



An  
Bord  
Pleanála

## Inspector's Report ABP-306614-20

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<b>Question</b>	Whether two gates providing access to an agricultural field from the ends of two private cul-de-sac service roads in an unfinished residential estate is or is not development and is or is not exempted development
<b>Location</b>	Dromin Upper, Listowel, County Kerry
<b>Referral</b>	
<b>Referred by</b>	Kerry County Council
<b>Planning Authority Ref.</b>	EX 810
<b>Owner/Occupier</b>	Eilín Olive Enright
<b>Date of Inspection</b>	3 <sup>rd</sup> June, 2020
<b>Inspector</b>	Kevin Moore

## 1.0 Introduction

- 1.1 On 28<sup>th</sup> January 2020 Eilín Enright made an application to Kerry County Council under section 5(1) of the 2000 Act seeking a Declaration as follows:

*“That development, resulting in the construction of two gates gate (A) and Gate (B) in a farmer’s field for the purpose of agriculture and the user for that purpose of the farm gates occupied together with the land so used at Dromin Upper, Listowel, Co. Kerry, for agricultural purposes (foliage including eucalyptus and decorative fir trees/forest produce) is exempted development within the meaning of section 5 of the Planning and Development Act 2000 as amended.”*

- 1.2 On 6<sup>th</sup> February 2020 Kerry County Council made a submission to the Board, under section 5 of the Planning and Development Act, referring the following question:

*“... to whether the two gates which have been erected to provide access to an agricultural field from the ends of two private cul-de-sac service roads in an unfinished residential estate is or is not development or is or is not exempted development ...”*

- 1.3 The Council noted that the Board previously declared that the gates constituted development which is not exempted development under ABP Ref. 08.RL.3516.
- 1.4 The planning authority’s submission included a report from a Senior Executive Planner in response to the receipt of the request from Eilín Enright for a declaration in accordance with section 5 of the Planning and Development Act. The Planner noted a previous decision by An Bord Pleanála and recommended that it would appropriate for the matter to be handled by the Board.
- 1.5 The planning authority’s submission includes a copy of the request made for a declaration from Eilín Enright.

## **2.0 Site Location / Description**

2.1 The appeal site is located along the eastern boundary of the Cahirdown Wood housing estate at the end of two internal estate cul de sac roads. The estate is located approximately one mile east of the town centre of Listowel in County Kerry. The estate is located immediately north of the N69 National Secondary Road and has a single vehicular access onto this road at the western end of the its frontage.

## **3.0 The Question**

3.1 The question before the Board is:

Whether two gates which have been erected to provide access to an agricultural field from the ends of two private cul-de-sac service roads in an unfinished residential estate is or is not development and is or is not exempted development.

## **4.0 The Response from Eilín Enright**

The response may be synthesised as follows:

### **4.1 Introduction**

- The landowner made a lawful application to the planning authority on 28<sup>th</sup> January 2020 under section 5(1) of the 2000 Act and the Council is required to fulfil its statutory duty.
- There are a number of matters in the planning authority's question which appear to differ from the submission made by the landowner. The Council's letter does not explain the new wording of the declaration. The Council cannot reformulate the question to the Board.

## 4.2 The Council's Obligations

- The planning authority is required to set out the grounds on which it asserts that the works are development or the grounds that the works are exempted development.
- Regarding the previous referral, there was no dispute on the following:
  - The use of the entrances was for agriculture, to gain access to the field for the purposes of agriculture (including horticulture);
  - The access was onto a private road over which the applicant has a right of way which terminated at a cul-de-sac;
  - There was no substantial evidence of traffic in the area where small vehicles were moving inwards and outwards nor were the vehicles accessing onto the private road.
- The Council is required to explain on what basis the use of the entrances amount to development or to exempted development having regard to the provisions of section 4(1)(a) of the 2000 Act. The use of the land remains for agricultural purposes and the movement of any mechanically propelled vehicle is connected with and incidental to that use. The entrances are therefore entitled to a statutory exemption under section 4(1)(a). Even if there was consideration of a traffic hazard, three to six movements of vehicles a week in an area where there is no traffic movement could never amount to a traffic hazard.
- The carrying out of works could never amount to a change of use.
- There is no limit on the width of an entrance that can be constructed for the purposes of section 4(1)(a) or Article 6(1) and Class 9 of the 2001 Regulations. In respect of Article 6(1) and Class 9, no traffic hazard under Article 9(1)(a)(iii) can be raised in respect of such works having regard to the judgement of Hogan J in *Cunningham v An Bord Pleanála and Sligo County Council*.

- The application for a declaration made to the planning authority sought a determination on the following:
  - Whether the gate, and use of Gate (A), for the purpose of agriculture otherwise from a public road falls within section 4(1)(a) of the 2000 Act,
  - Whether the gate, and use of Gate (B), for the purpose of agriculture otherwise from a public road falls within section 4(1)(a) of the 2000 Act,
  - Whether works for the construction of Gate (A) falls within Article 6(1) and Class 9 of the 2001 Regulations it being otherwise than onto a public road and falls within its provisions and is not subject to any of the exceptions or limitations in Article 9(1)(a)(iii) of the 2001 Regulations, and
  - Whether works for the construction of Gate (B) falls within Article 6(1) and Class 9 of the 2001 Regulations it being otherwise than onto a public road and falls within its provisions and is not subject to any of the exceptions or limitations in Article 9(1)(a)(iii) of the 2001 Regulations.

The Council cannot act in the manner it did and the Board is asked to request the local authority to properly engage with the declaration sought and on receipt of an appropriate response the landowner will engage and respond to the position the Council adopts.

#### 4.3 The Question of “Development”

- The erection of the gates comes within the definition of “development” in section 3 of the Act. The gates are less than two metres high and were constructed in the boundary hedge. They are kept locked except when in use.

#### 4.4 Section 4(1)(a) of the 2000 Act

- The user of the landowner’s farm, together with the two farm gates for agricultural purposes, is exempt development under section 4(1)(a). The

farm gates are buildings occupied with the land so used, i.e. for agricultural use. The agricultural user is also the low-density user of land for foliage and cognate decorative tree planting.

- The submission is supported by *Cunningham v An Bord Pleanála and Sligo County Council*, wherein it was determined that the exemption only applies in the case of development which consisted of the use of a structure for agricultural purposes. It does not apply in the case of the construction of such a structure.

#### 4.5 Article 6(1) and Class 9

- The gates come within Article 6(1) and complies with the conditions and limitations of Class 9 'Sundry Works'.
- The Board did not consider the exemption for gates under Article 6(1) and Class 9 in its previous decision under ABP Ref. 08.RL.3516.

#### 4.6 Article 9(1)(a)(iii)

- Article 9(1)(a)(iii) does not apply as the farm gates are to be used for the purposes of agriculture in the manner provided for in section 4(1)(a) of the 2000 Act. There is no limiting factor on the use of the land for the purposes of agriculture under section 4(1)(a).
- Article 9 cannot disapply a statutory exemption under section 4(1)(a).

#### 4.7 Traffic Survey

- A traffic survey undertaken in May 2017 explains the minimum traffic movements within the estate. The estimated traffic movements of small vans and trailers would not amount to a traffic hazard or obstruction of road users. An engineering report and traffic survey supports the submission.

#### 4.8 Article 6(1) and Class 11 Sundry Works

- Reference is made to a previous memo from a Planner in the Council in 2010 that submitted that works involving changes to the fence or ditch bounding the field is exempted under Class 11.

#### 4.9 Previous Referral by Kerry County Council

- The previous referral by the Council to the Board followed an earlier finding by the Council in October 2010 that the gates were exempted and a later finding in January 2012 that they were not so.

#### 4.10 Documentation

- It is submitted that documentation provided in the landowner's response was not before the Board when it made its previous declaration in April 2017.

## **5.0 Statutory Provisions**

### **5.1 Planning and Development Act 2000 (as amended)**

#### Section 2(1)

In this Act, except where the context otherwise requires—

“use”, in relation to land, does not include the use of the land by the carrying out of any works thereon;

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

### Section 3

3.—(1) 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.

### Section 4

4.—(1) *The following shall be exempted developments for the purposes of this Act –*

- (a) *development consisting of the use of any land for the purposes of agriculture and development consisting of the use for that purpose of any building occupied together with land so used.*

## 5.2 **Planning and Development Regulations, 2001 (as amended)**

### PART 2 - Exempted Development

#### Article 6(1)

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

#### Article 9(1)

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

- (a) if the carrying out of such development would – ...



- (iii) endanger public safety by reason of traffic hazard or obstruction of road users, ...

Schedule 2

*Part 1 Exempted Development – General*

Column 1 Description of Development	Column 2 Conditions and Limitations
<p><i>Sundry Works</i></p> <p>CLASS 9 The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway.</p> <p>CLASS 11 The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –</p> <p>(a) any fence (not being a hoarding or sheet metal fence), or</p> <p>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>The height of any such structure shall not exceed 2 metres.</p> <p>1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres.</p> <p>2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.</p>

**6.0 Planning History**

6.1 I note the following planning history relating to the site:

ABP Ref. 08.RL3516

The Board determined, in accordance with section 5(4) of the Planning and Development Act 2000, that the forming of two entrances to a field at the end of two cul-de-sacs at Cahirdown Wood Housing Estate, Listowel, County Kerry is

development and is not exempted development as it would endanger public safety by reason of traffic hazard or obstruction of road users.

## 7.0 Assessment

### 7.1 Introduction

7.1.1 I note the submission by the landowner relating to the planning authority's obligations in respect of making a declaration on the question raised by Eilín Enright to the authority on 28<sup>th</sup> January 2020. The Board will be aware that the planning authority has referred a question to it under section 5(4) of the Planning and Development Act 2000 (as amended). Section 5(4) is as follows:

*Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.*

It is clear from this provision that the planning authority is permitted to refer a question to the Board.

7.1.2 Further to this, I note that the planning authority has raised the following question:

*"... whether the two gates which have been erected to provide access to an agricultural field from the ends of two private cul-de-sac service roads in an unfinished residential estate is or is not development or is or is not exempted development ..."*

7.1.3 I note and accept that this question is of a different wording to that for which Eilín Enright sought a declaration from the planning authority on 28<sup>th</sup> January 2020. However, this is the question put to the Board on which the planning authority

has sought a determination. This is the question which the Board is required to make a determination on.

## 7.2 The Question of ‘Development’

7.2.1 The question before the Board relates to the erection of two gates. This would constitute “works”, as defined by section 2 of the Planning and Development Act, as it would include the removal of hedgerow to facilitate the construction, some degree of excavation, and the construction of the gates. It is evident, therefore, that the erection of the gates constitutes “development” for the purposes of the Planning and Development Act under section 3, involving the carrying out of works on, in, over and under land.

## 7.3 The Question of Exempted Development

### 7.3.1 Section 4(1)(a)

The landowner has submitted that the user of the landowner’s farm, together with the two farm gates for agricultural purposes, is exempt development under section 4(1)(a) of the Planning and Development Act. Section 4(1)(a) is as follows:

*4.—(1) The following shall be exempted developments for the purposes of this Act –*

*(a) development consisting of the use of any land for the purposes of agriculture and development consisting of the use for that purpose of any building occupied together with land so used.*

It is apparent from the above that section 4(1)(a) relates to the *use* of land for purposes of agriculture. The erection of gates, while it may facilitate access to allow the use of agricultural land, does not constitute 'use'. It constitutes 'works'. Gates may reasonably be determined to be 'structures' for the purposes of the Planning and Development Act but they could not reasonably be determined to be 'buildings', as appears to be suggested by the landowner. The landowner could not seek to avail of this exempted development provision in this instance.

### 7.3.2 Exempted Development Provisions

Part 2 of the Planning and Development Regulations 2001 (as amended), comprising Articles 5-11 and Schedule 2, relate to 'Exempted Development'.

Article 6(1) is as follows:

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

Article 9(1) includes the following:

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

- (b) *if the carrying out of such development would – ...*
  - (ii) *consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width,*

- (iii) *endanger public safety by reason of traffic hazard or obstruction of road users, ...*

Schedule 2 refers to the various classes of exempted development, and their associated conditions and limitations, and is in four Parts. Part 1 relates to 'Exempted Development – General', Part 2 to 'Exempted Development – Advertisements', Part 3 to 'Exempted Development – Rural', and Part 4 to 'Exempted Development – Classes of Use'. Parts 2 and 4 are not applicable in this instance and I note that there are no Classes of exempted development under Part 3 which could be considered to relate to the development the subject of the question to the Board.

The following Class and its conditions and limitations under Part 1 are noted:

Column 1 Description of Development	Column 2 Conditions and Limitations
<p><i>Sundry Works</i></p> <p>CLASS 9 The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway.</p>	<p>The height of any such structure shall not exceed 2 metres.</p>

I acknowledge that the landowner has made reference to Class 11 of Part 1, Schedule 2 in the submission to the Board. This is as follows:

Column 1 Description of Development	Column 2 Conditions and Limitations
<p><i>Sundry Works</i></p> <p>CLASS 11 The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –</p>	<p>1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not</p>

<p>(a) any fence (not being a hoarding or sheet metal fence), or</p> <p>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>exceed 2 metres.</p> <p>2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.</p>
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It is very clear that the gates the subject of the question to the Board are neither a fence nor a wall. Therefore, Class 11 could not be considered in the determination of the question before the Board.

I accept that Class 9, which applies to the construction/erection of gates, other than within or bounding the curtilage of a house, could be a Class of exempted development of relevance to the considerations of the Board, subject to meeting with the condition that such gates would not exceed two metres in height. The landowner has submitted that the gates do not exceed two metres in height and the height of the erected gates are not the subject of dispute. Evidently, regard is required to be had to Article 6(1) and to the relevant provisions of Article 9(1) when considering this.

I have set out the provisions of Article 9(1)(b)(ii) and (iii), which are considered relevant to this referral. I first submit that Article 9(1)(b)(ii) is not applicable in this instance as the erection of the gates does not 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. The gates form entrances to agricultural land from cul-de-sac ends within a residential estate and the planning authority's question expressly refers to two *private* cul-de-sac service roads.

Finally, I note the provisions of Article 9(1)(b)(iii) and, importantly, I acknowledge the Board's previous decision under ABP Ref. 08.RL3516. The entrances the

subject of that previous referral are the same openings that are gated to which the current question to the Board relates and they provide access from the same agricultural field to the east onto the same cul-de-sacs that serve the same residential estate of Cahirdown Wood. There are no material changes to the relevant circumstances that applied when the Board made its previous decision to those that now apply. I acknowledge that the landowner has submitted details on the nature of the land uses, the traffic associated with this agricultural use, the traffic survey carried out, etc. However, it has previously been determined by the Board that the two entrances to the field at the cul-de-sac ends are not exempted development because they would endanger public safety by reason of a traffic hazard or obstruction of road users. It is reasonable to ascertain that the Board previously determined that the vehicular traffic movements that would be generated via the entrances would be a traffic safety concern for residents of the estate. Whether considered 'entrances' or 'gates', consistency is required and there is no reason to seek to overturn the Board's previous considerations.

Having regard to the above, it can only reasonably be concluded that the two gates, which function as entrances and which have been erected to provide access to an agricultural field from the ends of two private cul-de-sac service roads in an unfinished residential estate, are development and are not exempted development.

## **8.0 CONCLUSION AND RECOMMENDATION**

**WHEREAS** a question has arisen as to whether two gates which have been erected to provide access to an agricultural field from the ends of two private cul-de-sac service roads in an unfinished residential estate is or is not development and is or is not exempted development:

**AND WHEREAS** the said question was referred to An Bord Pleanála by Kerry County Council on the 6<sup>th</sup> day of February, 2020:

**AND WHEREAS** An Bord Pleanála, in considering this referral, had particular regard to:

- (a) sections 2 and 3 of the Planning and Development Act 2000 (as amended),
- (b) articles 5-11 of the Planning and Development Regulations 2001 (as amended), with particular reference to articles 6(1) and 9(1)(a)(iii),
- (c) Part 1 of Schedule 2 *Exempted Development – General* of the Regulations, with particular reference to Class 9,
- (d) The planning history of the site, and
- (e) the submissions of the parties to the referral,

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

the erection of two gates to provide access to an agricultural field from the ends of two private cul-de-sac service roads in an unfinished residential estate is development and is not exempted development as it would endanger public safety by reason of a traffic hazard or obstruction of road users:

**NOW THEREFORE** the Board, in exercise of the powers conferred on it by section 5 of the 2000 Act, has decided that two gates, which have been erected to provide access to an agricultural field from the ends of two private cul-de-sac



service roads in an unfinished residential estate, constitute development and development that is not exempted development.

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Kevin Moore

Senior Planning Inspector

10<sup>th</sup> June 2020