



An  
Bord  
Pleanála

## Inspector's Report ABP-309494-21

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<b>Question</b>	Whether the completion of works consisting of a 2 metre high palisade fence is or is not development or is or is not exempted development
<b>Location</b>	Dromin Lower, Listowel, County Kerry
<b>Planning Authority</b>	Kerry County Council
<b>Planning Authority Ref.</b>	EX877
<b>Referral</b>	
<b>Referred by</b>	James Brennan
<b>Owner/Occupier</b>	James Brennan
<b>Date of Inspection</b>	13 <sup>th</sup> April, 2021
<b>Inspector</b>	Kevin Moore

## **1.0 Introduction**

1.1 On 19<sup>th</sup> February 2021, James Brennan made a submission to the Board, under section 5 of the Planning and Development Act, seeking a review of Kerry County Council's declaration that the completion of works consisting of the erection of a two metre high palisade fence does not constitute exempted development.

## **2.0 Site Location / Project Description**

2.1 The location of the palisade fence is on farmland immediately to the north of the River Feale and east of the town of Listowel in County Kerry. It has been erected on the east side of a stream running in a north / south direction and parallel to the River Feale to the south in a west / east direction. The fence is approximately two metres in height. There is woodland to the east and north of the fence and agricultural lands to the west.

## **3.0 The Question**

3.1 The question before the Board is:

Whether completion of works consisting of the erection of a two metre high palisade fence does or does not constitute development and does or does not constitute exempted development.

## **4.0 The Referrer's Submission**

4.1 The Referrer's submission to the Board includes the following:

- The fence is entirely situate on the applicant's property.
- No other person other than the applicant has a right of access to his farmlands.

- The contention that the public has had habitual access over the wooded portion of the farmlands for the purpose of obtaining access to the applicant’s agricultural fields is not logical. It does not fall within Article 9(1)(a)(x).
- The Council’s previous Planner, in the course of EX624, confirmed that the applicant’s boundary fence was in place in December, 2017 and this was ten years after a previous re-fencing.
- The Council’s Planner, in considering the question now before the Board, could only have made his assessment from an already predetermined view that a walking route / public access exists on the applicant’s land.
- With regard to the habitual nature of the access, the ‘tracks’ or ‘paths’ identified by the Planner, by virtue of their narrow width, unpaved nature and sheer roughness, are of no ‘evidential’ value.
- The Planner’s assumption that the steps relate to a walking route and not forming access to a spa well renders his opinion unsupportable.
- The Council accepts that no public right of way exists on the applicant’s lands per Article 9(1)(a)(xi).
- Regarding Article 9(1)(a)(x):
  - The right to fence lands and protect them from access by those who have no right to access them is a fundamental incident of the right of ownership.
  - The applicant’s lands do not constitute a “means of access” to any “seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility”.
  - If a landowner indulges access to his land or does not repel incursions onto his land with zeal, this does not result in the creation of a public right of any nature.

- The use must be ‘habitual’ and must be lawful. Unlawful use cannot be taken into account.
  - None of the ‘evidence’ referenced by the Council is demonstrative or even indicative of the applicant’s lands being “habitually open to or used by the public during the 10 years preceding” the fencing.
  - In making a ‘Conclusion’ on the basis of the ‘evidence’, the Council has entirely set aside, discounted and ignored all evidence submitted by the applicant, the owner of the lands and the person in occupation throughout the entire period.
- The Board is asked to consider whether Kerry County Council should have accepted the section 5 application EX858, having confirmed that the applicant’s intended replacement of fencing in 2017 was exempt from the requirement to obtain planning permission and those works having been carried out and in place at the time of the section 5 application Ref. EX858. This fence was constructed on foot of EX624.
  - The Board is asked to consider whether repetitive section 5 referrals are permissible.

The submission includes an Independent Property Review detailing the referrer’s landholding in the vicinity of the fencing, correspondence from Kerry County Council to the landowner, correspondence between the landowner and the adjoining landowner to the west, newspaper articles, and conveyance details.

## **5.0 The Planning Authority’s Considerations**

- 5.1 The planning authority’s declaration, dated 26<sup>th</sup> January 2021, concluded that the completion of works consisting of a 2 metre high palisade fence adjacent to a water course which discharges to the River Feale, which has been constructed at 90 degrees to the river parallel to the tributary water course and turns approximately 120 degrees 50m north of the river, and which extends outwards over the riverbank to prevent access to the adjacent lands to the east from the

riverbed at Dromin Lower, Listowel, would constitute development which is not exempted development, having regard to:

- The proposed works constituting works that would come within the scope of section 2(1) of the Planning and Development Act 2000-2010,
- The said works constituting development that comes within the scope of section 3(1) of the Planning and Development Act 2000-2010,
- The construction of a fence generally coming within the scope of exemption provided at Class 4, Schedule 3, Part 2 of the Planning and Development Regulations, 2001-2020,
- The restriction to this exemption under Article 9(i)(a)(x) applying, and
- The proposed works not requiring a Stage 2 Appropriate Assessment and the provisions of section 4(4) of the Planning and Development Act, 2001-2011, not applying.

5.2 The declaration followed the recommendation set out in the Planner's report before it was made. The following is noted from the Planner's report:

- The fence is constructed.
- There is an evidential pathway through the lands on the approach to the site from the west through the agricultural fields, consisting of a minor depression in the lands coupled with an absence/significant reduction in vegetation.
- On the day of inspection a number of people were witnessed walking this route.
- East of the fence there are two evidential pathways running parallel to each other and the riverbank. Both are devoid of vegetation, appear to be well tracked and in some locations consist of significant depressions in the lands approximately 300mm deep. The paths continue through the wooded area for a distance of approximately 150 metres before opening into an agricultural field.

- A number of steps exist on the western bank of the tributary watercourse facilitating stepped access to the bed of the water course. One of the paths east of the fence is in line with these steps.
- The construction works forming part of the erection of the fence have excavated what appears to have been a section of ground on which the path east of the fence was located immediately adjacent to the tributary water course.
- The site is located within the Lower River Shannon SAC. There is no potential for significant effects to Natura 2000 sites.
- EIA is not required.
- The applicant states that there is no public right of way at this location. The route is not a public road. The route is not listed in Volume 2 (Public Rights of Way) in the County Development Plan. The inclusion of a footpath on an OSI map does not confer legal status of a public right of way. From the land registry maps for the lands it is noted that the lands are not registered. There was no evidence submitted on the current application or previous applications that indicate a public right of way running west-east at this location adjacent to the riverbank. The Planner is not satisfied that the route is a public right of way and consequently the threshold required under Article 9(1)(xi) is not met.
- Regarding Article 9(1)(x):
  - The paths provide access to a woodland and riverbank. Therefore, the provisions of Article 9(1)(x) are relevant.
  - The existence of any fence at this location historically is disputed by the evidence submitted by the applicants in the second section 5 declaration EX858.
  - The previous application EX858 included an amount of evidence supporting the fact that the lands were open to the public, including documents from an Irish Tourist Board survey in 1942, a statement

from the landowner to the west and 17 individuals, a statement from North Kerry Anglers Association, and a video filmed in the vicinity of the area.

- From site inspection, it is noted that there is an evidential pathway through the lands on the approach to the site through the agricultural fields and it consists of a minor depression coupled with an absence / significant reduction in vegetation. It continues to the site of the fence and is aligned with a number of steps on the western bank of the tributary watercourse facilitating stepped access to the bed of the watercourse. The path continues east, consisting of a depression, and is well tracked. OSI maps show that a clearly delineated footpath is indicated at this location and it matches the alignment and route of the walking path witnessed.
- The stone steps facilitating access to the tributary bed are evidentially historical in nature, indicating that historically there was an intention to facilitate and maintain a walking route along this path.
- The applicant has submitted no evidence of an historical fence at this location. The applicant's photographs show a path continuing from the eastern bank of the stream in an easterly direction.
- In conclusion, the Planner submitted that he is satisfied that the lands were habitually open to the public for recreational purposes and as a means of access to the riverbank in the 10 years preceding the erection of a fence and the criteria specified under Article 9(1)(x) are met, having regard to:
  - The evidential paths east and west of the fence.
  - The historical stone steps facilitating stepped access into the tributary of the river along the route.
  - The evidential use of the path by members of the public on the day of inspection.

- The survey and publication of the route as a footpath on OSI maps.
- The documentation of the route by the Irish Tourist Board in 1942.
- The statement of the adjoining landowner in EX858 acknowledging the absence of a fence at this location and the existence of an historical pathway.
- The witness statements submitted on EX858 referring to walking the route.
- The statement by the North Kerry Anglers Association submitted on EX858 referring to an unhindered route since 1956.
- The video filmed in 2019 showing the absence of a fence and unimpeded access on EX858.
- Photograph D1 in Appendix D of the applicant's submission showing a path continuing from the eastern bank of the stream.
- The photograph submitted by the applicant on 19<sup>th</sup> January 2021 and taken on 12<sup>th</sup> November 2019 showing a path continuing on the eastern bank of the stream and this photograph clearly showing there was no fence at this location.

It was recommended that the proposed works would constitute development which is not exempted development.

## **6.0 Observations**

- 6.1. An observation from James Quigley refers to the palisade fence impeding his right-of-way to partake in fishing along the northern bank of the River Feale at Dromin Lower. The observer states that he is a beneficial owner in Ballinruddery of land in the former Ballinruddery estate and it confers on him two *profit-a-prendre* rights, namely the right to fish in all waters of the River Feale within the confines of the former estate and a right of way across lands of the former estate to exercise his right to fish.



- 6.2. An observation from James Hickey refers to the palisade fence impeding his right-of-way to partake in fishing along the northern bank of the River Feale at Dromin Lower. The observer states that he is a beneficial owner in Ballinruddery of land in the former Ballinruddery estate and it confers on him two *profit-a-prendre* rights, namely the right to fish in all waters of the River Feale within the confines of the former estate and a right of way across lands of the former estate to exercise his right to fish.
- 6.3. An observation from Bluebell Wood and River Walk Action Group states that the main plank of their observation relates to the conclusion on appropriate assessment and EIA and the adherence to the requirements of the EU Habitats Directive. The site of the development being subject to legal rights of way associated with *profit-a-prendre* rights bestowed to numerous landowners is also referenced. Reference is made to errors in the planning authority's declaration, to enjoyment of the riverside walkway unimpeded for over 70 years, and the inadequacy of the planning authority's AA and EIA screening. It is submitted the fence constitutes works and development, comes within the restrictions on exemptions under Article 9(1)(a)(x) of the Planning and Development Regulations, requires appropriate assessment, and does not come within the scope of exempted development for agricultural use as specified under sections 4(1)(a) or 4(1)(l) of the Planning and Development Act.

## 7.0 Planning History

The fence the subject of the review has been subject to two previous section 5 declarations issued by the planning authority:

P.A. Ref. EX624

In a declaration issued to Vincent and James Brennan on 19<sup>th</sup> December, 2017 Kerry County Council determined that the construction of about 50 metres of stock-proof fencing at the western boundary of the applicant's farm at Dromin Lower constituted exempted development.

P.A. Ref. EX858

In a declaration issued to Bluebell Wood and River Walk Action Committee on 23<sup>rd</sup> October, 2020 Kerry County Council determined that the works and construction of a 2 metre high palisade fence adjacent to a water course does not constitute exempted development.

## **8.0 Statutory Provisions**

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

#### PART I – Preliminary and General

##### *Section 2(1)*

In this Act, except where the context otherwise requires—

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

##### *Section 3*

**3.—(1)** In this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

#### PART 2 – Exempted Development

##### *Section 4*

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

- (a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used; ...
- (l) development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.

4.—(2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—

- (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or
- (ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described) ...

4.- (4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection 1 and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

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

### PART 2 - Exempted Development

#### Article 6(1)

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

#### Article 9(1)

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

- (a) if the carrying out of such development would – ...
  - (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, ...
  - (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 3 Exempted Development – Rural*

Column 1 Description of Development	Column 2 Conditions and Limitations
<i>Minor works and structures</i> Class 4  The construction, erection or maintenance of any wall or fence, other than a fence of sheet metal, or a wall or fence within or bounding the curtilage of a house.	  1. The height of the wall or fence, other than a fence referred to in paragraph 2, shall not exceed 2 metres.  2. The height of any fence for the purposes of deer farming or conservation shall not exceed 3 metres.

## **9.0 Assessment**

### **9.1 Introduction**

9.1.1. I note that, under P.A. Ref EX624, the planning authority made a declaration on 19<sup>th</sup> December, 2017 under section 5 of the Planning and Development Act that the construction of about 50 metres of stock-proof fencing at the western boundary of Vincent and James Brennan’s farmland constituted exempted development under the Planning and Development Act. The fencing was to run parallel to the western edge of the farmland adjoining the existing stream to the west. It is understood that the fencing that has now been erected at this location is on foot of this declaration. I further note that a short additional section of fencing has been provided in a west / east direction from the southern end of the fence. It is my submission to the Board that the referrer’s actions, culminating in the erection of the fencing that has been provided at this location, could reasonably be justified on the basis of this declaration.

- 9.1.2. I then note that, under P.A. Ref. EX858, the planning authority made a declaration on 23<sup>rd</sup> October, 2020 under section 5 of the Planning and Development Act that the erection of a 2 metre high palisade fence adjacent to a water course which discharges to the River Feale, constructed at 90 degrees to the river parallel to the tributary water course, turning approximately 120 degrees 50m north of the river, and extending over the riverbank to prevent access, constituted development that was not exempted development under the Planning and Development Act. It is my submission to the Board that this represents a *volte face*, a reversal of its previous decision and one which represents a change of mind by the planning authority.
- 9.1.3. I then note that the landowner sought a further section 5 declaration relating to this fencing, that which is now before the Board, and I observe that the Planner reporting and making the recommendation to the planning authority was the same person who made the recommendation in relation to the application for a declaration under P.A. EX858.
- 9.1.4. It is my opinion that the approach by the planning authority has at best been inconsistent but, more importantly, it has been unfair to the landowner. I repeat that the provision of the fencing now in place on foot of the declaration under P.A. EX624 presents as reasonable, based on that first declaration issued by the planning authority under section 5.
- 9.1.5. I acknowledge that there is no limit to the making of section 5 applications and I note that this procedure was previously availed of by Bluebell Wood and River Walk Action Committee and again by the landowner in the current referral now before the Board.
- 9.1.6. The referrer has asked the Board whether repetitive section 5 referrals should be permissible. I consider that this request is a matter that goes beyond the question before the Board. I would, however, submit that, where the planning authority has

previously determined fencing of this nature to be exempted development at this location and where such fencing was erected following the planning authority's declaration, it is reasonable to ascertain that the development could reasonably be determined to be exempted development on foot of that previous declaration. This is particularly so in light of there being no challenge to this declaration, i.e. there was no referral to the Board on foot of the planning authority's declaration relating to P.A. Ref. EX624.

## 9.2. **The Question of 'Development'**

9.2.1. The erection of fencing on the land would comprise excavation of the existing ground and the construction of palisade fencing. The acts of excavation and construction clearly form "works" as defined in section 2(1) of the Planning and Development Act. The works would have taken place on, in, over and under the land and would constitute "development" as defined in section 3 of the Planning and Development Act. I note that there is no dispute that the erection of the fencing constitutes "development".

## 9.3 **The Question of Exempted Development**

### 9.3.1 **The Provision of Fencing**

I note for the Board at this stage of my assessment the provisions for exempted development as set out in Class 4 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended), which relate to minor works in rural areas. The erection of a fence not exceeding 2 metres in height is provided for under this class. It is understood that the existing fence is provided on an agricultural landholding in a rural area, that it consists of a fence that is not sheet metal, is a fence which is not within or bounding the curtilage of a house, and that it does not exceed two metres in height.

### 9.3.2. The Issue of Public Right of Way

I first note for the Board the nature and extent of the access to the river at this location. The approach from the west as far as the stream and its confluence with the River Feale adjacent to the fencing is across open agricultural lands which adjoins the river. There is no clear path from the western approach to this location in the vicinity of the fencing. I note that there is a worn path running west of the stream from the river northwards and then turning westwards through a wooded area. This narrow path continues westwards through the woodland as far as land south of Kenny Heights. At this location, access can be gained through the hedgerow line onto the estate's public open space. Beyond this location the path becomes substantially overgrown and somewhat impassable due to the vegetation growth. Regarding the area east of the fencing within the referrer's lands, the land area running parallel to the river has become substantially overgrown in the vicinity of the fencing.

I acknowledge that the Ordnance Survey map for this location shows a footpath (presenting as 'F.P.')

along the northern shoreline of the River Feale to the west and east of the fence.

It is my submission to the Board that:

- The land, or any part thereof, immediately adjacent to the northern side of the River Feal does not form a public road.
- There is no documentary information from which one could reasonably determine that this same land has been listed or designated a public right of way, inclusive of the local authority's own listing of such rights of way in its County Development Plan.
- The inclusion of a footpath on the Ordnance Survey map for this location does not bestow public right of way status to any such path.



I, therefore, consider that there is no reason to determine that any part of the lands on the northern side of the River Feale, as represented in the Ordnance Survey map, represents a public right of way. With regard to the provisions under Articles 6 and 9 of the Planning and Development Regulations, and subsection 9(1)(a)(xi) in particular, it is reasonable to conclude that the carrying out of the development of the fence has not resulted in the obstruction of any public right of way.

### 9.3.3. Fencing or Enclosure of Land Habitually Open to or Used by the Public

My observations on this matter are as follows:

- There is no formal amenity space, recreational land area, or lands so developed, defined or otherwise characterised at the location in the vicinity of where the fencing has been erected.
- There are no physical attributes pertaining to the appearance or condition of the land in the vicinity of the fencing that would suggest that this specific location is one that is habitually used by the public for recreational or other purposes.
- There is no clear physical appearance to the land at and in the vicinity of the fencing from which one could reasonably determine that this specific location has been used as a place from which access is gained to the northern bank of the River Feale.
- There is a worn path running along the west side of the stream west of the fence and linking back to woodland in the direction of Kenny Heights. The fence does not interfere with the access to the riverbank from this path.
- The fence does not interfere with any access to the riverbank as far as the confluence of the stream and the river when approaching from the west through the agricultural lands.
- The fence is set back from the edge of the river.

Having regard to these observations, I consider that it is reasonable to conclude that the fencing that has been erected does not 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. Therefore, one cannot reasonably conclude that the fencing is subject to the restrictions set out under subsection 9(1)(a)(x) of the Planning and Development Regulations 2001, as amended.

#### 9.3.4. Need for Environmental Impact Assessment

The classes of development which require an environmental impact assessment are defined in Article 93 and Schedule 5 of the Planning and Development Regulations. The erection of a fence on agricultural land in a rural area does not fall within the classes of development which require EIA.

#### 9.3.5. The Need for Appropriate Assessment

##### *Appropriate Assessment Screening*

##### **Description of Development**

The development consists of the construction of a two metre high fence. This fence is now in place. It is reasonable to determine that the nature of such works would involve some ground preparation works, excavation, and the erection of the fence. This would include the digging of a hole for each fence post, the use of concrete generally to support each post in each hole, the placing of horizontal railings between posts, and fixing the rails in place.

## European Sites

The fencing has been erected within the Lower River Shannon Special Area of Conservation (Site Code: 002165), which includes the river, the riverbanks, the woodlands, and the agricultural grassland in the vicinity of the fence. This is the only European site potentially effected by the fence.

The Qualifying Interests of this SAC are:

Sandbanks which are slightly covered by sea water all the time

Estuaries

Mudflats and sandflats not covered by seawater at low tide

Coastal lagoons

Large shallow inlets and bays

Reefs

Perennial vegetation of stony banks

Vegetated sea cliffs of the Atlantic and Baltic coasts

Salicornia and other annuals colonising mud and sand

Atlantic salt meadows (*Glaucopuccinellietalia maritima*)

Mediterranean salt meadows (*Juncetalia maritimi*)

Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitriche-Batrachion* vegetation

*Molinia* meadows on calcareous, peaty or clayey-silt-laden soils (*Molinion caeruleae*)

Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*)

*Margaritifera margaritifera* (Freshwater Pearl Mussel)

*Petromyzon marinus* (Sea Lamprey)

*Lampetra planeri* (Brook Lamprey)

*Lampetra fluviatilis* (River Lamprey)

*Salmo salar*

Tursiops truncatus (Common Bottlenose Dolphin)

Lutra lutra (Otter)

The Conservation Objectives are:

To restore the favourable conservation condition of:

- Fresh Water Pearl Mussel
- Sea Lamprey
- Atlantic Salmon
- Coastal lagoons
- Atlantic salt meadows
- Otter
- Mediterranean salt meadows
- Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (Alno-Padion, *Alnion incanae*, *Salicion albae*),

To maintain the favourable conservation condition of:

- Brook Lamprey
- River Lamprey
- Sandbanks which are slightly covered by sea water all the time
- Estuaries
- Mudflats and sandflats not covered by seawater at low tide
- Large shallow inlets and bays
- Reefs
- Perennial vegetation of stony banks
- Vegetated sea cliffs of the Atlantic and Baltic coasts

- Salicornia and other annuals colonising mud and sand
- Bottlenose Dolphin
- Water courses of plain to montane levels with the Ranunculion fluitantis and Callitriche-Batrachion vegetation
- Molinia meadows on calcareous, peaty or clayey-silt-laden soils (Molinion caeruleae),

#### **Identification of Likely Effects**

The following is submitted:

- The fence is not directly connected with or necessary to the management of any European site.
- The function of the fence would have no known operational impacts after its construction. There would not be impediments to the species of conservation interest at this location.
- The potential likely significant effects would relate to the construction stage.
- Many of the Qualifying Interests of the SAC constitute marine habitats and marine-based species which would not be effected by any construction works associated with the fence at this inland location.
- The Cloon River is noted for the occurrence of Freshwater Pearl Mussel within the SAC.
- The habitats that would have been directly affected at the construction stage would have been the scrub banks at the woodland edge.
- The effects that could potentially arise relate to the construction works adjoining the watercourses.

- Potential effects would have included runoff at the construction stage to watercourses potentially effecting water quality. There likely would have been no works within the watercourses given the minor nature of the works and the siting of the fence on the land.
- The short section of fencing involved has been erected with no known effects on the SAC at the construction stage. There is no information to determine that the construction of the fence had any significant effects on water quality.
- No habitat or species fragmentation is known to have arisen for the SAC.
- There are no known adverse effects on species density.
- It would be reasonable to ascertain that the protection of the woodland by fencing of this nature from disturbance of habitats arising from human activity would likely improve the conservation status at this location due to the restrictions on encroachment by those congregating at such a location within the woodland, reducing the potential damage caused to natural habitat, minimising disturbance of species, etc.

#### **In-combination Effects**

There are no known other plans or projects in this area which would require consideration for in-combination effects.

#### **Mitigation Measures**

No measures designed or intended to avoid or reduce any harmful effects of the proposed alterations on a European site have been relied upon in this screening exercise.

### Screening Determination

The fence has been considered in light of the requirements of Section 177U of the Planning and Development Act 2000 as amended. Having carried out Screening for Appropriate Assessment of the project, it has been concluded that the project individually or in combination with other plans or projects would not be likely to give rise to significant effects on the Lower River Shannon SAC (Site Code: 002165), in view of its Conservation Objectives, and Appropriate Assessment is therefore not required.

This determination is based on the following:

- The nature and extent of the proposed works associated with the erection of the fence,
- The siting of the fence beyond existing watercourses, and
- The lack of any known adverse effects on the Lower River Shannon Special Area of Conservation at the construction stage of the fence, in particular on water quality, or by way of its function.

Having regard to the above, it is determined that one cannot reasonably conclude that the fence is subject to the restrictions set out under subsection 9(1)(a)(viiB) of the Planning and Development Regulations 2001, as amended, because it is considered that the fence would not be likely to have a significant effect on the integrity of any European site

#### 9.3.6. The Submissions by James Quigley and James Hickey

I note these observer submissions and the details provided on landownership and the entitlements arising, inclusive of the right to fish in all waters of the River

Feale within the confines of the former Ballinruddery estate and a right of way across lands of the former estate to exercise a right to fish. I submit to the Board that such provisions neither relate to matters pertaining to any public right of way or to the fencing or enclosure of any land habitually open to or used by the public. It is evident that such entitlements, rights and/or easements relate solely to the owners of the relevant parcels of land and that the continuance of access is a matter solely between the relevant landowners.

## 10.0 CONCLUSION AND RECOMMENDATION

**WHEREAS** a question has arisen as to whether the completion of works consisting of a 2 metre high palisade fence is or is not development and is or is not exempted development:

**AND WHEREAS** the said question was referred to An Bord Pleanála by James Brennan on the 19<sup>th</sup> day of February, 2021:

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

- (a) sections 2, 3 and 4 of the Planning and Development Act 2000 (as amended),
- (b) articles 5-11 of the Planning and Development Regulations 2001 (as amended), with particular reference to articles 6 and subsections 9(1)(a)(viiB), (x) and (xi), and
- (c) Part 3 of Schedule 2 *Exempted Development – Rural* of the Regulations, with particular reference to Class 4, and



- (d) the previous declarations by Kerry County Council under P.A. Refs. EX624 and EX858

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

- (a) the erection of the fence constitutes 'development' for the purposes of the Planning and Development Act,
- (b) the fence is not subject to the restrictions on exemption set out in Article 9 of the Planning and Development Regulations, with particular reference to subsections 9(1)(a)(viiB), (x) and (xi),
- (c) the fencing is not of a class of development which requires environmental impact assessment, and
- (d) the erection of the fencing comes within the scope of Class 4 of Part 3 of Schedule 2 of the Regulations:

**NOW THEREFORE** the Board, in exercise of the powers conferred on it by section 5 of the 2000 Act, has decided that the completion of works consisting of a 2 metre high palisade fence at Dromin Lower, Listowel, County Kerry is development and is development that is exempted development.

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Kevin Moore  
Senior Planning Inspector  
28<sup>th</sup> April, 2020