



An
Bord
Pleanála

Inspector's Report ABP 306762-20

Question

Whether the widening of existing private access road, infilling of marl hole and restoration and reuse of an existing derelict house as a habitable dwelling is or is not development or is or is not exempted development

Location

Ballina Upper, Blackwater, County Wexford.

Declaration

Planning Authority	Wexford County Council
Planning Authority Reg. Ref.	EXD00793
Applicant for Declaration	Frances Hopkinson
Planning Authority Decision	Is Exempted Development

Referral

Referred by	Frances Hopkinson
Owner/ Occupier	Patrick Cashe
Observer(s)	None

Date of Site Inspection

3rd November 2020

Inspector

Emer Doyle

1.0 Site Location and Description

- 1.1. The site relating to the referral is located within the rural townland of Ballina Upper approximately 3.5km south of the village of Blackwater, Co. Wexford.
- 1.2. The lands at this location consist of a laneway which serves two dwelling houses. Both are unoccupied and appear to have been unoccupied for a considerable period of time. A two storey dwelling is located closer to the public road with a cottage and outbuildings further down the access road. A small section of the access road has been recently surfaced with hardcore and this does not reach the two storey dwelling. A newly created pond/ drainage pit is located on lands between both houses.
- 1.3. I refer the Board to Fig 1- Aerial View of Site as contained in the planner's report. The elements of the site which are included in this referral are the private access road, the two storey dwelling house and an infilled marl hole. This marl hole has now been completely filled in and grassed over and is no longer visible. The second dwelling house which is labelled as 'derelict dwelling house' does not form part of this referral.

2.0 The Question

- 2.1. The question before the Board is:

Whether the widening and surfacing with hard core stone of the existing private laneway, infilling of part of former sand/ gravel pit/marl hole with material of unknown composition, restoration and re-use of existing derelict house as a habitable house, and the use of the widened and resurfaced private laneway as access to the house are or are not development and are or are not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On the 7th of February 2020, Wexford County Council issued a declaration stating that the development is exempted development.

- 3.1.2. The reasons for declaring the development to be exempted are not given in the declaration.
- 3.1.3. However, the reasons for the declaration are included in the planner's report as follows:
- 3.1.4. The Council had regard to
- Sections 2, 3, and 4 of the Planning and Development Act 2000 (as amended);
- Part 2, Articles 5, 6, 8C and 9 of the Planning and Development Regulations 2001 (as amended);
- Part 1 Classes 9 and 13 of the Planning and Development Regulations 2001 (as amended);
- Part 1, Article 6(1), Class 58 of the Planning and Development Regulations 2001 (as amended);
- Part 3, Class 11 of the Planning and Development Regulations 2001 (as amended).

3.2. **Planning Authority Reports**

3.2.1. Planning Reports

- The planner's report notes that the lane is generally 3m in width and where excesses occur, they would not be considerably greater than 3m. There are no photographs of the laneway prior to the works and it is not possible for the Planning Authority to decipher any potential removal of bank/ increases in width.
- No permission would be required for removal of overgrowth and the access was already existing as the entrance walls and pier to the eastern side are still intact and in place.
- The two storey house is not a protected structure and appears to be structurally/ substantially intact; any internal works would not require planning permission.
- The derelict house to the extreme rear of the site is substantially intact.

- A planning enforcement case under 0010/2019 measured the marl hole as 589.7 square metres. This was considered to be exempted development when assessed against Part 3, Article 6, Class 11 of the Planning and Development Regulations. There was no evidence of waste material being deposited to infill the hole.

3.2.2. Other Technical Reports

None.

4.0 Planning History

PA Reg. Ref. 0010/2019- Enforcement

- This case referred to in the planner's report measured the marl hole as 589.7 square metres. This was considered to be exempted development when assessed against Part 3, Article 6, Class 11 of the Planning and Development Regulations. There was no evidence of waste material being deposited to infill the hole.

5.0 Policy Context

5.1. Development Plan

5.1.1. The Wexford County Council Development Plan 2013-2019 applies.

5.2. Natural Heritage Designations

5.2.1. Screen Hills SAC is located 1.5km to south of site. The Raven SPA is located 1.6km to east of site.

6.0 The Referral

6.1. Referrer's Case

6.1.1. The following is submitted:

- The reasons for declaring the development to be exempted are not given in the declaration.
- The house was last occupied over 50 years ago and it is considered that the use has been abandoned.
- There are inadequate sightlines at the access.
- Under ABP Ref. ABP 304752-19, the Board considered that the house was derelict. It was last occupied in the 1950's similar to the house in this case.
- The original access road was only 2.2m wide and was widened to over 3m. At around 20m back from the public road, it is 4m and at 30m it is 3.4m wide. The width of exemption of a private way as per Class 13 of Part 1 of Schedule 2 of the Planning and Development Regulations is up to and not exceeding 3m.
- The landowner had allowed a neighbour to fill the former marl hole and google earth ariel photographs and development works on the adjoining site strongly suggested that the marl hole had been filled with waste from the neighbouring property. As such, the development would not be exempted under Class 13 of Part 3 of Schedule 2 of the Planning and Development Regulations.

6.2. Planning Authority Response

- None.

6.3. Owner's response

- None.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 (as amended)

- Sections 2 and 3 of the Planning and Development Act 2000 (as amended).

- Section 2 – ‘habitable house’ means a house which –
 - (a) is used as a dwelling,
 - (b) is not in use but when last used was used, disregarding any unauthorised use, as a dwelling and is not derelict, or
 - (c) which was provided for use, as a dwelling but has not been occupied.

7.2. **Planning and Development Regulations, 2001**

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 8 relates to exemptions for field drainage.

Article 8B relates to field drainage for agriculture, other than reclamation of wetlands.

Article 8C relates to land reclamation works, other than reclamation of wetlands, consisting of recontouring of land, including infilling of soil (but not waste material).

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

Class 13- the repair or improvement of any private street, road or way...

Schedule 2 Part 3

Class 11- development consisting of the carrying out of drainage and/or reclamation of wetlands.

7.3. Relevant Referrals and Appeal Case

RL3540

The Board decided that the development does not come within the scope of the exemption set out in Article 8C of the Planning and Development Regulations because it is proposed to import soil from outside the landholding and furthermore the material proposed to be imported is a waste material.

ABP 303109

The Board decided that the development does not come within the scope of the exemption set out in Article 8C of the Planning and Development Regulations because the material used for infill is unknown.

RL3034

The Board decided that the development does not come within the scope of Article 8C of the Planning and Development Regulations as no exemption is provided for the importation of soil from external sources to a farm holding.

RL2987

The Board decided that the development did not come within the scope of Article 8C as the soils and overburden material were to be imported to the farm holding.

RL3501

The Board decided that a roadway did not come within Class 13 of the Planning and Development Regulations as the works did not come within the condition and limitation which states that the width of any such roadway should not exceed three metres.

RL3141

The Board decided that a pathway at Tipperary Racecourse was exempted development as the width did not exceed three metres and came within the scope of Class 13 of Part 1 of Schedule 2 of the Planning and Development Regulations.

ABP 301388

The Board decided that the use of a first floor unit for residential use ceased in the early 1970's. Subsequently, there was an intervening use as a hairdressing salons for a period in excess of 40 years. The residential use was considered by the Board to be abandoned.

ABP 304752

In an appeal case referred to in the referral, permission was refused for a replacement house in Co. Waterford by the Board. On the basis of the information submitted with the application and appeal relating to the structure on site, the Board noted the overall disused condition of the structure which was without windows and doors and considered that there was insufficient evidence that the structure constitutes a habitable dwelling.

7.4. Relevant Case Law

7.4.1. Dublin County Council v. Tallaght Block Co. Ltd

This case determined that a use of land can be abandoned and that a change of use will occur when an abandoned use is recommenced. Hederman J in the Supreme Court stated:

“Where a previous use of land has been not merely suspended for a temporary period and determined period, but has ceased for a considerable time, with no evidenced intention of resuming it at any particular time, the tribunal of fact was entitled to find that the previous use had been abandoned, so that the resumption constituted a material change of use.”

7.4.2. **Cork County Council v. Ardfert Quarries Ltd.**

In this case a site had been used as an animal food processing plant from 1953 – 1966, it had been vacant from 1966 to 1970 and it had been used to manufacture and store tyres from 1970 to 1974. The High Court held that the use of the premises as a general industrial building from 1953-1956 had been abandoned by its none use from 1966-1970. Murphy J stated:

“Having regard to the elapse of time and the absence of any satisfactory explanation therefore, I must conclude that the use as of the operative date was subsequently abandoned.”

7.4.3. **Meath County Council v. Daly**

The High Court held that the resumption of the use of premises which had been used for car repairs and petrol sales pre 1964, after that use had been abandoned since 1964 from time to time by the user of the premises for other purposes, and particularly by its user from 1969 for some years by a double glazing company, was a material change of use.

Based on case law some suggested tests of abandonment (Scannell, 1995) are:

- The intention of the owner and/or occupier to abandon or not abandon.
- The period during which the use was discontinued. The longer the period the more likely the use is to be abandoned.
- Whether or not there have been any intervening issues.
- The physical condition of the land or structure.

7.4.4. **Rehabilitation Institution v Dublin Corporation**

In this case, Barron J considered material changes of use in the context of premises in which a number of different uses are carried on. This case determined that where an enforcement notice relating to an unauthorised change of use is served, it is permissible to revert to the preceding use if that use was lawful.

8.0 Assessment

8.1. It should be noted that the purpose of a referral is not to determine the acceptability or otherwise of the proposed works in respect of the proper planning and sustainable development of the area, but rather to determine whether or not the matter in question constitutes development and if so falls within the scope of exempted development.

8.2. Is or is not development

8.2.1. The items at issue comprise of the following:

(a) Widening and surfacing of existing private access road

(b) Infilling of marl-hole

(c) Proposed restoration and re-use of existing derelict house as a habitable house.

8.2.2. These acts of construction may reasonably be determined to comprise 'works' in accordance with the definition set out under section 2(1) of the Planning and Development Act 2000 (as amended). These works would be/ have been carried out on, in and over land and thereby would constitute 'development' in accordance with section 3 of the Planning and Development Act, 2000 (as amended).

8.3. Is or is not exempted development

There are three elements to this referral. In the interests of clarity, I will assess each item separately.

8.3.1. Widening and surfacing of private access road

8.3.2. Class 13 of Part 1, Schedule 2 of the 2001 Planning and Development Regulations relating to the construction of the access road exempts the repair or improvement of any private street, road or way, being works carried out within the boundary of the street, road or way, and the construction of any private footpath or paving providing that any such private footpath or paving does not exceed 3 metres.

8.3.3. On the site inspection, I measured the width of the private roadway in several places. The roadway is not uniform throughout its length with some sections being c. 3m and some sections increasing to over 4.2m in width. I note from the drawings submitted with the referral that the original width of the private road was stated to be 2.2m. As the private access is now over 3m in width, the access does not conform with the limitations set down in Class 13 of the Regulations and is not exempted development.

8.3.4. Infilling of marl hole

8.3.5. In this case, an existing hole was filled and a new hole was created. The Planning Authority report contains GIS images of the location of the hole that was filled in. The original hole, which is the subject of this referral, is completely filled over and grassed and is no longer visible on the site.

8.3.6. There is a letter on file from Dobbyn and McCoy Solicitors dated 29th of October 2019 re. Patrick Cashe v Frances Hopkinson Wexford Circuit Court Record Number 51/2019 as follows:

8.3.7. 'Our client instructs that some time back a neighbouring landowner was having extensive clearing works carried out to his land. There is a marl hole that is primarily on the neighbouring landowners land but approximately five percent of it is bordered by our client's land. In the context of these works the Contractor engaged by the neighbouring landowner contacted our client and asked permission to access the marl hole from his lands in an effort to level off the embankment and in order to make the marl hole safer for both landowners. Our client agreed to this. With regard to any suggestion of works having been carried out to the laneway or alleged trespassing our client instructs that no works were carried out to the laneway by himself or on his behalf and any such works to the best of his knowledge were carried out in the context of the works being done by the neighbouring landowner.'

8.3.8. Details submitted with the referral indicate that the neighbours concerned are John and Eimear Grey who received planning permission under planning application PA Reg. Ref. 2016/0058 to demolish an existing fully habitable dwelling house and construct a new dwelling. It is stated that waste and surplus materials from the

redevelopment of the neighbouring site were deposited into the former sand and gravel pit/marl hole.

- 8.3.9. The Planning Authority report notes that a planning enforcement case PA Reg. Ref. 0010/2019 measured the marl hole to be 589.7m². As this area does not exceed 0.1ha in overall area, it is considered to be exempted development. The Planning Authority report states that there is no evidence of waste material being deposited to infill the marl hole and they cannot speculate as to what material may have been used.
- 8.3.10. Article 8C of the Planning and Development Regulations 2001(as amended), provides an exemption for land reclamation works, other than reclamation of wetlands, including recontouring and infilling of soil, but not waste material, within a farm holding. Under Class 11 of Part 3 of the Regulations, development consisting of the carrying out of drainage and/or reclamation of wetlands are exempted development. Conditions include that the area to be affected shall not exceed 0.1 hectares.
- 8.3.11. The Board have consistently taken the view that the exemption for land reclamation works provided by Article 8C is confined to land reclamation works where soil is sourced from within the landholding (RL3034, RL2987, RL3540, ABP-303109). The onus is on the landowner to provide evidence to the Board in relation to what material the hole was filled with and where it originated from. The only information available to me that the infill material for the marl hole was not from the original landholding.
- 8.3.12. Having regard to the limited information available to me, I consider that waste material was imported onto the site from a neighbouring landholding and the purpose of infilling of the land was not related to either drainage of wetlands or agriculture.
- 8.3.13. As such, I do not consider that the development would benefit from the exemptions provided by Articles 8C and Class 11 of the Regulations.

8.3.14. Proposed restoration and reuse of derelict house as a habitable dwelling

8.3.15. I note that there are two dwelling houses on the site which are both unoccupied at present. The referral relates only to the two storey dwelling closer to the public road.

8.3.16. Section 2 of the Planning and Development Act states that 'habitable house' means a house which –

(a) Is used as a dwelling

(b) Is not used but when last used, disregarding any unauthorised use, as a dwelling and is not derelict, or

(c) Was provided for use as a dwelling but has not been occupied.

I refer the Board to photographs 1, 2 and 3 taken on the site inspection. Whilst the two storey house has been unoccupied for a considerable period of time it appears externally to be in very good condition with 4 walls and the roof completely intact. There are some broken and damaged windows but the window openings are intact. I am of the view that the structure falls within the definition of habitable house as set out in the Act.

8.3.17. I note that no internal or external works have been carried out to the house in question and the referral only relates to future works. I consider that any future works would need to be assessed in their own right.

8.3.18. I consider that the key issue to determine is whether or not the use of the premises has been abandoned. This is a complex issue but a number of tests are generally applied and include:

- The physical condition of the premises
- The period of non use
- The nature and character of the intervening use if any
- There must be an intention not to resume the use

8.3.19. An appeal case decided by the Board under ABP-304752 is referred to by the referrer. In this case, the applicant claimed that the existing dwelling to be replaced was habitable but the Board in their reason for refusal noted 'the overall disused

condition of the structure which was without windows and doors and considered that there is insufficient evidence that the structure constitutes a habitable dwelling.'

- 8.3.20. The referrer considers that both the current case and the appeal case in County Waterford under ABP-304752 are comparable as the period of last use of the dwelling dated to the 1950's.
- 8.3.21. I have examined the report and photographs of the appeal under ABP-304752 and I consider that there are many differences between the two cases.
- 8.3.22. In terms of the tests generally used for abandonment, the two storey dwelling in the referral is in exceptionally good condition with windows, doors, and roof substantially intact. I refer the Board to photographs 1-3 taken on the site inspection. The house in ABP-304752 was in poor condition. In addition, the policy for replacement houses in the Waterford County Development Plan required replacement houses to have electricity and water supply, four walls and an intact roof. This policy is at odds with the definition of 'habitable house' in the Act and is not relevant to this referral.
- 8.3.23. The period of non use may be the same in both cases in terms of evidence provided by the referrer in the form of letters from neighbours detailing that the house was last occupied in the 1950's. However, I note that the Planning Report states that the house was last occupied in the 1990's.
- 8.3.24. I accept the information provided by the referrer however, I consider that it is important to refer the Board to the photographs detailing the condition of the house. I note that no information has been provided by the owner in terms of the period of non use.
- 8.3.25. The third test relates to the nature and character of the intervening use if any. I note that there was an 'intervening use' in the case of the appeal case in that the house had been used for housing animals. There has been no intervening use in the current case.
- 8.3.26. The fourth test relates to the intention to resume the use. In the appeal case, there were a number of intermittent planning applications which in the view of the Inspector, indicated an intention to resume the use.
- 8.3.27. In the current case, there is no record of planning applications but having regard to the good condition of the house, I consider that there must have been maintenance

of the property in the intervening years since it was last used. As such, I consider that this indicates an intention to resume the use.

8.3.28. Whilst the period of non use as a dwelling is certainly considerable, I am of the view that the physical condition of the property is very good, there have been no intervening uses, and the property has been maintained in the intervening years. I note that the referrer describes the house as 'derelict' however, having regard to the condition of the house as described above and as evidenced by the photographs taken on the site inspection, it is my view that the house is not derelict. As such, having regard to the evidence before me I do not consider that the dwelling use has been abandoned. I consider that the property comes within the definition of 'habitable house' under Section 2 (b) and (c) of the Planning and Development Act as amended.

8.4. **Restrictions on Exempted Development**

8.4.1. Widening and surfacing of access lane with hardcore

8.4.2. I note that sightlines are extremely restricted in both directions from the access. Article 9(1)(a)(iii) de-exempts development where it would endanger public safety by reason of traffic hazard or obstruction of road users.

8.4.3. Having inspected the site and the engineering drawings provided by the referrer, I consider that the existing access constitutes a traffic hazard and as such, the restriction of an exemption as set out in Article 9(1)(a)(iii) would not apply to this case.

9.0 **Recommendation**

9.1. 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 widening and surfacing of the access lane with hardcore, the infilling of marl hole with material, and the proposed restoration and reuse of a derelict house as a habitable dwelling is or is not development or is or is not exempted development:

AND WHEREAS Frances Hopkinson requested a declaration on this question from Wexford County Council and the Council issued a declaration on the 7th day of February, 2020 stating that the matter was exempted development:

AND WHEREAS Frances Hopkinson referred this declaration for review to An Bord Pleanála on the 28th day of February, 2020:

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

- (a) Sections 2 and 3 of the Planning and Development Act, 2000, as amended,
- (b) Articles 6, 8, and 9 of the Planning and Development Regulations, 2001, as amended,
- (c) Class 13 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (d) Class 11 of Part 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (e) the submissions on the file, and
- (f) the report of the Inspector.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the widening and surfacing of the access lane with hardcore would constitute development, as it does not come within the scope of Class 13 of Part 1 of Schedule 2 to the Planning and Development Regulations 2001, as amended because of non compliance with the

conditions and limitations set out in Column 2 as parts of the access road exceed 3 metres,

- (b) the filling of the marl hole does not come within the scope of the exemption set out in Article 8C of the Planning and Development Regulations, 2001, as amended, in respect of Land Reclamation, because the material used for infill is unknown and is taken from a neighbouring landholding,
- (c) the filling of the marl hole does not come within the scope of Class 11 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, because the work was not carried out for the purpose of drainage of wetlands,
- (d) the proposed restoration and reuse of a derelict house as a habitable house is development and is exempted development.

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:

- (a) the proposed restoration and reuse of a derelict house as a habitable house is development and is exempted development.
- (b) the infilling of a marl hole with material is development and is not exempted development
- (c) and the widening and surfacing of an access lane with hardcore is development and is not exempted development,

All at Ballina Upper, Blackwater, County Wexford.

Emer Doyle
Planning Inspector

12th March 2021