



An
Bord
Pleanála

Inspector's Report ABP-306874-20

Question	Whether the erection of fence no. 1 and fence no. 2 at Riverdale, Westbury, Co. Clare is or is not development and is or is not exempted development.
Location	Riverdale, Westbury, Co. Clare
Declaration	
Planning Authority	Clare County Council
Planning Authority Reg. Ref.	R20-4
Applicant for Declaration	Gerard Madden.
Planning Authority Decision	Is not exempted development
Referral	
Referred by	Gerard Madden.
Owner/ Occupier	Gerard Madden.
Observer(s)	None.
Date of Site Inspection	5 th May 2020.
Inspector	Bríd Maxwell

1.0 Site Location and Description

- 1.1. This referral relates to a greenfield site located to the east of Riverdale Housing Estate in Westbury, Athlunkard Co Clare in County Clare and within the north-eastern suburbs of Limerick City. The Athlunkard River a tributary of the river Shannon River runs along the eastern boundary of the site and these lands form part of the floodplain. A constructed embankment with dense vegetation and trees is adjacent to the river. The River Shannon is located a short distance to the southwest. Access to the area is open and on the date of my site visit I noted recreational dog walkers in the area.
- 1.2. Photographs of the site and vicinity are appended to this report.

2.0 The Question

- 2.1. The question as posed is whether the erection of a fence 1.2m high at Riverdale Westbury is exempt from planning permission. The submission indicates that it is proposed to erect a timber post and sheep wire fence 1.2m high over two sections of land. The first area proposed to be fenced is 69m in length and is located at a small turning head and the second area 144m in length is to the south of this and would be a continuation of a fence on Council land to the south. The proposed fence follows the line of site boundary 02/2035.
- 2.2. Cover letter indicates that neither the Council nor the applicant are aware of any letters served by Clare County Council to the previous owners of the land indicating that this land was designated open space according to Section 14-1 of the Planning and Development Act 2000.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1 By order dated 13th February 2020 Clare County Council declared the following
Whereas Clare County Council (Planning Authority) has concluded:

- (i) The erection of a fence constitutes both ‘works’ and ‘development’ as set out under Sections 2 and 3 of the Planning and Development Act, 200, as amended:
 - (ii) The development does not come within the scope of exemption afforded by Section 4(1)(h) of the Planning and Development Act 2000, as amended;
 - (iii) The proposed fences, would not be exempted development as they would contravene conditions of a planning permission, namely, conditions number 1 and 5 of planning permission granted under planning reference no. P02/2035, and, therefore, the restriction on exemption under Article 9(a)(a)(i) of the Planning and Development Regulations 2001, as amended, applies in this instance;
 - (iv) The proposed fences would result in the fencing off or enclosure of lands habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purpose as a means of access to a place of recreational utility, being open space servicing the adjoining housing development and as such the restrictions on exempted development as set out under Article 9(1)(a)(x) of the Planning and Development Regulations 2001, as amended, apply in this instance
- Therefore The Planning Authority in exercise of the powers conferred on it by Section 5 of the Planning and Development Act, 2000 (as amended) hereby decides that: the erection of fence no 1 and fence no 2 at Riverdale, Westbury, Co Clare constitutes development which is not exempted development as defined within the Planning and Development Acts, 2000 (as amended) and associated regulations.”

3.2. Planning Authority Reports

3.2.1. Planning Reports

3.2.1.1 The Planner’s report concludes that the erection of fence 1 would contravene conditions no 1 and 5 of PI. Ref 02/2035. The proposal would result in fencing off of lands habitually open to or used by the public during the 10 years preceding such

fencing or enclosure for recreational purposes as a means of access to a place of recreational utility being open space serving the adjoining housing development.

3.2.2. Other Technical Reports

None

4.0 Planning History

19/30 Question whether the construction of a 1.5m high fence (sheep wire) internally on land at Riverdale, Westbury is or is not development and is or is not exempted development.

The Planning Authority determined that

- (i) The erection of a fence constitutes both 'works' and development as set out under Section 2 and 3 of the Planning and Development Act 2000, as amended.
- (ii) The development does not come within the scope of exemption afforded by Section 4(1)(h) of the Planning and Development Act 2000 as amended.
- (iii) The development does not come within the scope of the exemption afforded by Class 11 of Part 1 of the Second Schedule to the Planning and Development Regulations, 2001 as amended, as the height of the fence exceeds 1.2m.
- (iv) The proposed fence, which would intersect a permitted area of public open space, would not be exempted development as it would contravene a condition of a planning permission, that is, condition number 5 of planning permission granted under planning register reference number 02/2035, and, therefore, the restriction on exemption under Article 9(1)(a)(i) of the

Planning and Development Regulations 2001, as amended, applies in this instance.

- (v) Now therefore Clare County Council decides that the proposed erection of a 1.5m high fence internally on land at Riverdale constitutes development which is not exempted development.”

07/2318 Application by Greenband Investments for the construction of 103 houses access roads and all associated site works together with alterations to previously approved planning ref no s P02-2035 and P02-700. Withdrawn.

07/2235 As above. Incomplete application.

04/1467 Application for permission for the construction of 166 houses and associated works, permission is also being sought for the repositioning of house numbers 27, 28,43 44, 111,112, 113, and 114 and associated site works approved planning P02/2035.

04/1301 Incomplete application

02/2035 McInerney Construction Ltd. Permission for change of house design on site numbers 1 to 169 under previously approved planning permission No P99/2505 to be replaced with 51 terraced houses and 168 semi-detached houses and associated site works. Appeal Withdrawn

Condition 1 specified that the development to be carried out in accordance with plans and particulars submitted to the Planning Authority on 22 November 2002 as amended by particular of 24th June except where altered or amended by conditions of the permission.

Condition 5 No development shall occur in the designated open space areas including the open space area to south of the site hatched in blue colour on site layout plan drawing no 03-100A received by the Planning Authority on 24th June 2003.

02/700 Permission for change of house design on site numbers 170 to 238 under previously approved planning permission no **P99/2505** to be replaced with 90 number semi-detached houses and associated site works.

PL03-120563 99/2505 McInerney Construction. Permission granted and modified following appeal of conditions.

98/1064 McInerney Construction Ltd. Permission for alteration to amenity area layout and the programme for its provision. Withdrawn.

UD19/32 Warning letter issued served 30th May 2019 regarding : The erection of a fence to land designated as open space associated with a residential development and restricting access to members of the public to lands habitually open to and used by the public as a recreational utility and rendering the area inconsistent with the use as open space as specified in permissions granted under the Planning Acts.

UD09/193 Non-compliance with conditions relating to PL02/2035

UD09/194 Non-compliance with conditions 02/700

5.0 **Policy Context**

5.1. **Development Plan**

The Clare County Development Plan 2017-2023 refers.

The referral site is within an area zoned open space OS3.

5.2. **Natural Heritage Designations**

The Lower River Shannon SAC is within 100m of the site.

The River Shannon and River Fergus Estuaries SPA is within 3km of the site.

Having regard to the nature and scale of the development subject of the referral, I am satisfied that no appropriate assessment issues arise and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

6.0 The Referral

6.1. Referrer's Case

6.1.1 The referral case as submitted to the Board outlines the following background.

- The land was sold by public auction in September 2017 by a receiver for Greenband Investments Ltd. and conveyancing concluded in December 2018.
- This was land leftover from the original agricultural farm of about 12 acres.
- An acre of this land was transferred to Clare County Council to comply with Open Space requirements as previously agreed. (Clare County Council drawing No 12-1106-07)
- Some of this land was used as an enabling site for construction of housing estate. The rest had been overgrown with bushes and scrub
- Between 2011 and 2016 there had been many representations made to Clare County Council about the state of the land's dangerous condition of the enabling site which was cleaned up around 2016. There was a wooden fence constructed by Clare County Council between agreed open space and agricultural land.
- On 20th May 2019, referrer attempted to complete the fencing of the land and was subsequently advised to cease work by Clare County Council.
- No clarity from Clare County Council regarding designation as open space or whether notice was served to the previous landowners of this land designated as open space within the Athlunkard Settlement Plan.
- With regard to Section 4(1)(h) of the Planning and Development Act 2000 the appearance of the fence would not be inconsistent with the neighbouring housing estate as the fence would be a continuation of the existing Council fence.
- The fence will only be 1.2m high and will consist of green timber post and sheep wire thus reducing visual impact, Wire will be tensioned giving a neat appearance.

- Neither the Council nor the referring party are aware of any letters served by the Council to the previous landowners of this land that this land was designated as open space according to Section 14(1). In condition 5 of PO2-2035 the area marked in blue to the south is outside the land so does is not relevant.
- In 2011 the land went under the protection of the high court due to the receivership process and a right of way could not be established. The land was not habitually open or used by the public during the 10 years preceding the proposed fence.

6.2. **Planning Authority Response**

The Planning Authority did not respond to the referral.

7.0 **Statutory Provisions**

7.1. **Planning and Development Act, 2000**

S.2 Works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal....

S.3.(1) In this Act, “development” means, except where the context otherwise require, 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.

S.4(1)(a)-(l) sets out what is exempted development for the purposes of this Act.

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

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.

Class 11

The construction erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –

- (a) Any fence (not being a hoarding or sheet metal fence), or
- (b) Any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.

Conditions and limitations to same include:

- (1) the height of any new structure shall not exceed 1.2m or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2metres.

Article 9 (1) sets out the instances where development to which article 6 relates shall not be exempted development for the purposes of the Act including:-

- (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 utility.

8.0 Assessment

8.1. Is or is not development

- 8.1.1. I am satisfied that the erection of fence walls within the definition of 'works' under section 2 of the Act and that the carrying out of such works is development as defined under section 3(1) of the Act and this is not disputed by the parties.

8.2. Is or is not exempted development

- 8.2.1 The referrer submits that the development is exempted development by virtue of Class 11 of Schedule 2 Part 1 of the Planning and Development Regulations 2001,

as amended which provides for “The construction erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –

(c) Any fence (not being a hoarding or sheet metal fence),”

The relevant condition and limitation being that the height of any new structure shall not exceed 1.2m in height.

I am satisfied that the proposed fence falls within the relevant conditions and limitations therefore it is appropriate to proceed to consider the restrictions on exemption.

8.3. Restrictions on exempted development

- 8.3.1. I note that the Council in its decision referred to conflict with the terms and conditions of permission reference (02-2035) however the first party notes the proposed fence lies outside the site boundary of 02-2035 and therefore this permission is not directly relevant to the considerations raised within the referral. I note that details of the planning history on these lands including layout plans for 99/2505 02/700 and 02/2035 clearly show the area now proposed to be fenced as public open space.
- 8.3.2. Article 9 details a number of restrictions on exempted development. That relevant to the current case is Article 9(1)(a)(x) which refers to a development consisting of the fencing or enclosure of any land habitually open to or used by the public during the 10 year preceding such fencing or enclosure for recreational purposes, shall not be exempted development for the purposes of the Act.
- 8.3.3. The referrer refutes the assertions of the Council that the lands form part of open space and outlines that the lands had been used partly as an enabling site for the construction of the housing estate and the rest overgrown with bushes and scrub.
- 8.3.4. Having examined the submitted documentation and conducted a site visit, I would observe that as there is unfettered public access over this subject area and based on submitted details, the planning history and observation on site visit it is evident that the area functions as open space. The subject area is not enclosed or fenced and is *open to the public* and is contiguous to and open to a larger network of passive recreational open spaces extending to the north south and east. The site cannot be divorced from the wider area of open space of which it forms part merely be reason

of landownership. The applicant provides no evidence that the subject area has not been habitually open to the public during the last 10 years. The restrictions under article 9(1)(a)(x) therefore apply and the erection of a fence, as proposed, does not constitute exempted development.

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 erection of a fence 1.2m high at Riverdale Westbury is or is not development or is or is not exempted development:

AND WHEREAS Mr Gerard Madden requested a declaration on this question from Clare County Council and the Council issued a declaration on the 13th day of February 2020 stating that the matter was development and was not exempted development:

AND WHEREAS Mr Gerard Madden referred this declaration for review to An Bord Pleanála on the 11th day of March 2020:

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

- (a) Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) articles 6 and 9 and class 11 under Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) That the erection of the proposed fence falls within the definition of works under section 2 of the Act and constitutes development within the meaning of Section 3(1) of the Act.
- (b) That the erection of the proposed fence falls within the scope of class 11 under Part 1 of Schedule 2 of the Regulations and under Article 6(a) of the regulations,
- (c) That, by reason of the said fence enclosing land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes, the subject development by virtue of the provisions of Article 9(1)(a)(x) of the Planning and Development Regulations, 2001, does not come within the scope of the exempted development provisions of Schedule 2 of the Planning and Development Regulations, 2001.

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 proposed erection of fencing at Riverdale Westbury is development and is not exempted development.

Brid Maxwell
Planning Inspector
1 July 2020