



An  
Bord  
Pleanála

## Inspector's Report ABP-313086-22.

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### Question

Whether an existing 'dam-type structure' constructed on an open watercourse close to where it connects to the sea is, or is not development, or is, or is not exempted development.

### Location

Drimna Beg, Sneem, Co. Kerry.

### Declaration

Planning Authority

Kerry Council South

Planning Authority Reg. Ref.

EX947.

Applicant for Declaration

Chris Fitzgibbon.

Planning Authority Decision

Development and exempted development

### Referral

Referred by

Chris Fitzgibbon.

Owner/ Occupier

Steve O'Sullivan.

Observer(s)

None.

Date of Site Inspection

23/09/2022.

Inspector

A. Considine.

## 1.0 Site Location and Description

1.1. The subject site is located approximately 2km to the south of the village of Sneem and lies immediately adjacent to the foreshore on the River Sneem Estuary. The site is accessed via a private and overgrown track, from the N70 which lies to the north east of the subject site. The N70 is the primary tourist route through the Ring of Kerry including the Iveragh Peninsula. The subject site lies approximately 560m from the N70, almost at the end of any road surface, although the access to the site which has some hard surface, comprises primarily overgrown verges and high grass along the centre. I could not drive to the site from the public road due to it being inaccessible for cars.

## 2.0 The Question

2.1.1. The application relates to the following question:-

Whether an existing 'dam-type structure' constructed on an open watercourse close to where it connects to the sea is, or is not development, or is, or is not exempted development, at Drimna Beg, Sneem, Co. Kerry.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

On the 22<sup>nd</sup> of February 2022, Kerry County Council issued a declaration with regard to the questions posed and declared that:

1. The proposed works would constitute works that would come within the scope of Section 2(1) of the Planning and Development Act 2000 (as amended).
2. The said works would constitute development that comes within the scope of Section 3(1) of the said Act and,
3. The proposed works would come within the scope of exemption provided at Class 3 of Part 3 of Schedule 2 of the Planning and Development Regulations 2001 (as amended) and would not

contravene the restrictions on exemption at Article 9(1) of said Regulations.

Therefore, the proposed works would constitute development which is exempted development.

## 3.2. Planning Authority Reports

### 3.2.1. Planning Report

The Planning Report, prepared to address the questions posed, considers that the works relate to the construction of a culvert and sets out the statutory provisions applicable to the question raised in this regard. The report further notes the comments from the owner, which are summarised as follows:

- Mr. O’Sullivan is the registered owner of the lands for over 20 years with two parcels of land being linked by a farm track.
- The owner is not aware of any issues relating to the adjoining lands.
- The information submitted with the Section 5 is disputed and it is submitted that it is not reflective of the situation on the ground.

The Planning Officers report concludes that further information is required from the referrer with regard to verifying when the works were carried out and whether a bridge type structure was in place prior to the construction of the culvert.

The referrer responded to the FI request advising as follows:

- The referrer purchased the land 5 years ago and following extensive works only became aware of the issue in September 2021.
- It is considered that the structure was placed sometime within the past 10 to 15 years. It is submitted that this timeframe affects the determination of whether the works are unauthorised or not.
- The structure did provide what is referred to as a ‘culvert’ however, the drainage pipe is severely undersized and as such, acts as a restrictive flow control device more akin to a dam or a berm, impeding the flow, rather than a fully functioning and correctly sized culvert.

- The location of the site is relevant in terms of foreshore consents due to impacts on environment and hydrology.

Following receipt of the submission of the response to the FI request, the Planning Officers report notes that the Biodiversity Officer prepared an AA Screening Report and concluded that AA is not required. The report concludes that the construction of the culvert comes within the scope of the exemption provided for in Article 9(1) of the Planning and Development Regulations 2001. The report also notes the works may have required the consent of the Office of Public Works under Section 50 of the Arterial Drainage Act.

### 3.2.2. Other Technical Reports

**Biodiversity Officer:** Kerry Co. Councils Biodiversity Officer carried out an AA Screening report which considered the impacts on the Kenmare River cSAC (Site Code: 002150). The report concludes that no significant effects on European Sites were identified for the following reasons:

- No direct loss or fragmentation/alteration of any of the annexed habitats for which the SAC is designated is considered likely.
- No disturbance/displacement of annexed species at construction or operational phase is considered likely, and
- No cumulative or in-combination effects were identified.

No mitigation measures are relied upon in reaching this conclusion.

## 4.0 Planning History

4.1. There is no planning history relating to this site.

## 5.0 Policy Context

### 5.1. Kerry County Development Plan 2022-2028

5.1.1. The Board will note that the subject application was considered under the Kerry County Development Plan 2015. In the interim, the Board will note that the Elected Members of Kerry County Council adopted the Kerry County Development Plan

2022-2028 at a full Council Meeting on the 4<sup>th</sup> of July 2022. The Plan came into effect on the 15<sup>th</sup> of August 2022, and incorporates the Planning and Development (Kerry County Development Plan 2022-2028) Direction 2022, dated 5<sup>th</sup> December 2022. Therefore, the 2022 CDP is the relevant policy document pertaining to the subject site.

5.1.2. Chapter 11 of the Plan deals with Environment and identifies that the subject site lies within a Visually Sensitive Area. Section 11.6.3.1 of the Plan describes these area as

Visually sensitive landscape areas comprise the outstanding landscapes throughout the County which are sensitive to alteration. Rugged mountain ranges, spectacular coastal vistas and unspoilt wilderness areas are some of the features within this designation.

These areas are particularly sensitive to development. In these areas, development will only be considered subject to satisfactory integration into the landscape and compliance with the proper planning and sustainable development of the area.

The County enjoys both a national and international reputation for its scenic beauty. It is imperative in order to maintain the natural beauty and character of the County, that these areas be protected.

5.1.3. With regard to Designated Sites, Section 11.2.1 of the Plan deals with European / National Designations and notes that exempted development in such areas is de-exempted where such works/development require an Appropriate Assessment. the following policies are considered relevant:

- KCDP 11-1 Ensure that the requirements of relevant EU and national legislation, are complied with by the Council in undertaking its functions, including the requirements of the EU Birds and Habitats Directives.
- KCDP 11-2 Maintain the nature conservation value and integrity of Special Areas of Conservation, Special Protection Areas, Natural Heritage Areas (NHAs) and proposed Natural Heritage Areas (pNHAs). This shall include any other sites that may be designated at national level during the lifetime of the plan in co-operation with relevant state agencies.

- KCDP 11-3 Work with all stakeholders in order to conserve, manage and where possible enhance the County's natural heritage including all habitats, species, landscapes and geological heritage of conservation interest and to promote increased understanding and awareness of the natural heritage of the County.

## 5.2. Natural Heritage Designations

5.2.1. The subject site is not located within any designated site. The closest site is the Kenmare River SAC (Site Code: 002158) which lies approximately 10m to the south west of the site. This site was proposed as a Site of Community Importance in October 2021 under the Habitats Directive 92/43/EEC.

5.2.2. In addition to the Kenmare River SAC, the following Natura 2000 sites lie in close proximity to the site:

- The Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC (Site Code: 000365) - approximately 4.3km to the east of the site.
- The Blackwater River (Kerry) SAC (Site Code: 000365) - approximately 6.9km to the north east.
- The Cloonee and Inchiquin Loughs, Uragh Wood SAC (Site Code: 001342) – approximately 8.1km to the south east
- The Glanmore Bog SAC (Site Code: 001879) – approximately 9.3km to the south
- The Caha Mountains SAC (Site Code: 000093) – approximately 11.9km to the south east

## 6.0 The Referral

### 6.1. Referrer's Case

6.1.1. Teicniuil Priory Consulting Engineers Ltd, on behalf of Mr. Chris Fitzgibbon, applied to Kerry County Council for a Section 5 Declaration in respect of questions relating to the construction of a dam as an infill within a previously open channel of water, and

which provides for a small access road. A pipe has been installed within the dam but the restrictive nature of the structure, together with the influence of the infill dam extends to the referrers land and the foreshore.

- 6.1.2. The Section 5 Request to Kerry County Council included a number of enclosures such as the relevant application form, maps, site layout plan, SAC map, folio maps plans and elevations of the dam, photographs and report on the structure.
- 6.1.3. The submitted report notes that the outlet pipe is far less than the natural open channel that existed prior to the dam construction by an approximate factor of 5. The result is that the referrers land is in a constant state of flood and / or saturated ground and water logging. It is further questioned if the works carried out within the foreshore required planning permission and that the location of the dam immediately adjacent to the SAC would de-exempt such development.
- 6.1.4. This declaration is challenged on the grounds that:
  - The Board will note that the original referrer considers that the Declaration issued by Kerry County Council has not considered the full extent of the works carried out.
  - The works are noted to include the infilling of a previously open water channel, out-letting to the foreshore via a drainage pipe and the provision of a small access road, as well as the creation of the dam.
  - The Local Authority have solely considered a 'culvert' as the subject works of the development as stated on the foot of the Declaration which is not the case.

## 6.2. **Planning Authority Response**

None

## 6.3. **Owner/ occupier's response**

The owner of the property Mr. Steve O'Sullivan, through their agent Diarmuid Twomey Planning, Engineering & Architectural Services, submitted a response to the third-party referral. The submission reflects that submitted to the Local Authority during its consideration of the Section 5 request and is summarised as follows:

- Mr. O’Sullivan is the registered owner of the lands for over 20 years with two parcels of land being linked by a farm track.
- The owner is not aware of any issues relating to the adjoining lands.
- The information submitted with the Section 5 is disputed and it is submitted that it is not reflective of the situation on the ground.

#### **6.4. Referrers Response to Owner/Occupier Response**

- 6.4.1. The Referrer has sought to respond to the owner/occupiers response and considers that the owner has not addressed the question before the Board which is the legitimacy of the structure, that being whether the works constitute development which is exempted development or not. The response considers that the owner/occupier did not address the question before the Board. It is submitted that the comments are peripheral and not relevant to the subject matter.
- 6.4.2. The response acknowledges the registered owner of the lands and that said ownership is in excess of 20 years. The passage which connects the two plots of the owners land is part of the ‘dam’ structure, that is the subject of this appeal. It is submitted that the passage is not a farm track as suggested as the land is not in farm use and is scrub land. The exemptions in Article 8(G) of the Planning and Development Regulations are not applicable and the placement of the man-made rock embankment and stone constructed passage is in stark visual contrast to the immediate surrounding ground cover and vegetation.
- 6.4.3. The extent of the drainage issues on the referrers land, only became obvious during the clearing of scrub. The narrow drainage pipe under the passage became apparent and began the investigation of flooding issues. The landowner was made aware of the flooding issues by the referrer.
- 6.4.4. The pre-existing open channel width was circa 6.7m which has now been restricted to circa 1.7m in width. The 500mm diameter drainage pipe further exacerbates the already narrowing restriction. Remedial works are required to mitigate against flooding within the referrers land. The issue is determining whether or not the structure as a whole, including the passage, access track, drainage pipe and alterations of natural ground in close proximity to the foreshore and SAC required



planning permission, and if remedial measures would also require planning permission.

## 6.5. Observers

None.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

7.1.1. Section 2 (1) of the 2000 Planning and Development Act states as follows:-

“In this Act, except where the context otherwise requires – ‘development’ has the meaning assigned to it by Section 3 ...”

7.1.2. In Section 2 (1) of the Act “works” are interpreted as including

“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”.

7.1.3. Section 3 (1) of the 2000 Planning and Development Act states as follows:-

“In this Act, ‘development’ means, except where the context otherwise requires, the carrying out of 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(1) of the Planning and Development Act identifies what may be considered as exempted development for the purposes of the Act, and the following Sections are considered relevant:

- Section 4(1)(a) includes:

“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;”

- Section 4(1)(ia) includes:

“development (other than development consisting of the provision of access to a national road within the meaning of the Roads Act 1993) that consists of—

- (I) the construction, maintenance or improvement of a road (other than a public road) that serves a forest or woodland, or
- (II) works ancillary to such construction, maintenance or improvement;”

7.1.5. Section 4(2)(a) of the Act states:

“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 the principles of proper planning and sustainable development....

7.1.6. Section 4(2)(c) states:

“Regulations under this subsection may, in particular and without prejudice to the generality of paragraph (a), provide, in the case of structures or other land used for a purpose of any specified class, for the use thereof for any other purpose being exempted development for the purposes of this Act.”

7.1.7. Sections 4(4) states:

“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.

7.1.8. Section 5(1) of the Act states as follows:

“If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter”.

7.1.9. Section 5(3)(a) states:

“Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration”.

7.1.10. Section 4(2) of the Act provides that the Minister, by regulations, provide for any class of development to be exempted development. The principal regulations made under this provision are the Planning and Development Regulations, 2001.

## 7.2. Planning and Development Regulations, 2001

7.2.1. Article 6(1) of the Planning & Development Regulations, 2001 as amended 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.”

7.2.2. Article 8 of the Regulations relate to works specified in a drainage scheme and provide as follows:

**8B.** Works consisting of field drainage for agriculture, other than drainage and/or reclamation of wetlands, shall be exempted development.

**8G.** Development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road), or works ancillary to such road development, where the road serves forests and woodlands, shall be exempted development.

7.2.3. Article 9 of the Planning & Development Regulations deal with restrictions on exemption for developments to which article 6 relates and sets out a number of restrictions which would render development not-exempt for the purposes of the Act. Article 9(1)(viiB) is relevant and states as follows:

“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,”

7.2.4. Schedule 2, Part 3 of the Planning & Development Regulations deal with Exempted Development – Rural and Class 3 is relevant in this instance.

- Works relating to the construction or maintenance of any gully, drain, pond, trough, pit or culvert, the widening or deepening of watercourses, the removal of obstructions from watercourses and the making or repairing of embankments in connection with any of the foregoing works.

### 7.3. Legal Precedents

ECJ Judgement C-323/17 - People over Wind and Peter Sweetman v Coillte, where the Court of Justice of the European Union (CJEU) ruled that mitigation measures could not be taken into account at the screening stage of an appropriate assessment.

### 7.4. Precedent Referral Decisions

Having regard to the question posed, I consider the following referral decisions to be relevant:

7.4.1. **ABP-304569-19:** Question as to the culverting of a stream for the purposes of drainage works to agricultural land, the upgrading of internal access by the laying of hardcore to facilitate access to uplands including agricultural lands and forestry to the south is or is not development or is or is not exempted development. The Board determined that:

- (a) the carrying out of drainage works for agriculture, including the provision of a culvert, and the laying of hardcore as part of internal access to uplands, including agricultural lands and forestry, involved the carrying out of works, and therefore constitute development.
- (b) The carrying out of drainage works for agriculture (which included the provision of two culverts) would come within the scope of the

exemption provided for under Article 8B of the Planning and Development Regulations 2001, as amended, and also the exemption provided for under Class 3 of Part 3 of the Second Schedule to these Regulations, but the restriction on exemption set out in Section 4 (4) applies in this instance, as the competent authority has determined that the works, which are in the vicinity of a fast flowing stream that connects to the Carlingford Shore Special Area of Conservation (site code 002306), would have required appropriate assessment, and are therefore not exempted development.

- (c) The laying of hardcore to facilitate access to uplands, including agricultural lands and forestry, as stated, does not come within the scope of Article 8G of the Planning and Development Regulations, 2001 (as amended) as there is no evidence of forests or woodland that are served by this road, and the development does not come within the scope of Class 3 of Part 1 of the Second Schedule to the Regulations, because the subject road that has been laid is a new road, for the use of vehicles, and the works involved therefore do not constitute the repair or improvement of an existing street, road or way, nor the construction of any private footpath or paving. It is therefore not exempted development.

7.4.2. **ABP Ref: RL2587:** The Board decided that the carrying out of works to complete flood relief pipe at Scariff, Middleton, County Cork was development and was not exempted by reason of the nature and extent of work involved.

7.4.3. **ABP Ref RL2485:** The Board decided that the filling of 0.8 hectare area with inert materials and the construction of a forestry road at Cruagh, Rockbrook, Rathfarnham, Dublin was development and was not exempted development (road had not been constructed to serve forestry).

## 8.0 **Assessment**

8.1.1. The application relates to the following question:-

Whether an existing 'dam-type structure' constructed on an open watercourse close to where it connects to the sea is, or is not development, or is, or is not exempted development, at Drimna Beg, Sneem, Co. Kerry.

8.1.2. The Board will note the Local Authority restricted its consideration of the question on the basis that the works referred comprise the construction of a culvert. The Referrer suggests that the LA did not take proper cognisance of the nature of the development which they describe as a 'dam-type structure' and which includes the infilling of a previously open water channel for the provision of a small access road, and the inclusion of a small drainage pipe. The Referrer seeks a definitive response as to whether the structure is exempted development or not, whether other statutory bodies are required to be notified and / or consent given for the works as well as foreshore consent. The submission to the Board requests confirmation of the planning and consent status of the structure described.

8.1.3. I also note that the owner / occupier advises that the two land folios are linked by a farm track / passage. It would therefore appear that the 'culverting' of the land drain was a result of the need to create the link farm track / passage, rather than the culvert being carried out in isolation or to drain agricultural land.

8.1.4. In terms of the Section 5 declaration before the Board, I would note that such a declaration can only say:

- a) whether something is development or not, and if it is
- b) whether it is exempted development or not.

8.1.5. It is not appropriate to determine if something is permitted development or whether it is unauthorised development, which it appears to be at the root of the question posed in this case. Neither is it appropriate to determine the acceptability or otherwise of the detail of the question posed in terms of the proper planning and sustainable development of the area.

## 8.2. **Is or is not development**

8.2.1. The works referred to Section 2(1) of the Act defines 'works' as including "any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ....".

8.2.2. Section 3(1) of the Act defines development as "...the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or other land."

8.2.3. In this regard, I am satisfied that the question posed and to which the referral relates are 'works'. I am satisfied that the said 'works' comprise 'development'. This determined, consideration is required as to whether the 'works' would constitute 'exempted development'.

### 8.3. **Is or is not exempted development**

8.3.1. Having established that the 'works' undertaken amount to 'development', the issue to be considered is whether the development is exempted development or not. The Board will note that the owner/occupier has indicated that the two land folios in his ownership have been linked via a farm track / passage. The area in question here relates to the area which impacts the previously open channel which has been culverted and the link passage constructed over. Ultimately, there are two elements to the subject referral question being:

- The culverting of the open channel
- The construction of a farm track / passage.

8.3.2. **Culverting of the open channel:** Section 4(1) of the Planning and Development Act identifies what may be considered as exempted development for the purposes of the Act, and the following Section is considered relevant:

- Section 4(1)(a) includes:  
"development consisting of the use of any land for the purpose of agriculture....;"

Article 8B of the Planning and Development Regulations is also considered relevant as it relates to works specified in a drainage scheme and provides as follows:

- 8B. Works consisting of field drainage for agriculture, other than drainage and/or reclamation of wetlands, shall be exempted development.

8.3.3. In terms of this element, Article 6 of the Planning and Development Regulations 2001 (as amended), subject to Article 9, provides an exemption for minor works and

structures, with Class 3, Part 3 (Exempted Development – Rural) of Schedule 2 stating ‘maintenance of any gully, drain, pond, trough, pit or culvert, the widening or deepening of watercourses, the removal of obstructions from watercourses and the making or repairing of embankments in connection with any of the foregoing works’. In the context of the works, it does not appear that they were carried out in order to provide drainage for agricultural purposes, rather to provide a link access to two folios of land. In addition, the affected watercourse was not widened or deepened, rather it would appear to have been substantially narrowed with the inclusion of a small drainage pipe. It is the third-party referrers submission that this work has resulted in the flooding of their land. In this context, I do not consider that the subject works can be considered to be exempt.

8.3.4. **The construction of a farm track / passage:** Section 4(1) of the Planning and Development Act identifies what may be considered as exempted development for the purposes of the Act, and the following Section is considered relevant:

- Section 4(1)(ia) includes:

“development (other than development consisting of the provision of access to a national road within the meaning of the Roads Act 1993) that consists of—

(I) the construction, maintenance or improvement of a road (other than a public road) that serves a forest or woodland, or

(II) works ancillary to such construction, maintenance or improvement;”

Article 8G of the Planning and Development Regulations is also considered relevant as it relates to works consisting of the construction, maintenance or improvement of a road and provides as follows:

- **8G.** Development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road), or works ancillary to such road development, where the road serves forests and woodlands, shall be exempted development.

8.3.5. Having regard to the information available to me, and having undertaken a site inspection, I can confirm that the link passage connects two land folios and there is no evidence of any forest or woodland in the wider area. As such, I do not consider



that this element of the works could be construed as benefiting from this exemption provision.

8.3.6. In terms of the fact that the road in question is a private road, and not within public management, I note the provisions of Part 1 of Schedule 2, Class 13 of the Planning and Development Regulations as it relates to private footpath or paving, and states as follows:

- The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving.

Again, I would note that the track, is both detached from and currently difficult to access in a car from the main public road, and therefore is not within the boundary of the street, road or way, has been constructed to provide for vehicular access and as such, cannot benefit from this exemption.

8.3.7. Having regard to the nature of the works undertaken, and notwithstanding the timeframe over which they were carried out, I am satisfied that they have been carried out in order to connect two folios of land, which includes the installation of a culvert and link passage and would not be exempted development.

### **Restrictions on Exemption**

8.3.8. Further to the above, and with regard to restrictions on exemption, I refer the Board to Section 4(4) of the Planning and Development Act which states as follows:

“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.”

8.3.9. The Kenmare River SAC (Site Code: 002158) lies approximately 10m to the south west of the site. The watercourse which has been affected by the installation, located upstream of the SAC, flows into the SAC at this point. The referrer submits that Appropriate Assessment would have been required for the works in the first instance. I would agree, and as such, given the lack of any clear detail of the construction works, I conclude that the works carried out cannot be considered to be exempted development.

8.3.10. I note that the Biodiversity Officer of Kerry County Council has conducted an AA Screening Report on the subject works in the absence of any details from the owner / occupier. The Kenmare River SAC (Site Code: 002158) is so designated for a number of Qualifying Interests including reef habitats as well as otter and seals which are known to use the site and are noted in this area of the SAC. The Biodiversity Officer has not identified any impacts to the habitats and species associated with the SAC and concluded that no significant effects on European Sites were identified due to the works carried out.

8.3.11. While I would acknowledge the report of the Biodiversity Officer, I am satisfied that the works are reasonably considered not to be exempted development under the provisions of Section 4(4) of the Planning and Development Act, as amended.

## 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 an existing 'dam-type structure' constructed on an open watercourse close to where it connects to the sea is, or is not development, or is, or is not exempted development, at Drimna Beg, Sneem, Co. Kerry.

**AND WHEREAS** Chris Fitzgibbon, through his agent Teicniuil Priory Consulting Engineers Ltd, The Courtyard, Fair Hill, Killarney, Co. Kerry, requested a declaration on these questions from Kerry County Council and the Council issued a declaration on the 22<sup>nd</sup> day of February 2022 stating that the matter was development and was exempted development:

**AND WHEREAS** referred this declaration for review to An Bord Pleanála on the 16<sup>th</sup> day of March 2022:

**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 8B, 8G and 9 of the Planning and Development Regulations, 2001, as amended,
- (c) Class 13 of Part 1 of the Second Schedule to the Planning and Development Regulations, 2001, as amended,
- (d) Class 3 of Part 3 of the Second Schedule of the Planning and Development Regulations, 2001, as amended,
- (e) the location of the subject site in proximity to Kenmare River SAC (Site Code: 002158);
- (f) the nature of land use and the pattern of development in the area:

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

- (a) the dam-type structure constructed on an open watercourse close to where it connects to the seas by culverting of the open channel and the construction of the farm track / passage involved the carrying out of works, and therefore constitute development.
- (b) the culverting of the open watercourse was not for the purposes of field drainage for agriculture, rather for the provision of the link farm track / passage and therefore would not come within the scope of the exemption provided for under Article 8B of the Planning and Development Regulations 2001, as amended, or the exemption provided for under Class 3 of Part 3 of the Second Schedule to these Regulations,
- (c) the provision of the farm track / passage to link two folios of land, does not come within the scope of Article 8G of the Planning and Development Regulations, 2001 (as amended) as there is no evidence of forests or woodland that are served by this passage, and the development does not come within the scope of Class 3 of

Part 1 of the Second Schedule to the Regulations, because the subject passage that has been laid is a new road, for the use of vehicles, and the works involved therefore do not constitute the repair or improvement of an existing street, road or way, nor the construction of any private footpath or paving. It is therefore not exempted development,

(d) the restriction on exemption set out in Section 4(4) applies in this instance, as the competent authority has determined that the works, which are in the vicinity of Kenmare River Special Area of Conservation (Site Code 002158), would have required appropriate assessment, and are therefore not exempted development.

**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 carrying out of the works, namely the construction of a 'dam-type structure' on an open watercourse close to where it connects to the sea at Drimna Beg, Sneem, Co. Kerry, is development and is not exempted development.

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A. Considine

Planning Inspector

12<sup>th</sup> December 2022