



An
Bord
Pleanála

Inspector's Report ABP 312182-21.

Question	Whether the erection of a 1.2m fence is or is not development and is or is not exempted development.
Location	Riverdale, Westbury, Co. Clare.
Declaration	
Planning Authority	Clare County Council
Planning Authority Reg. Ref.	R21-59
Applicant for Declaration	Gerard Madden
Planning Authority Decision	Is not exempted development
Referral	
Referred by	Gerard Madden
Owner/ Occupier	Gerard Madden
Observers	None
Date of Site Inspection	23 rd of November 2022
Inspector	Siobhan Carroll

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1.0 Site Location and Description

- 1.1. The site is located at Riverdale, Westbury, Co. Clare. Westbury is a housing development of primarily semi-detached properties which is situated in the northern environs of Limerick City. It is located within the settlement of Athlunkard. The River Shannon is situated to the south of Westbury.
- 1.2. The location of the subject fencing is the east of the cul-de sac containing numbers 1- 30 Riverdale. The properties within the cul-de sac are all two-storey semi-detached dwellings. The end of the cul-de-sac contains a side turn turning head which adjoins the open space area.
- 1.3. The open space area is grassed with some deciduous tree planting and informal pathways within the grassed areas.

2.0 The Question

- 2.1. Whether the erection of a 1.2m fence at Riverdale, Westbury is or is not development and is or is not exempted development. The subject fencing is indicated in the submitted plans as having a length of approximately 72m and is located circa 16m to the south-east of the turning head at Riverdale.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. Clare County Council issued a declaration under Section 5 of the Planning and Development Act 2000, on the 15th of November 2021 stated that it is considered the proposed development the erection of a 1.2m fence is not exempted development for the following reason:
 - The erection of a fence constitutes both 'works' and 'development; as set out under Section 2 and 3 of the Planning and Development Act, 2000, as amended.

- The erection of the proposed fence falls within the scope of Class 11 of Part of 1 of the Second Schedule to the Planning and Development Regulations 2001, as amended, and under article 6(a) of the Planning and Development Regulations, 2001, as amended.
- By reason of said fencing enclosing land habitually open to, or used by, the public during the ten years preceding such fencing or enclosures for residential purposes, the subject development, by virtue of the provisions of article 9(1)(a)(x) of the Planning and Development Regulations, 2001, does not come within the scope of the exempted development provisions of the Second Schedule to the Planning and Development Regulations, 2001, as amended.

3.2. Planning Authority Reports

3.2.1. Planning Reports

- The report of the Planning Officer stated that it was the fourth such declaration sought on these lands for the development of a fence. The previous declarations R21-5, R19-20 and R20-4 were not deemed to be exempted development by the Planning Authority or the Board. The proposed fence is located to the south of the zoned open space as set out in the Development Plan. It is stated in the report that having inspected the site it is clear that the subject lands are subject to public use consisting of informal pathways throughout the site connecting to the wider open space. The area is open space, and it is not enclosed and it is contiguous to the wider open space area. It was concluded by the Planning Officer that the proposed fence constitutes both works and development as set out in the Act. It also falls within the exemptions as set out under Class 11 of Schedule 2 Part 1 of the Regulations. In relation to this it was concluded that the de-exemption 9(1)(a)(x) is relevant as the lands are “habitually open to or used by the public”.

3.2.2. Other Technical Reports

- None

4.0 Planning History

4.1.1. **ABP 306874-20 & R20-4** – Section 5 referral case. The question whether the erection of fence no. 1 and fence no. 2 at Riverdale, Westbury, Co. Clare is or is not development and is or is not exempted development. The Board concluded that:

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

The Board determined that that the proposed erection of fence number 1 and fence number 2 at Riverdale, Westbury, County Clare is development and is not exempted development.

4.1.2. **Reg. Ref. 19/30** – Section 5 referral Question whether the construction of a 1.5m high fence (sheep wire) internally on land at Riverdale, Westbury is or is not development and is or is not exempted development.

The Planning Authority determined that;

- (i) The erection of a fence constitutes both ‘works’ and development as set out under Section 2 and 3 of the Planning and Development Act 2000, as amended.
- (ii) The development does not come within the scope of exemption afforded by Section 4(1)(h) of the Planning and Development Act 2000 as amended.

- (iii) The development does not come within the scope of the exemption afforded by Class 11 of Part 1 of the Second Schedule to the Planning and Development Regulations, 2001 as amended, as the height of the fence exceeds 1.2m.
- (iv) The proposed fence, which would intersect a permitted area of public open space, would not be exempted development as it would contravene a condition of a planning permission, that is, condition number 5 of planning permission granted under planning register reference number 02/2035, and, therefore, the restriction on exemption under Article 9(1)(a)(i) of the Planning and Development Regulations 2001, as amended, applies in this instance.
- (v) Now therefore Clare County Council decides that the proposed erection of a 1.5m high fence internally on land at Riverdale constitutes development which is not exempted development.”

- 4.1.3. **Reg. Ref. 07/2318** – Application by Greenband Investments for the construction of 103 houses access roads and all associated site works together with alterations to previously approved planning ref no s P02-2035 and P02-700. Withdrawn.
- 4.1.4. **Reg. Ref. 07/2235** – As above. Incomplete application.
- 4.1.5. **Reg. Ref. 04/1467** – Application for permission for the construction of 166 houses and associated works, permission is also being sought for the repositioning of house numbers 27, 28,43 44, 111,112, 113, and 114 and associated site works approved planning P02/2035.
- 4.1.6. **Reg. Ref. 04/1301** – Incomplete application
- 4.1.7. **Reg. Ref. 02/2035** – McInerney Construction Ltd. Permission for change of house design on site numbers 1 to 169 under previously approved planning permission No P99/2505 to be replaced with 51 terraced houses and 168 semi-detached houses and associated site works. Appeal Withdrawn Condition 1 specified that the development to be carried out in accordance with plans and particulars submitted to the Planning Authority on 22 November 2002 as amended by particular of 24th June except where altered or amended by conditions of the permission. Condition 5 No

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

- 4.1.8. **Reg. Ref. 02/700** – Permission for change of house design on site numbers 170 to 238 under previously approved planning permission no P99/2505 to be replaced with 90 number semi-detached houses and associated site works. ABP-306874-20
- 4.1.9. **PL03-120563 & Reg. Ref. 99/2505** – McInerney Construction. Permission granted and modified following appeal of conditions.
- 4.1.10. **Reg. Ref. 98/1064** – McInerney Construction Ltd. Permission for alteration to amenity area layout and the programme for its provision. Withdrawn.
- 4.1.11. **UD19/32** – Warning letter issued served 30th May 2019 regarding : The erection of a fence to land designated as open space associated with a residential development and restricting access to members of the public to lands habitually open to and used by the public as a recreational utility and rendering the area inconsistent with the use as open space as specified in permissions granted under the Planning Acts.
- 4.1.12. **UD09/193** – Non-compliance with conditions relating to PL02/2035.
- 4.1.13. **UD09/194** – Non-compliance with conditions 02/700.

5.0 Policy Context

5.1. Development Plan

- 5.1.1. The operative development plan is Clare County Development Plan 2017 – 2023.
- 5.1.2. The subject site of the proposed fence is located to the south of lands zoned open space OS3 in the Athlunkard settlement plan.
- 5.1.3. Section 19.4 refers to Nature of Zonings. In reference to Open Space, it states that; It is intended that lands zoned ‘open space’ will be retained as undeveloped open space, mainly for passive open space related activities.

5.2. Natural Heritage Designations

- 5.2.1. Lower River Shannon SAC (Site Code 002165) is situated 375m to the south of the subject site.
- 5.2.2. River Shannon and River Fergus Estuaries SPA (Site Code 004077) is situated 3.3km to the south-west of the subject site.

6.0 The Referral

6.1. Referrer's Case

- The referrer is seeking a declaration under Section 5 of the Planning and Development Act 2000 (as amended) in relation to the erection of a 1.2m high fence at Riverdale, Westbury, Co. Clare.
- Clare County Council concluded that it did not constitute exempted development on the basis that Article 9(1)(a)(x) applied as they consider that this land was habitually open to the public for recreational use within the last ten years.
- The referrer states that this is incorrect and that the land has not been used for public recreation at any time within that period. They state that there is no evidence to support that there has been any public use of these lands within the last ten years.
- The land forms part of a 14 acre holding which was purchased in 2018 by the owner who is the referrer of this case.
- It is stated that the owner of the lands has not received any requests for the use of this land for public recreational use.
- It is stated that the lands in question have been assigned different zonings within the Clare County Development Plan. Approximately 4 acres of the land is designated as public open space in the Clare County Development Plan 2017-2023.
- The remaining portion of lands bordering the Athlunkard Settlement have been categorized as agricultural in nature and this is the area where the

subject agricultural fencing is proposed to be erected. The land in question is bounded on the east by farm land and to the south by land owned by the Council which is bounded by a ditch and open dykes and on the west by a fence and bank that cuts the land off from the space that was designated open space in Reg. Ref. P02/2035. On the north access is restricted by overgrown bushes, trees and scrub which acts as a natural barrier. The only means of access into the lands is through Westbury.

- It is stated that there is no doubt that this area of land is outside the Westbury settlement was not habitually open to or used by the public during the 10 years preceding. If the relevant lands were to be open space then the Council would not have agreed to the construction of a 400m fence, cutting the area off from the open space designated in Reg. Ref. P02/2035.
- It is submitted that it is clear that this land is already inaccessible to the public, and it has been intentionally demarcated as such by the Council. It is noted that this fence was erected without planning permission as it was designated exempted development.
- It is stated that the owner purchased the lands three years ago and that since then there has been no public use of the lands. It is therefore submitted that it is not possible for Article 9(1)(a)(x) to apply in respect of the subject lands.
- Clare County Council accept that they cleared part of the 14 acres of the vegetation scrub and landscaped the enabling area that was used to construct the adjoining estate. They were requested by the landowner Mr. Madden to furnish him with proof if all or any of the 9 acres outside the settlement was being used habitually for recreational purposes before May 2009. It is stated that this was not provided.
- It is stated that the Council accepted that this remaining land is overgrown with bushes and scrub. Therefore, it is unsuitable for public use.
- The lands in question are not covered under Reg. Ref. 99/2505, Reg. Ref. 02/700 and Reg. Ref. 02/2035. The only planning permission relevant to this area is Reg. Ref. 07/2235 which sought the construction of 103 houses on the land in question, however this application was withdrawn due to issues concerning road access and the inadequate sewage system in the area.

- The fact that Clare County Council constructed a fence between 2011 and 2017 approximately 400m long around the perimeter of the land and did not include it as public open space in their settlement plans, is indicative of the fact that this land was not earmarked as part of the original plan and as such does not come within Article 9(1)(a)(i) of the Planning and Development Regulations, 2001.
- It is understood that Article 9(1)(a)(ii) of the Planning and Development Regulations, 2001, does not apply because no new access is being constructed. Article 9(1)(a)(iii) does not apply as no new access or change of use applies.
- It is stated that the land is farming land and no intensification of farming is applied for. The land has always been accessed through Westbury. It is submitted that Clare County Council has confused the two different use designations for the total site area due to misunderstanding in relation to the part known as OS3.
- It is considered that the Council did not follow correct procedures in designating the area known as OS3 as a public open space in the Clare County Development Plan. It is considered that the Council did not follow correct procedures in landscaping part of OS3 and they did not provide evidence that this area was used habitually for recreational purposes on or before May 2009.
- It is stated that there is no evidence of any public recreational use of these lands. The section 5 referral is accompanied by Land Registry Ordinance Survey maps.
- The referrer cites the case *McGoldrick v An Bord Pleanála* [1997] 1 IR 497 where the Court accepted that Ordinance Survey Maps could be used as evidence to determine the use of lands. The Judge in the cited case also determined that in order to be in compliance with fair procedures that a statement of fact of an application must be responded to by way a further information, rejection of what has been contended or accepted. As per the decision in the *McGoldrick* case, if the Council is asserting their determination is correct in fact then it can only be on the basis of information made know to

the applicant. In this case the only evidence has been that there has been no such use in the last ten years. It is submitted that this determination is erroneous and therefore the exemption sought should be provided.

6.2. Planning Authority Response

Response received from the Planning Authority on the 21st December 2021.

- The subject site is contiguous to the public open space area, contains a network of informal pathways, is not fenced off and is open to the public.
- Previous determinations issued on this property, including that of the Board reference ABP 306874-20 found that the erection of a fence here was not exempted development. It is considered that this referral is broadly similar to previous declarations as issued and such works are not considered to be exempted development.
- Details of the previous decisions affecting the site are set out in the Planner's Report.
- The applicant has stated that he is the owner of the land in question.

6.3. Further Responses

6.3.1. None sought.

7.0 Statutory Provisions

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

7.1.1. Section 2

7.1.2. Under Section 2, the following is the interpretation of 'works':

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

7.1.3. Section 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'.

7.1.4. Section 4

Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act. Section 4 (2) provides for the making of Regulations.

7.2. **Planning and Development Regulations, 2001 (as amended)**

7.2.1. 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'.

7.2.2. Article 9(1)

Sets out restrictions on exemption to which article 6 relates shall not be exempted development for the purposes of the Act including:-

(a) If the carrying out of such development would-

(x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility.

7.2.3. Schedule 2 Part 1 Class 11

Part 1

Exempted Development – General

Column 1 Description of Development	Column 2 Conditions and Limitations
<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>

8.0 Assessment

8.1. Is or is not development

- 8.1.1. Firstly, it is necessary to establish if the subject works constitutes development. 'Works' as defined under Section 2 of the Act includes any act of construction, extension, repair or renewal. The 'works' subject of this Section 5 referral comprise the erection of a 1.2m fence.
- 8.1.2. Section 3 (1) of the Planning and Development Act, 2000, as amended defines 'development' as follows:

8.1.3. “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.”

8.1.4. Accordingly, the proposed works as set out above therefore constitutes ‘development’ as defined under Section 3 (1) of the Act.

8.2. Is or is not exempted development

8.2.1. Schedule 2 Part 1 Class 11 of the Planning and Development Regulations, 2001, (as amended), refers to 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). The conditions and limitations for Class 11, which is relevant to the subject erection of the 1.2m fence is the first item. It states, “the height of any new structure shall not exceed 1.2m or the height of the structure being replaced, which ever is the greater, and in any event shall not exceed 2m.”

8.2.2. Accordingly, I would consider that the proposed erection of the 1.2m fence is covered under the provisions of Class 11.

8.3. Restrictions on exempted development

8.3.1. The Planning Authority in their decision in respect of the Section 5 referral concluded that while the subject 1.2m fence come under the provisions of Class 11 of Part 1 of the Second Schedule of the Planning and Development Regulations, 2001 (as amended) and constituted exempted development that the provisions of Article 9(i)(a)(x) applied as an restriction on the exemption. The declaration issued by the Planning Authority stated that ‘By reason of said fencing enclosing land habitually open to, or used by, the public during the ten years preceding such fencing or enclosures for residential purposes, the subject development, by virtue of the provisions of article 9(1)(a)(x) of the Planning and Development Regulations, 2001, does not come within the scope of the exempted development provisions of the Second Schedule to the Planning and Development Regulations, 2001, as amended.’

8.3.2. The case put forward by the owner of the lands and the referrer of the Section 5 Mr. Madden is that that the land has not been used for public recreation at any time

within that period of ten years. They submit that there is no evidence to support that there has been any public use of these lands within the last ten years. It is highlighted by the referrer that the subject land is outside the Westbury estate and that it borders Athlunkard Settlement. The subject lands are described by the referrer as agricultural in nature and that subject fencing would be agricultural fencing. The land where the subject fence is proposed is described by the referrer as being bounded on the east by farm land and to the south by land owned by the Council which is bounded by a ditch and open dykes and on the west by a fence and bank that cuts the land off from the space that was designated open space in Reg. Ref. P02/2035. On the north access is restricted by over grown bushes, trees and scrub which acts as a natural barrier. It is therefore highlighted by the referrer that the only means of access into the lands is through Westbury.

- 8.3.3. It is argued in the referral that the subject lands were not habitually open to or used by the public during the 10 years preceding and that if the lands were to be open space then the Council would not have construction of a 400m fence, cutting the area off from the open space designated in Reg. Ref. P02/2035.
- 8.3.4. Mr. Madden states that he purchased the lands three years ago and that since then there has been no public use of the lands and that the location is unsuitable for public use. It is put forward by Mr. madden that the Council did not follow correct procedures in landscaping part of OS3 and they did not provide evidence that this area was used habitually for recreational purposes on or before May 2009.
- 8.3.5. In relation to the matter of the recreational uses of the subject lands where the subject fence is proposed this is a matter in dispute between the Council and the owner Mr. Madden. The response from the Planning Authority in relation to the subject referral states that the subject site is contiguous to the public open space area, contains a network of informal pathways, is not fenced off and is open to the public. The previous determinations issued on this property are cited, including the referral case ABP 306874-20 which the Board determined that the erection of a fence here was not exempted development. The Planning Authority considered that this referral is broadly similar to previous declarations and that therefore such works are not considered to be exempted development.

8.3.6. In relation the proposed location of the subject fence, on inspection of the site I observed an informal path running north-south and parallel to the existing fence. I would assert contrary to the case made by the referrer that this location is accessible as is evident from the informal path. Accordingly, as detailed by the Planning Authority in their response there is an informal path running and linking the subject site to the existing public open space area to the east of the Westbury Estate which demonstrate that the land is habitually open to and used by the public. Furthermore, while I note that subject lands are not zoned open space OS3, the referrer has not demonstrated that the subject area has not been habitually open to the public during the last ten years. Therefore, I concur with assessment of the Planning Authority that the subject restriction on exempted development provided under article 9(i)(a)(x) would apply.

9.0 **Appropriate Assessment**

9.1. Having regard to the nature and scale of the development which is the subject of this referral and its location relative to Natura 2000 sites, no appropriate assessment issues arise and it is not considered that the development would be likely to have a significant effect either individually or in combination with other plans or projects on a European site.

10.0 **Recommendation**

10.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the erection of a 1.2m fence is or is not development or is or is not exempted development:

AND WHEREAS Gerard Madden requested a declaration on this question from Clare County Council and the Council issued a declaration on the 15th

day of November, 2021 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 13th day of December, 2021:

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

- (a) section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) articles 6 and 9 of the Planning and Development Regulations, 2001, as amended, and Class 11 of Part 1 of the Second Schedule to the Planning and Development Regulations, 2001, as amended,
- (c) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the erection of the proposed fence falls within the definition of works under section 2 of the Planning and Development Act, 2000, as amended, and constitutes development within the meaning of section 3(1) of the Act,
- (b) the erection of the proposed fence falls within the scope of Class 11 of Part 1 of the Second Schedule to the Planning and Development Regulations, 2001, as amended, and under article 6(a) of the Planning and Development Regulations, 2001, as amended, and
- (c) by reason of the said fence enclosing land habitually open to, or used by, the public during the ten years preceding such fencing or enclosure for recreational purposes, the subject development, by virtue of the provisions of article 9(1)(a)(x) of the Planning and Development Regulations, 2001, does not come within the scope of

the exempted development provisions of the Second Schedule to the Planning and Development Regulations, 2001, as amended.

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 erection of a 1.2m fence at Riverdale, Westbury, County Clare is development and is not exempted development.

Siobhan Carroll
Planning Inspector

16th February 2023