



An
Bord
Pleanála

Inspector's Report ABP-306347-20

Question

The question has been asked as to whether the existing locked gate located at Cockle Lane in Lisselan, Tramore is considered development under the meaning given in the Planning and Development Act 2000 and whether this development is restricted from exemptions under restrictions listed in Article 9 of the Planning and Development Regulations 2001.

Location

Lisselan, Tramore, Co. Waterford.

Declaration

Planning Authority

Waterford City and County Council

Planning Authority Reg. Ref.

D5 2019/20

Applicant for Declaration

John Deveraux

Planning Authority Decision

Is not development

Referral

Referred by

John Deveraux

Owner/Occupier

Unknown

Inspector

Paddy Keogh

1.0 Site Location and Description

- 1.1. This referral relates to a gated vehicular entrance at Lisselan, Tramore, Co. Waterford. The recessed entrance is located c. 8 km from the centre of Tramore on the seaward side of a public road linking Tramore with Dunmore East (the 'back road' to Dunmore East). The gate is set between piers contained within a splayed entrance serving a laneway linking the public road with the coast (dunes and beach at 'Backstrand' Tramore). This laneway is known locally as Cockle Lane. Letters on file that accompanied the referral lodged with the planning authority attest to the fact that the laneway has served as a public access to the foreshore at 'Backstrand' that has been used by cockle pickers for many years (the entire living memory of some of a number of the people giving testament). These testaments assert that there is a well-established public right of way to the Backstrand via Cockle Lane.

2.0 The Question

- 2.1.1. The question asked in the referral to the planning authority was as follows:

Whether the existing locked gate located at Cockle Lane, Lisselan in Tramore is considered development under the Planning and Development Act, 2000 and whether is development is restricted from exemptions on restrictions listed under Article 9 of the Planning and Development Regulations, 2001.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. The planning authority per Order dated 5th, December 2019 determined that:

The placing of a lock on a gate at Lisselan, Tramore, Co. Waterford is not development.

3.2. Review

- 3.2.1. The declaration by the planning authority has been referred (by the referrer) to the Board for review pursuant to Section 5(3)(a) of the *Planning and Development Act, 2000*, as amended (*'the Act'*).

3.3. Reformulation of the Question

- 3.3.1. In my opinion, without altering the substance of the question, in the interests of conciseness the question can be reformulated, as follows:

Whether the (permanent) locking of the gate at the entrance to Cockle Lane, Lisselan, Tramore, Co. Waterford is or is not development and is or is not exempted development.

3.4. Planning Authority Reports

Planning Reports

- 3.4.1. A report from the planning authority Senior Executive Planner dated 4th, December 2019 includes:
- A gate has been placed at the entrance to Cockle Lane and this gate has been permanently locked.
 - A number of statements have been submitted to the planning authority attesting to the fact that Cockle Lane has been used by members of the public to access the Backstrand at Tramore for c. 60 years.
 - It has been asserted by the referrer that the act of locking the gate constitutes a material change of use (material change of use of the gate from public use to private use). It has been submitted that the locking of the gate alters the use of both the gate and the land.
 - Planning permission for the gate was granted per Reg. Ref. PD35A/87. From the details provided it appears that the lock was placed on the gate in recent years.
 - The placing of a lock on the gate is not considered to constitute 'works' as defined for the purposes of the *Act*.

- There has been no alteration to the use of the gate. There is no registered public right-of-way at this location. Nonetheless, the Senior Executive Planner has no reason to doubt the claims made in relation to the existence of a public right of way at this location.
- The restrictions on exemption provided for under Article 9 of the *Planning & Development Regulations, 2001*, as amended (*‘the Regulations’*) do not apply as Article 6 of the Regulations (providing for exemptions) does not apply in this instance.
- The facts of all of the precedent referral decisions cited by the referrer can be distinguished from the current case.
- In conclusion.
 - (a) *The locking of the gate does not constitute works within the meaning attributed in Section 2(1) of the Act.*
 - (b) *The locking of the gate does not constitute development which comes within the scope of Section 3(1) of the Act.*
 - (c) *The restrictions on development, set out in the Regulations are not relevant to this determination.*

4.0 Planning History

Reg. Ref. PD35A/87 – planning permission for the demolition of the demolition of an existing entrance, erection of a new entrance, piers and walls at Lisselan, Tramore, Co. Waterford was granted by the planning authority to Edward Cheasty.

5.0 The Referral

5.1. Referrer’s Case

5.1.1. A submission from the referrer dated 6th, January 2020 includes the following:

- The physical locking of a gate that was previously opened to the public to access a laneway, known as Cockle Lane, that allowed public access to Tramore Backstrand is development and is not exempted development.

- The Board determination in RL3816 is a precedent for the current case. In RL 3816 the laying of concrete blocks to obstruct the use of a pedestrian turnstile was held to constitute 'works' and, therefore, development for the purposes of the Act. The current case bears significant similarities to the current case in terms of the change of use of the access road and alteration of the structure in question.
- In the current instance the fundamental nature of the gate (from an object that opens to any member of the public to an object that opens to a keyholder only) has been altered beyond recognition.
- The insertion of a lock prevents the opening of the gate and constitutes 'works' for the purposes of the Act.
- The locking of the public gate on Cockle Lane has fundamentally altered the use of the lands as a pathway to Tramore Backstrand foreshore.
- The act of locking the gate is an act of development and represents a material alteration to the use of the gate and the use of Cockle Lane.
- Testaments have been provided from a number of people to assert that a public right-of-way has existed at Cockle Lane for many years.
- Previous determinations by the Board have set precedents establishing that development of the nature that is the subject matter of the current referral constitutes development that is not exempted development. These precedents include (i) RL3816 – Pollaid Great Arch, Fanad, Co. Donegal (insertion of boulders into a turnstile blocking access to Great Arch), (ii) RL3562 – Brackloon Woods, Co. Mayo (fencing and enclosure of land leading to a place of natural beauty i.e. Brackloon Woods), (iii) RL3219 – Fenit Island, Co. Kerry (erection of fencing to permanently enclose lands used as a place of natural beauty) and (iv) RL3154 – Lousiburg, Co. Mayo (erection of standard wooden post and wire sheep fencing enclosing/obstructing access to lands used as a place of natural beauty).

6.0 Statutory Provisions

6.1. Planning and Development Act, 2000, as amended ('the Act')

6.1.1. Section 2(1) (Interpretation) states:

*'In this Act, except where the context otherwise requires-
'works' includes any act or operation of construction, excavation,
demolition, extension, alteration, repair or renewal.....'*

6.1.2. Section 3 (1) states:

*'In this Act, 'development' means, except where the context otherwise
requires, the carrying out of any works on, in, over or under land or the
making of any material change in the use of any structures or other land.'*

6.1.3. Section 4(4) states:

*Notwithstanding.....any regulations under subsection 2,
development shall not be exempted development if an environmental
impact assessment or appropriate assessment of the development is
required.*

6.2. Planning and Development Regulations, 2001, as amended ('the Regulations')

6.2.1. Article 6 refers to exempted development provisions. Article 6(1) states;

*Subject to Article 9, development of a class specified in column 1 of Part 1
of Schedule 2 shall be exempted development for the purposes of the Act,
provided that such development complies with the conditions and
limitations specified in column 2 of the said Part 1 opposite the mention of
the class in the said column 1.*

Article 9(1) refers to development which shall not be exempted development for the purposes of the Act and includes:

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

(x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational amenity.

7.0 Assessment

- 7.1.1. On the basis of the documentation on file, I consider that there is some lack of clarity in relation to whether the question originally asked of the planning authority (and subsequently referred to the Board for review) relates to (i) the placing of a gate on existing gate piers and (ii) the locking of the gate or simply relates to the locking of an existing gate.
- 7.1.2. I note that under Reg. Ref. PD35A/87 planning permission was granted for an entrance, piers and wing walls at the site of the current referral subject to one condition which referred to the location of the piers. The report on file dated 4th, December 2019 from the planning authority Senior Executive Planner states that the permitted drawings relating to Reg. Ref, PD35A/87 indicated new entrance wing walls, piers and a gate. I also note that the referrers original submission to the planning authority included photographs showing the entrance with a gate in place in March 2009 (open) and in September 2009 (closed).
- 7.1.3. On the basis of the planning permission granted under Reg. Ref. PD35A/87 and the photographic evidence from March and September 2009 I consider that the referrer's question relates to the locking (placing of a padlock on the gate).
- 7.1.4. Furthermore, (in the context of the subject matter of this referral) I should point out that at the time of my site inspection (afternoon of 17th, June 2020) there was no lock in place on the gate and while the gate was bolted closed this bolt could be easily opened in order to facilitate public access to the laneway. On this basis it may be the case that the matter relating to the locking of the gate and public access to the laneway has been resolved locally. Nevertheless, the question that was asked by the referrer has subsequently been referred to the Board for review and the matter must be determined by the Board.

7.2. Is or is not development

'Works'

- 7.2.1. The definition of development provided in Section 3(1) of the Act involves 'works' and/or 'material change of use'. For development to take place 'works' and/or 'material change of use' must occur.
- 7.2.2. 'Works' for the purposes of the Act is defined in Section 2(1) and includes any act of 'construction, excavation, demolition, extension, alteration, repair or renewal'.
- 7.2.3. The planning authority Senior Executive Planner considers that the placing of a lock on the gate is not considered to constitute 'works' as defined for the purposes of the Act.
- 7.2.4. The referrer suggests that the insertion of a lock prevents the opening of the gate and constitutes 'works' for the purposes of the Act. The referrer seeks to rely on the Board determination in the case of RL3816 (Great Arch, Fanad, Co. Donegal) where it was held that the laying of concrete blocks to obstruct the use of a pedestrian turnstile constituted 'works'.
- 7.2.5. In my opinion, the placing of a padlock on an existing gated entrance cannot reasonably be regarded as involving any of the essential components of 'construction', 'excavation', 'demolition', 'extension', 'alteration', 'repair' or 'renewal' required to come within the scope of 'works' as defined for the purposes of the Act or Regulations. In the context of the definition of 'works' I consider that the current case is clearly distinguishable from the Board determination in the case of RL3816 where a turnstile had clearly been 'altered' by reason of the placing of boulders in a turnstile. In the latter case the turnstile was no longer capable of functioning as a turnstile after the 'alterations'. In the current instance (notwithstanding potential restrictions on use) the gate continues to function as a gate.
- 7.2.6. In my opinion, the locking of a gate does not include any act of 'construction, excavation, demolition, extension, alteration, repair or renewal' and, therefore, does not fall within the definition of 'works' for the purpose of Section 2(1) of the Act.

'Material Change of Use'

- 7.2.7. Where no 'works' as defined for the purposes of the Act have taken place 'development' can still occur in circumstances where a material change of use has occurred (any change of use must be 'material' to come within the scope of the definition of 'development' for the purposes of the Act and Regulations).
- 7.2.8. The planning authority Senior Executive Planner is of the opinion that there has been no alteration to the use of the gate.
- 7.2.9. It has been asserted by the referrer that the act of locking the gate constitutes a material change of use (material change of use of the gate from a public use to a private use). It has also been submitted that the locking of the gate alters the use of both the gate and the land.
- 7.2.10. Based on the documentation on file there appears to be no dispute between the parties in relation to the status on Cockle Lane as a private laneway. No party has asserted that the laneway is or ever was a public road. However, the referrer strongly asserts that an historic public right-of-way providing access from the public road (Tramore to Dunmore East) over the private laneway to the foreshore at Backstrand Tramore has been well established. The planning authority Senior Executive Planner states that she has no reason to dispute this claim to a public right-of-way along the laneway. Based on the various written testaments that accompanied the referrer's submission to the planning authority I would share the opinion of the Senior Executive Planner in this matter.
- 7.2.11. A public (or private) right of way can only be extinguished in very limited circumstances. It cannot be easily extinguished. While the locking of a gate may clearly impede members of the public from exercising their right to the benefit of the right of way it does not serve to extinguish the right of way (even in circumstances where the way has been restricted for many years). In my opinion, determination of matters relating to the burden and benefit of the right of way in the current instance constitute civil matters between the parties and is not matters for determination with the scope of Planning and Development legislation.
- 7.2.12. In the context of the current referral the matter for determination is whether or not a material change of use of the laneway has occurred. In this context, I consider that a private laneway accessed from the public road via a recessed entrance containing a gate (which has the benefit of planning permission) continues to be used as a private

laneway accessed from the public road via the same recessed entrance and gate. In my opinion, the placing of lock on the gate has no consequences (material or otherwise) in terms of the use of the gate. In coming to this conclusion, I acknowledge that the restriction in use of a public road to use as a private road only may well have material consequence in planning terms (reduction in intensity of use etc.). However, this does not describe the situation in the current instance – the use of a private laneway continues in use as a private laneway (subject to claims by a number of individuals in respect of the existence of a public right of way). In terms of planning, the issue of benefit and burden of any alleged right-of-way over the laneway does not impact on the essential character and use of the laneway.

7.2.13. In conclusion, therefore, given that the subject matter of this referral involves neither ‘works’ nor ‘material change of use’ I agree with the conclusion of the planning authority that the placing of a lock on a gate is not development for the purposes of the Act or Regulations.

7.3. Is or is not exempted development

7.3.1. In light of the conclusion at para. 7.2.12 above in relation to the subject matter of this referral not being ‘development’ for the purposes of the Act and Regulations, the issue of possible development exemptions under the Act and Regulations do not arise.

7.3.2. In the event that the Board were to disagree with the above finding and conclude that the subject matter of the referral is development then I consider that there are no exemptions under either the Act or Regulations (for the locking of a gate) that can be availed of in this instance and I consider that the appropriate determination by the Board would be that the locking of the gate would ‘*constitute development which is not exempted development*’.

7.4. Precedent Cases & Restrictions on exempted development

7.4.1. The referrer has cited previous Board determinations as precedents that can be relied upon in support of the argument that the subject matter of the current referral constitutes development and that such development is not exempted development. In particular, the referrer seeks to rely on the provision of Article 9(1)(a)(x) of the Regulations in support of the notion that any exemption that might otherwise apply would be de-exempted. However, I note that in each of the cases cited the Board

held that 'works' and therefore 'development' had occurred [(i) placing of boulders in a turnstile – RL3816; (ii) erection of fencing – RL3562; (iii) erection of fencing – RL3219 and (iv) erection of wooden post and wire sheep fence – RL3154]. Furthermore, in each case cited the works that had taken place might have been able to benefit from exemptions provided for under the Regulations (pertaining to the erection of fences etc.) were it not for the operation of Article 9(1)(a)(x) which places restrictions on the enclosure or fencing of lands habitually opened to the public etc. In my opinion, the current referral can be clearly distinguished from these precedents if that (a) no development has taken place and (b) even if it were to be determined that development had taken place, there are no exemptions available under either the Act or the Regulations that can be availed of in respect of such development. Therefore, in circumstances where there is no exempted development provision the matter of restrictions on any such provision by reason of the operation of Article 9(1)(a)(x) does not arise.

- 7.4.2. Other than the restriction on exempted development that might notionally arise under Article 9(1)(a)(x) of the Regulations and addressed at para. 7.4.1 above, the only other restrictions on possible exempted development that might apply in the current instance are those provided under Section 4(4) of the Act (relating to developments requiring Environmental Impact Assessment and/or Appropriate Assessment). Again, as has already been stated I consider that the subject matter of this referral does not involve development and even if the Board were to disagree with this finding and conclude that the subject matter of this referral does involve development then there are no exemptions under either the Act or the Regulations that can be availed of in respect of the placing of a lock on a gate. In these circumstances the operation of Section 4(4) of the Act does not arise in the first instance (and, even if it did the need for Environmental Impact Assessment or Appropriate Assessment would clearly not arise in the context of the subject matter of this referral).

8.0 Recommendation

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

WHEREAS a question has arisen as to whether the (permanent) locking of the gate at the entrance to Cockle Lane, Lisselan, Tramore, Co. Waterford is or is not development and is or is not exempted development.

AND WHEREAS John Deveraux requested a declaration on this question from Waterford City & Council and the City & Council issued a declaration on the 5th, day of December, 2019 stating that the matter was not development.

AND WHEREAS John Deveraux referred this declaration for review to An Bord Pleanála on the 8th day of January 2020:

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(4) of the Planning and Development Act, 2000,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the locking of an existing gate involving neither works, as defined for purposes of Section 2(1) of the *Planning & Development Act, 2000*, as amended nor a material change of use of the structure of lands does not constitute development as defined for the purposes of Section 3(1) of the *Planning & Development Act, 2000*, as amended.
- (b) Any exemptions or restriction on exemption that might otherwise apply to development as defined for the purposes of this Act or these Regulations are not relevant and do not apply to the subject matter of this referral and determination.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the (permanent) locking of the gate at the entrance to Cockle Lane, Lisselan, Tramore, Co. Waterford is not development.

Paddy Keogh
Planning Inspector

23rd, June 2020