

An  
Bord  
Pleanála

## Inspector's Report ABP-308442-20

<b>Question</b>	Whether the construction of a fence, a pedestrian gate and a vehicular gate on the road is or is not development and is or is not exempted development.
<b>Location</b>	Former Anglers Rest, Doonass Demense, Clonlara, Co. Clare, V94 K735
<b>Declaration</b>	
Planning Authority	Clare County Council
Planning Authority Reg. Ref.	R2044
<b>Requester/Applicant for Declaration</b>	Fiona McCarthy
Planning Authority Decision	No declaration
<b>Referral</b>	
<b>Referred by</b>	Clare County Council
<b>Owner/ Occupier</b>	Derek Cox & Michelle Caffrey
<b>Observer(s)</b>	Fiona McCarthy
<b>Date of Site Inspection</b>	26 <sup>th</sup> January 2021.
<b>Inspector</b>	Adrian Ormsby

## 1.0 Site Location and Description

- 1.1. The site is located on the northern bank of the River Shannon in the townland of Doonass c. 2.8 km south east of the village of Clonlara in County Clare.
- 1.2. The sites curtilage includes a building that appears to have most recently been known as the Anglers Rest, an open green area along the bank of the Shannon and a large car parking area to the north west of the building.
- 1.3. The building itself is part two and part single storey and can be described as three attached blocks. These blocks appear to include-
  - a two storey pitched roof building formerly, a bar and restaurant.
  - a single storey standard pitch with hipped end function room annex to the side of the bar/restaurant and
  - a two storey pitched roof guesthouse/residential property to the rear of the bar.
- 1.4. The site is located at the end of a local cul de sac road running south east from Clonlara. The road appears to enter the rear of the property with the front elevation being the south facing bar/restaurant block facing on to the River Shannon and the rear elevation being that facing towards the public road.
- 1.5. It is clear from the site inspection that the site does not currently operate as a business or commercial property. The bar/restaurant is closed/not accessible to the public and many of the function room windows are hoarded up. The block to the rear appears to be operating as a residential property and occupied by the owners. The car parking area has been fenced off with a locked gates for vehicles and an openable pedestrian gate providing access to the River Shannon along the western side of the site. An area that can be described as a private amenity space is located to the north of the residential block and is fenced off. A front door and porch/canopy is located on the eastern gable of the now residential block.
- 1.6. The fence, pedestrian gate and vehicular gate that appear to be the subject of this referral are located on the northern side of the building and can be described as residential in appearance. They serve to restrict the movement of pedestrians and

vehicles along the side gable of the building that now operates as the home of the site owners.

In the interest of clarity, the matters considered under assessment are those items labelled 'New Fence', 'New Gate' and 'New Pedestrian Gate' as per Drawing Number D-120920-1 as submitted with the original request for a Declaration to Clare County Council date stamped 29/09/20.

- 1.7. The Doonass Graveyard is located directly to the east of the site. The site is also c. 1.2km to the southwest of the Doonass Footbridge to Castleconnell in County Limerick.

## 2.0 The Question

- 2.1. The Requester asks-

*Is the construction of a fence, a pedestrian gate and a vehicular gate on a road, development, and if so is it exempted development, location of which is Doonass, Co. Clare?*

The Requester includes a drawing and states the items referred to in the question are labelled 'new fence, new gate, and new pedestrian gate' and are identified to the north of the existing building.

- 2.2. The Owners in their submission response to this Referral suggest the question to be asked is-

*Whether a fence, a pedestrian gate and vehicular gate within the curtilage and to the rear of a private residence is or is not development and if it is development is it exempted development?*

- 2.3. In the interest of clarity, and as set out and explained in the assessment in section 9 below I consider it appropriate to reword the question as follows-

*Whether the construction/erection of a fence, pedestrian and vehicular gateway within the curtilage of a 'Business Premises' where part of that premises is now in use as a 'House' is or is not development, and if it is development, is it, or is it not exempted development?*

### 3.0 Planning Authority Declaration

#### 3.1 Declaration

In a letter received by An Bord Pleanála on the 19<sup>th</sup> of October 2020 Clare County Council have advised that they have not made a declaration in this instance and is now referring the matter to An Bord Pleanála for a determination under Section 5 (4) of the Planning and Development Act, 2000 as amended.

### 4.0 Planning History

- There does not appear to be any planning history on this site and this is also acknowledged in the submitted planners report from Clare County Council.
- It is noted the Requester in this case refers to 00/30 which was an application “to retain buildings” at Doonass, Clonlara, Co. Clare. Permission was granted on the 28/05/2001 subject to 3 conditions. There is no other information available on file or online in relation to this application.

### 5.0 Policy Context

#### 5.1 Development Plan

The Clare County Development Plan 2017-2023 is the operative plan.

- The site is located in a Rural Area Under Strong Urban Pressure and not within a Settlement Boundary.
- Appendix 6- Public Rights of Way (The subject site is not identified).

#### 5.2 Natural Heritage Designations

A small section of the southern boundary of the site is located within the Lower River Shannon SAC, site code 002165. However, the location of the subject referral is located c. 50m north of the SAC.

### 5.3. Environmental Impact Assessment

- 5.3.1. The proposed development does not fall within a class of development set out in Part 1 or Part 2 of Schedule 5 of the Planning and Development Regulations 2001-20 (as amended) and therefore is not subject to EIA requirements.

## 6.0 The Referral

### 6.1. Requester's Case

The issues raised by the Requester can be summarised as follows-

- The fence gate and pedestrian gate were constructed during the Covid 19 lockdown without consultation of neighbours, the local community or any of the various groups that enjoy the amenities of the river and the walks that the 3 items now block.
- The occupants of the former 'Anglers Rest' are responsible for this construction and subsequent locking of the gates, thus preventing the enjoyment of the aforementioned amenities for the first time in history according to locals.
- The referral is accompanied by drawings and what appears to be a signed list/petition of people in support of the declaration request.

### 6.2. Referrer's Case / Planning Reports

- 6.2.1. Two planner reports, dated the 14<sup>th</sup> and 16<sup>th</sup> of October have been received from the County Council. They highlights the following matters-

- The application comprises a number of things including background information regarding the construction of the development whereby it is stated that the development carried out is blocking/obstructing access to the amenity of the river near Angles Rest cottage.
- The report refers to a number of statutory provisions in both the Planning Act and Regulations and in particular Schedule 2 Article 6 Part 1 Exempted Development —General Class 11 which includes for 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) subject to conditions and limitations.

- The report dated the 14<sup>th</sup> of October states-

*'this matter should be referred to An Bord Pleanála for determination in particular regarding whether the works obstruct a public right of way, under the Act and whether the proposal therefore constitutes development which is not exempted development.'*

#### 6.2.2. Technical Reports from the Planning Authority

- None on file.

#### 6.3. Owner's Response

The Owners and occupiers have made a submission response prepared by AK Planning (Town Planning & Development Consultancy) in response to this declaration request which can be summarised as follows-

- Michelle Caffrey and Derek Cox purchased this property for use as a family dwelling in 2017. They refurbished the property in 2018. Due to sporadic incidents of trespass they were forced to erect a garden fence and gates in June 2019.
- Previously the property operated as a public house before closure in 2011 or thereabouts. The then owners allowed access with conditions across their property for people walking towards the river. This may have been a commercial decision for what was primarily a commercial enterprise at the time.
- Those who passed across this space while in use as a public house and subsequently while vacant following its closure believe there is an ongoing entitlement to do so even when it is in use as a private residence.
- The site is currently in use as a residential dwelling.
- The property use as a public house was abandoned in 2011.

- There is a car parking area to the north of the property now disused save for occasional funeral parking which the current owners facilitate in conjunction with the local graveyard committee.
- The property appears to date back to the mid-19<sup>th</sup> century.
- The original dwellings front elevation addresses the River Shannon. The fence and gates subject of the Section 5 are located to the rear of the property and come within the exemption height limits.
- The local authority referred the Section 5 application unaltered.
- The owners challenge the Planners Report 'site location' description and state a road does not access the river. The public road ends at the entrance to the council owned graveyard. From this point the property is served by a driveway that wraps around the front of the building.
- The status of the lands identified by the Local Authority as 'OPW land' is questionable. A solicitor acting for the owners of the site has determined that actual ownership of these lands cannot be ascertained.
- The submission suggest the question to be asked at this juncture is  
*Whether a fence, a pedestrian gate and vehicular gate within the curtilage and to the rear of a private residence is or is not development and if it is development and if it is development is it exempted development?*
- The original declaration does not refer or make claims to a 'Right of Way'. The subsequent local authority referral does refer to a Right of Way but their referral question to the Board was not revised accordingly.
- There is no registered 'Right of Way' in existence across the subject property (Folio No. CE58407F). A letter in support of this is submitted from the owners solicitor. There are limited sporting rights for permitted fishing which is managed by the ESB who have responsibility in this area. Access is provided across the property to the north for fishing which avoids the private residence.
- The fence and gate erected is development and constitutes exempt development under Schedule 2 Article 6 Class 5 of the Planning and Development Regulations.

- The Local Authority introduced the question of an informal right of way in order to provide a basis to de-exempt the works under Article 9 (1) (a) (x). The owners contend there is no evidence to substantiate the claim that this route has been habitually used for a period of 10 years prior to the erection of the gate and fence and as such Article 9 (1) (a) (x) should not be considered.

#### 6.4. Further Responses

6.4.1. The Requester Fiona McCarthy has made an observation/submission to An Bord Pleanála on foot of the Council's referral. This submission can be summarised as follows-

- The matters for referral meet the criteria that would qualify as "development" within the meaning of Section 3 of the Planning and Development Act. It has also caused a material change of use of the land within the terms of this section in that the habitual access over the land can no longer be enjoyed.
- The development is of such a standard that it qualifies as "works" within the meaning of section 2 of the Act.
- The developments referred to have the effect of closing of traditional access to what space had been used for parking cars associated with graveyard visits, and also pedestrians to the bank of the River Shannon and to the turret at the well-known 'Fall of Doonass' by means of the 'Cead Mile Failte' Steps.
- The development is not exempt under the provisions of Article 9 (1) (a) (x) of the Planning and Development Regulations 2000 as amended.
- The submission attaches an enclosure with 57 signed and duly witnessed (by a Peace Commissioner) testimonies to such use for at least 10 years from members of the local community.
- This access roadway has been in public use for so long – since the 19<sup>th</sup> century. There is certainly a de facto right of way and may be recorded somewhere in the planning authority records or CDP as a formally recognised Right of Way. Its historical and functional use is then set out.



- It would appear that no planning permission has been sought nor granted for material change of use from silent licenced business premises to that of a private dwelling house.
- A material change has taken place, the main entrance has been changed from the south side to the east side of it. The change has been highlighted by the addition of an external porch so this entrance is now a feature of the new frontage of the house.
- The Observer/Requester requests the Board to look at the need for permission for change of use and the associated other changes which may have led to difficulties in the community.
- The Observer/Requester details that she has only become aware that it is possible for a Public Right of Way to be protected by the County Council, legally, by its inclusion in the County Development Plan.
- The observation submission is also accompanied by-
  - a chronology of obstruction as referred to the council i.e. an email
  - Historical record of visits to 'St Senans weel' dating back 80 years- includes reference to the Anglers Rest Hotel
  - Birdwatch Ireland notes dated 22/07/2018 includes reference to the Anglers Rest.
  - Planned walking circuit submission by Clonlara Development Group.
  - An aerial map/photograph of a planned loop walk is shown along with handwritten annotations.
  - A new site layout plan style drawing identifying the works and planning irregularities.
  - Photographs of the gates and fences.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000-20 as amended (henceforth referred to as PDA's)

Section 2 provides the following interpretations-

*"fence" includes a hoarding or similar structure but excludes any bank, wall or other similar structure composed wholly or mainly of earth or stone;*

*"house" means a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building"*

*"works" ...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.....*

Section 3 (1), states the following:

*"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 (1) sets out what is exempted development for the purpose of the Act and includes a number such developments including-

*(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;*

Section 4 (2) (a) states-

*“The Minister may by regulations provide for any class of development to be exempted development for the purpose of the Act”*

Section 4 (3) states-

*A reference in this Act to exempted development shall be construed as a reference to development which is—*

- (a) any of the developments specified in subsection (1), or*
- (b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.*

**7.2. Planning and Development Regulations, 2001-20 as amended (henceforth referred to as PDR's)**

Part 2 EXEMPTED DEVELOPMENT Article 5 provides the following interpretations for this Part-

*“business premises” means—*

- (a) any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons,*
- (b) a hotel, hostel (other than a hostel where care is provided) or public house,*
- (c) any structure or other land used for the purposes of, or in connection with, the functions of a State authority;*

*“excluded premises” means—*

- (a) any premises used for purposes of a religious, educational, cultural, recreational or medical character,*

*(b) any guest house or other premises (not being a hotel or a hostel) providing overnight guest accommodation, block of flats or apartments, club, or boarding house, or,*

*(c) any structure which was designed for use as one or more dwellings, except such a structure which was used as business premises immediately before 1 October, 1964 or is so used with permission under the Act;*

Article 6(1) of the PDR's states 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) details development to which article 6 relates and shall not be exempted development for the purposes of the Act. In particular the following are relevant-

*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—*

*(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,*

*(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,*



(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,

(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,

(xi) obstruct any public right of way

Schedule 2, Part 1 of the PDR's deal with Exempted Development - General.

The following are considered relevant-

Column 1 Description of Development	Column 2 Conditions and Limitations
<p>CLASS 5</p> <p>The construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or wooden fence or a wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>1. The height of any such structure shall not exceed 2 metres or, in the case of a wall or fence within or bounding any garden or other space in front of a house, 1.2 metres.</p> <p>2. Every wall other than a dry or natural stone wall bounding any garden or other space shall be capped and the face of any wall of concrete or concrete block (other than blocks with decorative finish) which will be visible from any road, path or public area, including public open space, shall be rendered or plastered.</p> <p>3. No such structure shall be a metal palisade or other security fence.</p>
<p>CLASS 7</p> <p>The construction or erection of a porch outside any external door of a house.</p>	<p>1. Any such structure shall be situated not less than 2 metres from any road.</p> <p>2. The floor area of any such structure</p>

	<p>shall not exceed 2 square metres.</p> <p>3. The height of any such structure shall not exceed, in the case of a structure with a tiled or slated pitched roof, 4 metres or, in any other case, 3 metres.</p>
<p><i>Sundry Works</i></p> <p>CLASS 9</p> <p>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>
<p>Class 11</p> <p>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>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>

DECISION QUASHED

7.3. **S.I. No. 30/2018 - Planning and Development (Amendment) (No. 2) Regulations 2018, (henceforth referred to as PDR's 2018) enacted by the Minister on the 8<sup>th</sup> of February 2018.**

Article 10 (Change of Use) of the Planning and Development Regulations 2001 ( S.I. No. 600 of 2001 ) is amended by inserting the following sub-article after sub-article (5):

“(6).....”

*(b) This sub-article relates to a proposed development, during the relevant period, that consists of a change of use to residential use from Class 1, 2, 3 or 6 of Part 4 to Schedule 1.*

*(c) Notwithstanding sub-article (1), where in respect of a proposed development referred to in paragraph (b)—*

*(i) the structure concerned was completed prior to the making of the Planning and Development (Amendment) (No. 2) Regulations 2018,*

*(ii) the structure concerned has at some time been used for the purpose of its current use class, being Class 1, 2, 3 or 6, and*

*(iii) the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development, then the proposed development for residential use, and any related works, shall be exempted development for the purposes of the Act, subject to the conditions and limitations set out in paragraph (d).*

.....

#### 7.4. Referrals Database

7.4.1. I have searched and examined the Board's database of referrals and note there are a number of referrals relating to individual matters such as right of way, land habitually open to or used by the public during the 10 years preceding, change of use, primary and subsidiary/ancillary uses. However, I have not been able to find a previous referral that I consider to be comparable to the subject referral.

#### 8.0 Assessment

##### 8.1. Is or is not development

8.1.1. Section 2(1) of the PDA's defines 'works' as including "any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...". I am

satisfied that construction of a fence, pedestrian and vehicular gateway are 'works' in accordance with this definition and the subject referral therefore relates to 'works'.

8.1.2. Section 3 (1) of the PDA's refers to the meaning of "development", except where the context otherwise requires, as the carrying out of any works on, in, over or under land. Accordingly, I am satisfied that the subject referral i.e. fence, a pedestrian gate and a vehicular gate 'is development' within the meaning of the PDA's.

## 8.2. Is or is not exempted development

8.2.1. I refer to section 4 (2) of the PDA's which details that the 'Minister' may by regulations provide for any class of development to be exempted development. Article 6 of the PDR's details specific classes for this purpose in column 1 of Part 1 of Schedule 2 subject to conditions and limitations specified in column 2 of the said Part 1. Class 5, 9 and 11 all provide an exemption similar to that in the subject referral.

8.2.2. In order to choose the appropriate Class, the Board needs to consider if the development -

- has taken place within the 'curtilage of a house' (Class 5) and if not,
- is it construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway (Class 9) or
- is it construction or erection, other than within or bounding the curtilage of a house of a fence (Class 11)?

8.2.3. In order to determine the appropriate Class, the Board need to establish the original and current use of the structure on site. As noted in the planning history there is no record of a grant of permission for the structure on site. Having examined Ordnance Survey historic 6 inch mapping (1837-1842) there is substantial evidence to suggest a structure has been in-situ at this site in some form prior to 1963. Aerial photography from 1995 appears to show the general footprint of the current structure.

8.2.4. Based on the information on file from the Requester, the Owners and the Local Authority it appears that this premises operated as one commercial entity providing a



bar, restaurant and a guesthouse. It is noted that none of the parties to this appeal have challenged this or offered an alternative use.

8.2.5. I also note that Google Street View imagery May 2009 shows the northern elevation of the structure with two signs advertising the property as the 'Anglers Rest Pub' and 'Restaurant Bar Accommodation'. A small sign to the East elevation also appears to advertise the property as 'B&B'.

8.2.6. Through further online investigation and as indicated by the owners of the property in their submission this property was sold at auction in 2017. The online description of the property for the purpose of the auction is still available to view and states-

*"The property is arranged over ground and first floors to provide a guest house building. Internally the property comprises 8 bedrooms, a bar, restaurant and function room together with ancillary kitchen and storage facilities."*

8.2.7. The PDR's provides an interpretation of '*business premises*' to which the subject referral may be considered to fall within and includes-

- (a) any structure or other land (not being an excluded premises) which is normally used for the carrying on of any commercial undertaking
- (b) a hotel, hostel (other than a hostel where care is provided) or public house, or

The PDR's then interprets '*excluded premises*' as

- (b) any guest house or other premises (not being a hotel or a hostel) providing overnight guest accommodation,

8.2.8. The two interpretations as summarised above provide some difficulty in interpreting the original use of the overall structure. The structure was clearly used as a 'Public House' but not as hotel or hostel. The structure was also clearly used as 'Guesthouse' (not being a hotel or a hostel) which means it could be considered an 'Excluded Premises' and therefore not a 'Business Premises'. I have not been able to establish any evidence, and I also note there is nothing on file to suggest that these uses have ever operated independently or the structure itself was ever subdivided. Furthermore, I have not been able to establish any other appropriate interpretation or class use for the subject referral.

- 8.2.9. In a scenario like this I consider it prudent to consider the likelihood of a 'Primary' use and any 'Subsidiary'/'Ancillary' use. In my opinion, it is more likely that the Public House over the time of its existence and operation, would have been the 'Primary' use on this site given the seasonal nature of such uses as Guesthouses and the sites rural location. Furthermore, given the apparent size of the Public House and based on the small number of rooms that appear to have been available in the Guesthouse element of the structure, I consider that it is more likely that the significant movements to and from the 'Business Premises' was for the benefit of the 'Public House' with its restaurant use and accordingly the main source of income derived, was likely to be from same.
- 8.2.10. In their submission on this referral the owners of the property appear to suggest the front elevation of the property addressed the River Shannon. This is the southern elevation and the one to the 'Public House'. This in my view supports the contention that the public house was the 'Primary' use of this structure and site.
- 8.2.11. In my opinion the primary established use of this site was as a 'Public House' with a subsidiary/ancillary 'Guesthouse'. I am therefore satisfied the original or established use of this site was a 'Business Premises' as interpreted by the PDR's 2001.
- 8.2.12. Having established the use of the site I note that the Owners of the property in their submission to the Board have clearly stated '*The property use as a public house was abandoned in 2011*'. While I accept the property is not currently operating and in use as a public house I have observed it is being maintained and externally is in good condition. I was also able to observe through the windows that the bar itself appears to be in-situ within the building. As such I am not convinced that the original 'Business Use' as interpreted by the PDR's has been 'abandoned' to an extent that I can categorically say there is no planning use on the structure. Furthermore, I do not accept the owners of the property purchased a property of this size and nature to then abandon its historical usage completely while only maintaining the overall appearance of the buildings and the site.
- 8.2.13. It is clear from the information on file that part of the structure/building i.e. the part that I have considered to be a subsidiary/ancillary guesthouse is now being used solely for residential purposes and as a 'House' in accordance with the interpretation of house as per section 2 of the PDA's. There is no evidence on file to suggest

planning permission was granted for the use of this structure as a house and I note the Requester in her observation on the referral to the Board has questioned if this is a material change of use that requires planning permission.

- 8.2.14. In my opinion it is necessary to determine if a material change of use has taken place in order to determine the subject referral. In this regards it is very important to highlight that this is for the purposes of determining the subject referral only. The opinion I arrive at for the purpose of this matter and this subject referral should not be considered a formal Section 5 recommendation upon the status of the change of use of the Business Premises to residential use as a house.
- 8.2.15. In order to determine the subject referral, it is necessary to form an opinion if the use of the subsidiary/ancillary Guesthouse 'block' of the overall structure as a house is exempted development. This is necessary in order to choose the appropriate class as set out in section 9.2.2
- 8.2.16. I refer to the PDR's 2018 which provide an exemption for a change of use to residential use from Class 1, 2, 3 or 6 of Part 4 to Schedule 1 of the PDR's. The existing structure on site clearly does not fall with Class 1, 2 or 3. Class 6 includes uses as a Guesthouse. However, I have already established in section 9.2.11 it is my opinion the established use of the site (although not currently operational) is as a 'Business Premises' and therefore not as a Guesthouse. Accordingly, I am satisfied the permitted use does not fall within Class 6 as set out in Part 4 Exempted Development Classes of Use of the PDR's.
- 8.2.17. In the absence of any clear exemption for the development in the PDR's it is necessary to consider the provisions of the PDA and the definition of development under Section 3 (1).
- 8.2.18. I am satisfied that a change of use from the original 'Business Premises' use has occurred to part of the existing structure. This change is a 'Residential' use and as such can be considered a house. In order to determine if this can be defined as 'Development' within Section 3 (1) I must determine if the change of use is 'material'.
- 8.2.19. The original use of this element of the building was a 'Guesthouse' subsidiary/ancillary to the Public House. The guesthouse appears to have operated with eight bedrooms. I have considered the different patterns of activity associated with a residential use as a house from that of the 'Guesthouse', the significantly less



intensive nature of the use with regards to wastewater, traffic and road safety as well as the pattern of development in the area, where I note the proximity of other residential houses.

- 8.2.20. Based on the information available to me, and for the purpose of determining the subject referral only, I do not consider the change of use of the subsidiary/ancillary 'Guesthouse' element of the overall 'Business Premises' in this instance to be 'material' and therefore is not development i.e. it does not bring about new material planning impacts. I am satisfied the use of this part of the structure as a house does not require planning permission.
- 8.2.21. As set out in Section 9.2.2 I am now satisfied the development subject to this referral falls within Schedule 2, Part 1 Exempted Development – General Class 5 of the PDR's i.e. the construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or wooden fence.
- 8.2.22. In order to apply the conditions and limitations of Class 5 to the subject referral it is necessary to determine the 'front of the house'
- Southern Elevation-* As I have formed a view that the exempted residential change of use applies to part of the building i.e. the subsidiary/ancillary guesthouse and not the Public House, it is my opinion the public house's southern elevation cannot be considered the front of the now residential house and should be discounted.
- Northern Elevation-* Having walking the boundary of the site I observed what appears to be a fencing like boundary along the northern elevation of the building enclosing an area that is clearly a private amenity space to the now residential house. I also observed there were no doors to this elevation. As such I can discount the northern elevation as the front of the house.
- Western Elevation-* This element of the house includes a first floor door, an external staircase that drops down to ground level to an area enclosed by a wall and a large gate like structure that restricts movement to the area of private amenity space to the northern elevation of the house. As such I can discount the western elevation as the front of the house.
- Eastern Elevation-* This elevation is located behind the development subject to this referral. During the inspection I observed an open porch like structure around a door



where the owners and visitors to the property can enter. I also observed a large window to a kitchen area and a doorbell. I am satisfied that the eastern elevation is the elevation to which is the front of the house. The actual front of the house is then considered to be from the point of the front of the porch forward because Class 5 does not prescribe the front building line. The porch is clearly the front of the house.

8.2.23. I note the Requester's concern in relation to a 'new window & porch constructed since 2018 overlooking graveyard without planning permission. Without warranting a detailed assessment, and having regard to my view that the change of use of the structure to residential use is exempted development for the purpose of this referral only, I consider the window appears to be exempted development under section 4 (1) (h) of the PDA's and the porch appears to be exempted development under Schedule 2, Part 1 Class 7 of the PDR's.

8.2.24. From the site inspection it is clear the owners have carried out development by constructing/erecting a gate, gateway, railing and/or wooden fence within the curtilage of the house. This is not disputed by any of the parties involved. In order for this development to be exempted development it must meet the listed conditions and limitations. Most of the development in question is clearly to the front of the house i.e. forward of the East elevation. However, I do note the 'New Fence' as per Drawing No. D-120920-1 is located behind the front of the house. The conditions and limitation in this regard specifically states-

*'The height of any such structure shall not exceed 2 metres or, in the case of a wall or fence within or bounding any garden or other space **in front of a house**, 1.2 metres.'*

The development does not include a wall. Fence is to be interpreted in the PDA's as-

*'includes a hoarding or similar structure but excludes any bank, wall or other similar structure composed wholly or mainly of earth or stone'*

The development forward of the front porch (which does not include the western most pier and the fence) in my opinion is not a hoarding or similar structure. While the interpretation of fence does allow for other structures not mentioned, it is my opinion that the development from the front of the porch to the eastern side boundary is best described as one wooden gateway structure that provides a pedestrian and

vehicular gate. A structure better described as a 'wooden fence' is then located behind the front of the house.

In accordance with the relevant conditions and limitations to Class 5, The height of any such structure shall not exceed 2 metres. I have measured all points of the structure forward of the porch to the eastern boundary and I am satisfied the development of the wooden pedestrian and vehicular gateway structure is c.1.69m high with the eastern most pier at c.1.9m high. The subject fence that is not forward of the front of the house is c. 1.61-1.65 cm high and the western most pier is c. 2m high. The development is therefore not restricted by the conditions and limitations of Class 5.

### 8.3. Restrictions on exempted development

8.3.1. Article 9 of the PDR's details development to which article 6 and Class 5 of Schedule 2 Part 1 of the PDR's relates and details circumstances that these shall not be exempted development for the purposes of the Act. The following restrictions on exempted development are considered pertinent and will be assessed in turn.

8.3.2. 9 (1) (a) 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*

The development does not consist of or comprise the formation, laying out or material widening of a means of access to a public road.

8.3.3. 9 (1) (a) if the carrying out of such development would—

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

The development does not endanger public safety by reason of traffic hazard or obstruction of road users. The development is located close to the end of a public local road and cul de sac and appears to be within private property.

8.3.4. 9 (1) (a) if the carrying out of such development would—

*(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,*

I note the proximity of the development to the Lower River Shannon Special Area of Conservation (site code 002165). Having regard to the nature and small scale of the subject development and the distance from the nearest European site, no Appropriate Assessment issues arise, and it is not considered that the proposed development would be likely to have a significant effect, individually, or in combination with other plans or projects, on a European site.

8.3.5. 9 (1) (a) if the carrying out of such development would—

*(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use*

The Requester in this instance has alleged that unauthorised development and use appears to have taken place other than those matters raised in this section 5 Referral. However, the Requester has not submitted any of evidence to substantiate this claim and has requested the Board to consider these matters. The Planning Authority has also not identified any such concerns.

In order to reach certain conclusions and to form a reasonable judgement on the subject referral it has been necessary for me to consider such matters as the alleged unauthorised residential use and alleged unauthorised porch. In both instances and for the purpose of this referral only I don't find these matters to be unauthorised. Furthermore, the matter of enforcement falls under the jurisdiction of the Planning Authority and not with An Bord Pleanála.

Notwithstanding the above I am satisfied the development subject to this referral does not consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use

8.3.6. 9 (1) (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,*

Having reviewed all of the information submitted on the file it is clear to me that the crux of this referral relates to subject development restricting access to 'Cead Mile Failte Steps' as labelled by the Requester and a walkway to a 'Turret' at the 'Falls of Doonass'. The steps were identified at the site inspection and are located c. 26m to the south east of the front elevation of the east side of the 'Public House'. The subject development restricts people accessing the steps via the most direct route from the public road over lands that appear to be in the site owners control. It is noted there is signage on the subject development stating, 'private property'. The Requester contends that this gateway can be locked. The owners have submitted a personal statement justifying why they erected the development. The need for same is acknowledged and understandable.

The Owners contend that there is an alternative access to the river via the car park to the north of the house. This access runs along the western boundary of the buildings on the site and is shown on a drawing in their submission. I walked this route and note that public access is available through an opened gate and to the river. Upon reaching the river a person could also walk eastwards along the front of the Public House and access to the 'Cead Mile Failte Steps'. I did note there were some railing and bollards and the general access to the steps is not as straight forward as the now gated route would have been. But it does appear to be available to the public.

Notwithstanding the existence of an alternative route the wording of 9 (1) (a) (x) is clear. It states- 'consist of the....enclosure of any land habitually open to or used by the public...'. In my opinion the 'land' in question is the land to the east of the buildings on site and these lands are now restricted by the presence of the development subject to this referral and are no longer be habitually open to or used by the public.

In accordance with Article 9 (1) (a) (x) I now need to determine if the 'land' was used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to the riverbank or other place of natural beauty or recreational utility.



In the Owners submission on this referral it is stated-

*'On taking ownership in 2017 the new owners discouraged periodic access within close proximity of their dwelling'. A fence was erected in 2019 to provide security as there were instances when individuals not known to the family would pass within a few metres of the house and on occasion would loiter in their private amenity space.*

In the Requester's observation submission to An Bord Pleanála she has enclosed 57 signed and duly witnessed (by a local Peace Commissioner in Castleconnell) testimonies declaring that each signatory has-

*habitually used the now blocked road/pathway running between (what was) the 'Anglers Rest' and the graveyard to the River Shannon Bank and the 'Cead Mile Failte' steps at Doonass for recreational and access purposes during at least the 10 years preceding the first blockage of this road/pathway to such use for at least 10 years from members of the local community*

I acknowledge the Owner's desire and need to enclose the property forward of the front of their house. However, based on the information submitted by both parties and on file, it is apparent that the development subject to this referral consists of the enclosure of land habitually open to or used by the public during the 10 years preceding such enclosure for recreational purposes and as a means of access to the riverbank and other places of natural beauty and recreational utility.

8.3.7. 9 (1) (a) if the carrying out of such development would—

*(xi) obstruct any public right of way*

The Planning Authority have referred the subject referral to An Bord Pleanála for determination. The matter of works obstructing a public right of way is raised in the Planners Report dated the 14<sup>th</sup> of October.

The applicants have submitted a letter from their solicitor stating there are no rights of way noted on folio CE58407F. The letter also refers to a Declaration of the Vendor confirming there are no third party rights affecting the property.

Having reviewed Appendix 6 of the Clare County Development it is clear that the subject referral is not an identified public right of way in this context. That is not to say, the matter is not a public right of way, that has not been identified though the

Development Plan process. This is acknowledged by the Requester in her submission and observation.

Notwithstanding this, it is considered that matters relating to determining rights of ways are not ones for An Bord Pleanála. When disputes arise in these instances it is considered they are matters for the Courts to determine.

In the absence of any evidence that the subject development obstructs any public right of way I do not consider the restriction on exemptions to be applicable in this instance.

- 8.3.8. In conclusion, I find that the matter subject to this referral is development and is not exempted development in accordance with Article 9 (1) (a) (x) restrictions on Article 6 exemptions, whereby the development consists of the enclosure of land to the east of the structures on site, habitually open to and used by the public during the 10 years preceding such enclosure for recreational purposes and as a means of access to the riverbank and other place of natural beauty and recreational utility.

## 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 construction/erection of a fence, pedestrian and vehicular gateway within the curtilage of a 'Business Premises' where part of that premises is now in use as a 'House' is or is not development, and if it is development, is it, or is it not exempted development?

**AND WHEREAS** Fiona McCarthy requested a declaration on this matter from Clare County Council and the Council did not make a declaration in this instance.

**AND WHEREAS** Clare County Council referred this declaration for determination to An Bord Pleanála and was received on the 19<sup>th</sup> day of October 2020:

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

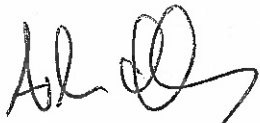
- (a) sections 2, 3 and 4 of the Planning and Development Act 2000, as amended,
- (b) Articles 5, 6 and 9 of the Planning and Development Regulations 2001, as amended, and Part 1 of Schedule 2 to those Regulations, including Classes 5, 7, 9 & 11 including the relevant Conditions and Limitations,
- (c) the original use and absence of a planning history of the site,
- (d) the pattern of development in the area,
- (e) the submissions of the Requester, Referrer and the Owner, and
- (f) the report of the Inspector.

**AND WHEREAS** An Bord Pleanála has concluded that the construction/erection of a fence, pedestrian and vehicular gateway within the curtilage of a 'Business Premises' where part of that premises is now in use as a House -

- (a) Does constitute the carrying out of works which comes within the meaning of development in Section 3(1) of the Planning and Development Act, 2000-20 as amended
- (b) Does come within the scope of Class 5, Part 1 of Schedule 2 to the Planning and Development Regulations, 2001-20 as amended, and
- (c) The works undertaken consist of the enclosure of land habitually open to or used by the public during the 10 years preceding the

enclosure for recreational purposes, as a means of access to the riverbank and other places of natural beauty and recreational utility.

**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 wooden fence pedestrian and vehicular gateway subject to this referral is development and is not exempted development.



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Adrian Ormsby  
Planning Inspector

05<sup>th</sup> of February, 2021

**DECISION QUASHED**