am satisfied that this revised access will not endanger public safety by way of a traffic hazard.

7.4. Development Contributions

- 7.4.1. The applicant is appealing the development contributions conditioned by the Planning Authority. It would appear that there are two areas that the applicant is appealing: the contribution for the floor area of the novelty train depot and the open area of the car park. The calculations sheet appended to the final grant of permission states that 275.3sq.m x the applicable rate is the commercial development cost (i.e. the café of 218.6sq.m and the train depot of 56.7sq.m), and €15,000 per hectare of open development of 2.336Ha for the overflow car park.
- 7.4.2. With respect to the train depot, the applicant contends that this is not a commercial development as there is no fee charged to use the train or to access the animal farm and therefore it is not 'commercial'. I do not agree with the applicant and consider that it is clearly part of the café/shop facility and to apportion out such development would be akin to stating that toilets should be excluded from any assessment of area as they are not part of the commercial footprint of a development. Therefore, I am satisfied that the Planning authority have correctly addressed the commercial costs.
- 7.4.3. In terms of the car parking, the Council have included a Development Contribution for the parking area and considered it to be 'open development'. The applicant contends that the 'open development' within the Scheme refers to such developments as golf courses whereby the main purpose of the development is the open area. The applicant provides examples of warehousing that has been subject to development levies but notes that the ancillary parking is not included for levy purposes. It is submitted that this is similar.
- 7.4.4. I agree with the applicant in this instance that the parking is ancillary to the overall development and is not 'open development' in a similar manner to a golf course. I note that the Planning Authority did not provide any further comment with respect to the applicant's submission in relation to the car parking.
- 7.4.5. In conclusion, I am satisfied that the Development Contributions for the commercial element including the train depot has been correctly applied. However, I am satisfied

that the car parking is ancillary to the development and should not be included for contribution purposes.

7.5. **Unauthorised Development**

- 7.5.1. Unauthorised development issues were raised by third-party appellants. The issues relate to the fact that there is acknowledged unauthorised development on the site. The applicant's Consultant states that this is the case, but that it is statute-barred from any enforcement proceedings. The third parties are of the opinion that the Planning Authority should not have granted permission for development that will facilitate and consolidate this unauthorised development. The applicant is of the view that the development for retention is not linked to the unauthorised development and can be seen as a standalone development.
- 7.5.2. Firstly, it would appear that there is no disagreement between parties that the shop, animal farm, children's play area and indoor crazy golf facility and the docks etc. are unauthorised development. The applicant states that they are; and because they have been in existence for more than 7 years, they are statute-barred from enforcement proceedings.
- 7.5.3. I note that the original Planner's Report included Google Earth imagery from 2013 and 2019 which indicates a new structure between both of those dates which is not statute-barred from enforcement proceedings. I consider this to be a matter for the Planning Authority and not the Board.
- 7.5.4. The appellants refer to various other cases that the Board have decided as well as Case Law with respect to works to unauthorised developments. In each case referenced, the Board decided that they could not grant permission because to do so, would be to facilitate and consolidate unauthorised development. I have reviewed the Inspector's reports and the Board's Direction and Orders for the appeal cases Ref. 304107¹ and Ref. 304584² referred to. Each of the cases mentioned were refused permission based on the fact that the Board was not satisfied that the

¹ Permission refused 10/09/19 for retention and completion of a driveway to serve foxhound kennel complex as it appeared that the kennel complex does not have the benefit of planning permission

² Permission refused on 01/10/19 for an extension to a Materials Recovery Facility as the Board was not satisfied that the proposal would not facilitate an intensification of the facility for which no permission was sought.

proposed development would not facilitate development for which no permission had been sought.

- 7.5.5. The applicant refers to many Board decisions whereby the Board clearly seek to establish if development is linked to unauthorised development, such as case PL16.222802³. In this case the Board refused permission for quarry equipment as the quarry itself was unauthorised and to permit the equipment would be to clearly facilitate further quarrying. Reference is also made to case PL06D.209786⁴, PL22.238742⁵ and PL09.241580⁶. I have reviewed the cases referred to. In the latter case the Inspector was satisfied that while there was an element of unauthorised development, what was applied for was not linked to that unauthorised development and the Inspector therefore considered the cases on their merits.
- 7.5.6. I am of the view that the question to answer therefore is whether the proposed development relates to a site where unauthorised development is taking place and, in such circumstances, whether it would facilitate the continued unauthorised development or expansion of these activities and whether the Board is precluded from considering a grant of permission. As highlighted the application seeks retention of the café, parking and train depot and permission for a new entrance and access road only. It also includes for the closure of the existing access.
- 7.5.7. In my opinion, the development for which retention permission is sought is connected to other elements not included as part of the application. For example, the train depot is to house a children's novelty train which provides an entertaining way of bringing children around the animal farm. The unauthorised animal farm is not included as part of the application. There is clearly a link between these developments.
- 7.5.8. Furthermore, the car parking for which retention is sought provides parking facilities for customers of the shop, the crazy golf facility, the children's party area and the animal farm etc. I am of the opinion that the car park and the aforementioned elements are linked.

³ Permission refused 11/07/08 for development of processing equipment within an existing sand and gravel pit which is unauthorised.

⁴ Permission granted 11/04/05 for retention of ground and first floor extension

⁵ Permission granted 11/08/11 for propriety waste system and retention of portacabin

⁶ Permission granted 10/06/13 for change of use of timber warehouse to wholesale of tyres

- 7.5.9. With respect to the new entrance and access road whereby permission is sought, I note that the existing entrance will be closed off and signage to that effect will be erected – the public notices clearly indicate that the existing entrance will be closed off. Thus, it is clear that the proposed new road will serve the entire development including the statute-barred unauthorised development. I consider this road to facilitate and consolidate unauthorised development.
- 7.5.10. The 2017 application included all aspects of the development and sought to regularise the entire development. The Planning Authority refused permission for four reasons of which two were based on traffic and potential hazard. The applicant notes that this has now been resolved with the revised access proposal included in this application. I am satisfied that the revised proposal does address traffic safety concerns.
- 7.5.11. However, the subject proposal unfortunately has not included all of the elements that were included in the 2017 application. The subject proposal is not seeking to regularise the acknowledged unauthorised development.
- 7.5.12. I agree with the applicant and the Planning Authority that the revised access proposal would be preferable and not constitute a traffic hazard. As noted above, I am satisfied that the development is acceptable and is a suitable facility in a rural area. I am equally of the view that this facility is providing much needed social and economic benefit in this area and in other circumstances would consider that this is development to be welcomed. However, I am of the opinion that a grant of permission in this instance would relate to and facilitate a development which does not have the benefit of planning permission. Accordingly, I consider that it would be inappropriate for the Board to consider the grant of a permission for the proposed development and the development for which retention is sought in such circumstances.

7.6. **Appropriate Assessment**

- 7.6.1. Having regard to the nature and scale of development proposed and to the nature of the receiving environment, no appropriate assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.0 Recommendation

I recommend planning permission is refused for the reasons and considerations below.

9.0 Reasons and Considerations

Having regard to the nature and extent of the proposal and the submissions made in connection with the planning application and the appeal and the planning history on the site, it appears to the Board that the overall development does not have the benefit of planning permission. It is considered, therefore, that a grant of permission in this instance would facilitate and consolidate development which does not have the benefit of planning permission. Accordingly, it is considered that it would be inappropriate for the Board to consider the grant of a permission for the proposed development and the development for which retention is sought in such circumstances.

Ciara Kellett
Senior Planning Inspector

2nd January 2020