



An
Bord
Pleanála

Inspector's Report 307371-20

Question	Whether the construction of a road on private land is development, and if so, is it exempted development
Location	Drummans Lower, Drumkeeran, Co. Leitrim
Declaration	
Planning Authority	Leitrim County Council
Planning Authority Reg. Ref.	ED-19-25
Applicant for Declaration	Joachim Schaefer
Planning Authority Decision	Split decision: (1) Is development and is exempted development and (2) Is development which is not exempted development
Referral	
Referred By	Joachim Schaefer
Owner/Occupier	Matt Fisher & Maria Carey
Observer(s)	None

1.0 Site Location and Description

- 1.1. The subject site is located in the rural townland of Drummans Lower, approximately 2.8 km to the south-east of the settlement of Drumkeeran, Co. Leitrim. The site is accessed via a single-lane, private roadway, which extends in a north-easterly direction from the R280 regional road. The roadway provides access to 3 no. residential dwellings and agricultural land.
- 1.2. The subject site is located approx. 987 m along the northern extent of the private roadway. The site is characterised by an access track of compacted stone of approx. 3 m wide. The track extends in an easterly direction from the private roadway for approx. 415 m through agricultural lands, towards the shore of Lough Allen. A filter drain has been provided along sections of the route.
- 1.3. The access track includes 2 no. spurs, the first of which is located close to the site entrance and extends in a northerly direction for approx. 30 m. This spur is approx. 3 m wide and connects to a larger, generally rectangular parcel of compacted stone of approx. 12 m wide. The second spur is located towards the eastern extent of the route. It has a width of approx. 7 m and extends in a southerly direction for approx. 16 m.

2.0 The Question

- 2.1. Based on the information which was submitted to Leitrim County Council by the referrer on 15th November 2019, I consider that the question before the Board is **whether the construction of a road on private land is or is not development within the meaning of the Planning and Development Act, 2000 (as amended) and is or is not exempted development?**
- 2.2. The question as formulated by Leitrim County Council is **whether the repair and improvement of a private road and the creation of a private road to access agricultural structures under construction constitutes development, and if so, whether it is or is not exempted development.**
- 2.3. The development identified by the referrer on the map submitted to the Planning Authority, includes the main easterly section of the access track and the northern spur as described in sections 1.2 -1.3 above. The referrer's submission to An Bord

Pleanála notes that an additional section has been added at the southern end of the route as described above. I intend to consider the entire access track for the purposes of my assessment.

- 2.4. No substantive building works in relation to agricultural structures were underway on site at the time of my inspection and no details in relation to same have been provided by the landowners in their written submission to the Board. I further note that the northern spur is not materially different in its composition to the remainder of the access track.
- 2.5. As such, I intend to proceed with my assessment based on the initial question as posed by the referrer in this instance, rather than that formulated by the Planning Authority.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. A declaration was issued by Leitrim County Council on 27th March 2020 with a split decision as follows:

- (1) The repair and improvement of a private road constitutes development, and such development is exempted development, and;
- (2) The creation of a private road to access agricultural structures under construction constitutes development, and such development is not exempted development.

4.0 Planning Authority Reports

4.1. Planning Report (25th March 2020)

- 4.1.1. The Planning Officer considered that the construction of the access route constituted development. Based on historical mapping and aerial photography, the Planning Officer noted the pre-existence of tracks and a registered wayleave over the area to which the referral relates. The Planning Officer also undertook measurements on site to verify that the access route did not exceed 3 m in width.

- 4.1.2. Based on the foregoing, the Planning Officer considered that the provisions of Class 13 of Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended) applied to the main access route, and as such, the development was deemed to be exempted development.
- 4.1.3. The Planning Officer further considered that this exemption did not apply to the northern spur, on the basis that this route was being purposely developed to provide for vehicular access, and as such, was not considered to constitute a private footpath or paving.
- 4.1.4. No assessment is provided in the Planning Officer's report in relation to the southern spur.

4.2. **Other Technical Reports**

- 4.2.1. None.

5.0 **Planning History**

- 5.1. **ABP Ref. 305710-19: Planning Authority Reg. Ref. P19/142:** Planning permission granted on 12th February 2020 for the construction of an extension; to raise the ridge profile of the dwelling and amend the elevations; to demolish an agricultural building; construct a garage and retain a domestic fuel storage shed.
- 5.2. **Planning Authority Reg. Ref. ED-19-30:** Whereas a question arose as to whether the construction of a private road constitutes development and, if so, whether such development is or is not exempted development.
- 5.3. A declaration issued on 27th March 2020 that **the construction of a private roadway constitutes development and such development is not exempted development.**
- 5.4. I note that this roadway is located to the north-west of the roadway to which the current referral relates. Leitrim County Council's Planning Officer estimated the roadway to be approx. 50 metres in length and 5 metres wide.
- 5.5. **Planning Authority Reg. Ref. ED-19-29:** Whereas a question arose as to whether the construction of a septic tank, reed bed and willow beds constitutes development and, if so, whether such development is or is not exempted development.

- 5.6. A declaration issued on 27th March 2020 that the construction of a septic tank, reed bed and willow beds constitutes development and such development is not exempted development.
- 5.7. **Planning Authority Reg. Ref. ED-19-28:** Whereas a question arose as to whether (a) the use of a former agricultural building as a building for purposes incidental to the enjoyment of the dwelling house; (b) works to the external appearance of the former agricultural building including replacement of the roof, replacement doors and windows, replacement steps, the exposing of brickwork by removing plaster and internal works, and (c) the provision of a lean-to extension to the former agricultural building which is providing sanitary accommodation (bathroom) and a laundry room, constitutes development and, if so, whether such development is or is not exempted development.
- 5.8. A declaration issued on 27th March 2020 that (a) the use of a former agricultural building as a building for purposes incidental to the enjoyment of the dwelling house constitutes development and such development is exempted development; (b) works to the external appearance of the former agricultural building including replacement of the roof, replacement doors and windows, replacement steps, the exposing of brickwork by removing plaster and internal works is development and such development is exempted development; and, (c) the provision of a lean-to extension to the former agricultural building which is providing sanitary accommodation (bathroom) and a laundry room is development and is not exempted development.

6.0 **Natural Heritage Designations**

- 6.1. Boleybrack Mountain SAC is located 5.1 km to the north-east of the site; Cuilcagh Anierin Uplands SAC is located 7.4 km to the south-east; Lough Gill SAC is located 12.6 km to the north-west; Unshin River SAC is located 17.4 km to the south-west; Lough Arrow SPA and SAC is located 16 km to the south-west; and, Bricklieve Mountains and Keishcorran SAC is located 20 km to the south-west.
- 6.2. **Appropriate Assessment**
- 6.2.1. Having regard to the nature and scale of the proposed development, and its location relative to Natura 2000 sites, no appropriate assessment issues arise and it is not considered that the proposed development would be likely to have a significant

effect, either individually or in combination with other plans or projects, on a European site.

6.3. EIA Screening

- 6.3.1. Schedule 5, Part 2, 10 (dd) of the Planning and Development Regulations, 2001 (as amended) confirms that all private roads which would exceed 2000 m in length are subject to EIA. The combined length of the private road in this instance is approx. 416 m, and as such, is sub-threshold for the purposes of EIA.
- 6.3.2. Having regard to the nature and scale of the development, it is considered that it would not result in a real likelihood of significant effects on the environment. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.
- 6.3.3. As such, I am satisfied that the provisions of Part 1, Section 4 (4) of the Act do not apply.

7.0 The Referral

7.1. Referrer's Case

- 7.1.1. The referrer submits the following:
- Unauthorised development which was not exempt, took place in respect of the entire road under construction, and is not limited to the creation of a private road to access agricultural structures under construction;
 - Leitrim County Council has named and defined the newly constructed road towards the proposed stables as a spur road, which is the small part of the entire road construction, which has been deemed not to be exempted development;
 - The main road leading to Lough Allen does not constitute repair and improvement of a private road, nor the reconstruction of a road;
 - The new road construction took place along a line which was used in the past to cross and access fields by tractor, farm machinery and for shifting livestock and accessing pasture and meadows for making silage or saving hay;

- At no time, was there any form of stoned, mettled or paved path or road anywhere in these fields where the new road is constructed;
- The road construction is an entirely new development and has nothing to do with the repair, improvement or reconstruction of any previous structure;
- The road exceeds 3 m in width;
- The road is not intended to be used as a private footpath or paving, but rather as an agricultural road upon which motorised vehicles will pass to access stable development;
- Another square area has been excavated c. 300 m down the road towards Lough Allen, which may relate to the preparation of foundations for another agricultural structure;
- The referrer notes difficulty in accessing the lands, despite being legally entitled to do so;
- It is submitted that the entire new road is development, which is not exempted development.

7.2. Planning Authority Response

- 7.2.1. A response was received from the Planning Authority on 23rd July 2020.
- 7.2.2. The Planning Authority notes that the referral question was not clearly stated on the referral application form and that a degree of interpretation was required on their part as to the substantive question being asked. The Planning Authority has no difficulty should the Board consider that this question excluded some other element which was not determined.
- 7.2.3. It is further stated that the Planning Authority did not indicate at any time that a road was previously in existence on the subject site, but that it did consider that a “way” existed. This was noted to be supported by the way being registered on the subject land and being clearly visible in aerial photography. The works were considered to constitute the improvement of this “way”. The Planning Authority notes that the appeal submission appears to acknowledge that such a “way” existed, thus supporting their own rationale.

- 7.2.4. The response includes correspondence from the Regional Inspector of the National Parks and Wildlife Service in relation to the purported presence of Fritillary Butterfly on the site. The Planning Authority considers that the response from the Regional Inspector is important in relation to the protection afforded to such species outside of designated SACs.
- 7.2.5. I note that this correspondence states that “populations of Marsh Fritillary which occur outside of SACs and which are not in any way linked to populations within SAC sites for which they are a qualifying interest, have limited legal protection through the provisions of the Wildlife Acts and the Environmental Liability Directive”.

7.3. **Landowner Response**

- 7.3.1. A response was received from Davitt Plan & Design on behalf of the landowners on 26th August 2020, which can be summarised as follows:
- Land registry maps confirm that there is a clear right-of-way which follows the line of the road in question. This “way” has been long established and used by the landowners and by owners and occupiers of the land for a substantial period of time;
 - Land registry information (schedule and maps) from 1986 describes a right-of-way comprising a 3 m wide wayleave in the location of the subject way. There has been no amendment or removal of this right-of-way;
 - The landowners have upgraded the existing way, as it had fallen into disrepair and was not fit for purpose, in accordance with best practice methodologies and maintained at 3 m;
 - The landowners have never witnessed the March Fritillary butterfly on their landholding & the works have not adversely impacted their habitat, as there was already an existing pedestrian, vehicular and animal access in use on the site for a substantial period of time.

7.4. **Further Responses**

- 7.4.1. A further response was received from the referrer on 27th August 2020. The new points which are raised can be summarised as follows:

- Leitrim County Council has created and answered a question which was not asked by the referrer, regarding the use of the road to access agricultural structures;
- The development does not take the conservation needs of the Marsh Fritillary into account.

8.0 Statutory Provisions

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

- 8.1.1. **Part 1, Section 3(1)** of the Act states that “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”.
- 8.1.2. **Part 1, Section 2(1)** of the Act states that ““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”.
- 8.1.3. **Section 4(1)** sets out the various forms and circumstances in which development is exempted development for the purposes of the Act.

8.2. Planning and Development Regulations, 2001 (as amended)

- 8.2.1. **Article 6 (1)** states that “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.
- 8.2.2. **Article 9** sets out the following relevant restrictions on exempted development:
- (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 –

- (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,
- (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,
- (xi) obstruct any public right of way;

8.2.3. **Schedule 2, Part 1, Class 13** of the Regulations defines the following as exempted development: “the repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving”, with the condition and limitation that “the width of any such private footpath or paving shall not exceed 3 metres”.

9.0 **Assessment**

9.1. The purpose of this referral is not to determine the acceptability or otherwise of the construction of a road on private land in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.

9.2. **Is or is not development**

9.2.1. A question has been raised as to whether the construction of a road on private land is development within the meaning of the Planning and Development Act, 2000 (as amended), and if so, is it exempted development?

9.2.2. As set out in Section 8.0 of this report above, “development” means, except where the context otherwise requires, the carrying out of works on, in, over or under land, while “works” includes any act or operation of construction or excavation. In my opinion, it is reasonable to conclude that construction works have been undertaken on site for the purposes of laying down the access track, and as such, constitutes development within the meaning of the Act.

9.3. Is or is not exempted development

- 9.3.1. I consider that the development would not fall within any of the categories of exemptions set out in Section 4 (1) of the Act.
- 9.3.2. In my opinion, the construction of the access track, including the northern spur and the main easterly section, would reasonably constitute exempted development under the provisions of Class 13 of Schedule 2, Part 1 of the Planning and Development Regulations, 2001 (as amended). This class relates to the repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving. The conditions and limitations require that the width of any such private footpath or paving shall not exceed 3 metres.
- 9.3.3. While Leitrim County Council's Planning Officer considered that the northern spur was intended to facilitate vehicular access to agricultural structures under construction, I note that no substantive construction works were ongoing on site at the time of my inspection. As such, in my opinion, the northern spur is not materially different to the remainder of the access track.
- 9.3.4. The mapping documentation which has been provided by the landowner confirms that a 3 m wayleave/right-of-way has been in existence in the general location of the subject site since at least 1986. I note that this wayleave is visible on historical mapping of the lands which is available on Google Earth.
- 9.3.5. Having regard to the foregoing, in my opinion, the works which have been undertaken on site comprise "improvement" works to a "way" as provided for under Class 13. I further consider that the compacted stone which has been applied to the way, can reasonably be described as "paving", which I note to be 3 m in width as per the limitations and conditions attached to this class.
- 9.3.6. However, I further consider that the northern-most section of the track, comprising a rectangular section of compacted stone of approx. 12 m in width, and the southern spur, which is approx. 7 m wide, do not comply with the limitations and conditions attached to Class 13, and as such, constitute development which is not exempted development.

9.3.7. While a query has arisen in relation to the purported presence of Fritillary Butterfly on the site, I note that the site does not form part of an SAC for which this species is a qualifying interest. In my opinion, the works to which this referral relates would not have an impact on the habitat of this species, and as such, I am satisfied that this issue is without substance in this instance.

9.4. **Restrictions on exempted development**

9.4.1. I have reviewed the relevant restrictions on exempted development under Article 9 of the Regulations and I am satisfied that no restrictions apply in this case.

9.5. **Conclusion**

9.5.1. In my opinion, the activities which have been undertaken on the subject site constitute works and therefore constitute development within the meaning of the Act. I further consider that the main section of the access track and the northern spur constitute exempted development under Class 13 of Schedule 2, Part 1 of the Planning and Development Regulations, 2001 (as amended).

9.5.2. I further consider that the northern-most section of the track, comprising a rectangular parcel of compacted stone of approx. 12 m in width, and the southern-most spur of approx. 7 m in width, do not meet the limitations and conditions attached to Class 13, and as such, constitute development which is not exempted development.

10.0 **Recommendation**

10.1. I recommend that the Board issue an order as follows:

WHEREAS a question has arisen as to whether the construction of a road on private land is or is not development or is or is not exempted development:

AND WHEREAS Joachim Schaefer requested a declaration on this question from Leitrim County Council and the Council issued a declaration on the 27th day of March, 2020 stating that (1) The repair and improvement of a private road constitutes development and such development is exempted development, and; (2) The creation of a private road to access agricultural structures under construction constitutes development and such development is not exempted development.

AND WHEREAS Joachim Schaefer referred this declaration for review to An Bord Pleanála on 18th day of July, 2020:

AND WHEREAS An Bord Pleanála, in considering the referral, had regard 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 (1) of the Planning and Development Act, 2000, as amended,
- (d) Article 6 (1) and Article 9 (1) of the Planning and Development Regulations, 2001, as amended,
- (e) Class 13 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, and
- (f) The pattern of development in the area

AND WHEREAS An Bord Pleanála has concluded that –

- (a) The construction of a road on private land consists of the carrying out of works and therefore constitutes development within the meaning of the Act;
- (b) The northern spur and eastern-most section of the road constitute development which is exempted development under Class 13 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended;
- (c) The northern-most section of the road, comprising a rectangular parcel of compacted stone of approx. 12 m in width, and the southern-most spur of approx. 7 m in width, do not meet the limitations and conditions attached to Class 13, and as such, constitute development which is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5(3) of the 2000 Act, hereby decides that the construction of a private road (1) is development which is exempted development and (2) comprises development which is not exempted development.

Louise Treacy
Planning Inspector

16th October 2020