



An
Bord
Pleanála

Inspector's Report ABP-313717-22.

Question

Whether the use of an area of land measuring 6m by 12m approximately for the occasional/infrequent parking of a car, is, or is not development, or is, or is not exempted development.

Location

Sound Road, Kenmare, Co. Kerry.

Declaration

Planning Authority

Kerry Council South

Planning Authority Reg. Ref.

EX991.

Applicant for Declaration

Sam Sleator.

Planning Authority Decision

Development and exempted development

Referral

Referred by

Sam Sleator.

Owner/ Occupier

Sam Sleator.

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 to the south of the town of Kenmare and on an area of private land to the west of the N71. The N71 forms the primary route from Killarney to Cork which provides access to the peninsulas of Kerry and West Cork, and runs through the towns of Bantry, Skibbereen, Roscarbery, Conakilty and Bandon on a private access road.
- 1.2. The location of the subject site is to the north of the bridge over the Roughty River in Kenmare and is located off a small private road which extends westerly from the N71 and provides access for a small number of houses. Two houses front onto the site access road facing north, while the access itself turns at a 90° angle to the south where two further houses are accessed, including the referrers home.
- 1.3. The subject site occupies an area of 72m² and the boundary wall has been removed and replaced with 3-bay metal gate. A timber post and rail fence forms the western, northern and eastern boundaries with a hedge planted outside this fence. The surface of the site has been significantly altered from the remaining lands to the north and is currently under lawn.

2.0 The Question

- 2.1. The application relates to the following question:-

Whether the use of an area of land measuring 6m by 12m approximately for the occasional/infrequent parking of a car, is, or is not development, or is, or is not exempted development, at Sound Road, Kenmare, Co. Kerry.

- 2.2. The application advises that a previous similar application – ref. EX985 – was misconstrued as an application in relation to change of use. It is requested that deliberations on the matter be confined to the act or convenience of parking a car on open land for occasional/infrequent short stay durations – in the interest of safety and to allow house visitations.
- 2.3. The use of the small plot of land will avoid the need to park on the Sound Road surface, partially blocking the road and discommoding the neighbours. A clear precedent for such occasional parking occurs in the locality already, on lands across from the applicants site, where a local farmer parks his vehicles for short duration on

his land adjacent to the cattle crush. It is submitted that the application is not unlike cases covered by Class 37 Schedule 2 (exempted parking) where temporary parking is allowed for periods up to 15 days and not exceeding an aggregate of 30 days in any one year.

3.0 Planning Authority Declaration

3.1. Declaration

On the 10th of May 2022, Kerry County Council issued a declaration with regard to the questions posed and declared that:

1. The proposed change of use of the land subject of this referral for occasional/infrequent use as a car parking area would constitute a material change of use of the land
2. The said change of use would constitute development that comes within the scope of Section 3(1) of the Planning and Development Act 2000 (as amended) and,
3. The proposed works would not fall for consideration within the scope of exemptions provided under the Planning and Development Act 2000 (as amended).

Therefore, the proposed change of use of the land for occasional/infrequent use as a car parking area would constitute development which is not exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Report

The Planning Report, prepared to address the questions posed, notes the planning history, including the previous Declaration issued by Kerry County Council with regard to the question relating to the change of use of the land to a car parking area – PA ref: EX985 refers which concluded that the works constituted development which were not exempted development.

The report notes that the subject site is not located within the curtilage of the referrers house and as such, the exemption provided at Section 4(1)(j) in relation to 'development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such' would not apply in this case.

There are no exemptions provided in the P&D Act in relation to the change of use of land to a car park, whether for occasional/infrequent use or otherwise.

The arguments made regarding the provisions of Class 37, Part 1, Schedule 2 of the Planning and Development Regulations 2001 (as amended) are noted but it is concluded that this Class is in relation to the temporary use of land for a local event and the placing of tents, vans or other moveable structures or objections on the land in connection with such use. The exemption provisions of Class 37 do not apply in this case.

The report concludes that the development would not constitute exempted development.

3.2.2. Other Technical Reports

None.

3.2.3. Third-Party submissions

None

4.0 Planning History

4.1. The following is the relevant planning history relating to this site:

ABP ref: PL08.243811 (PA ref:14/378): Permission refused for the retention of four private parking spaces at Bayview, Kenmare, Co. Kerry.

The Board concurred with the PA and refused permission for the development for the following stated reason:

The car park proposed to be retained is located on the southern approach to Kenmare town on the N71 national secondary route in an area of natural amenity which affords views over the Kenmare River towards the Iveragh Peninsula and is zoned 'Passive Open Space' in the Kenmare Functional

Area Local Area Plan 2010-2016. It is an objective of the planning authority, as set out in the said Plan, that uses in such areas should not detract from the primary use as passive open space. The car park, together with the associated boundary fencing, is obtrusive in views from the public road towards the Kenmare River and the Iveragh Peninsula and would, therefore, contravene materially the zoning objective set out in the said Plan and be contrary to the proper planning and sustainable development of the area.

PA ref: EX985: Referral sought with regard to a similar question as currently being considered where the applicant sought a declaration with regard to the change of use of an area of land measuring 6m x 12m approximately to a car parking area was exempted development. The Planning Authority issued a declaration stating that the proposed change of use of the land to a car parking area would constitute development which is not exempted development.

This declaration was not referred to the Board.

PA ref: 07/1036: Permission granted for 1½ storey renovations to the existing house and a new entrance onto the N71.

The Board will note that there are legal proceedings issued by Kerry County Council pursuant to Section 160 of the Planning and Development Act, 2000 (as amended) in respect of the applicant 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 submitted to the Council 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 4th of July 2022. The Plan came into effect on the 15th of August 2022 and incorporates the Planning and Development (Kerry County Development Plan 2022-2028) Direction 2022, dated 5th December 2022. Therefore, the 2022 CDP is the relevant policy document pertaining to the subject site.

- 5.1.2. Section 1.8.2 of the Plan deals with Municipal Districts/Electoral Areas and notes that the electoral structure of the County was reconfigured following the re-organisation of local government in 2014. The County is now divided into five municipal districts, for electoral and local government purposes. The five districts are Tralee, Killarney, Listowel, Kenmare and Castleisland/Corca Dhuibhne. A planned programme to prepare Local Area Plans (LAPs) in respect of Municipal Districts and other defined geographical areas commenced in 2018 and will continue following the completion of the County Development Plan.
- 5.1.3. Having regard to the significant geographical extent of the Kenmare Municipal District, it is necessary to prepare a land use planning strategy comprising of a number of Local Area Plans covering the Municipal District administrative area. The West Iveragh Local Area Plan 2019 – 2025 covers the western part of the Iveragh peninsula. The Core Strategy of the 2022 CDP advises that the existing zoning in the Kenmare FA LAP 2010-2016 remains.
- 5.1.4. Section 1.7 of the Kenmare FA LAP 2010-2016 deals with Land Use Zonings and the subject site is zoned Passive Open Space, which generally relates to use as town parks and children's playground areas and areas intended as natural amenity areas adjacent to natural features such as rivers.
- 5.1.5. 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 24m to the 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 5.3km to the north of the site.
 - The Blackwater River (Kerry) SAC (Site Code: 000365) - approximately 6.2km to the north west.
 - The Maulagowna Bog SAC (Site Code: 001881) – approximately 6.2km to the south.
 - Killarney National Park SPA (Site Code: 004038) - approximately 7.4km to the north
 - Kilgarvan Ice House SAC (Site Code: 000364) – approximately 8.2km to the east
 - The Caha Mountains SAC (Site Code: 000093) – approximately 8.3km to the south
 - Glanlough Woods SAC (Site Code: 002315) – approximately 9.6km to the east
 - The Cloonee and Inchiquin Loughs, Uragh Wood SAC (Site Code: 001342) – approximately 9.7km to the south west
 - Glengarriff Harbour and Woodland SAC (Site Code: 000090) – approximately 11.6km to the south.

- 5.2.3. The Roughty River Estuary pNHA (Site Code: 002092) lies approximately 127m to the east of the site.

6.0 The Referral

6.1. Referrer's Case

To the Planning Authority:

- 6.1.1. Frank Coffee Consulting Engineer, on behalf of Sam Sleator, applied to Kerry County Council for a Section 5 Declaration in respect of questions relating to the occasional/infrequent parking of a car on the applicant site at Sound Road, Kenmare, Co. Kerry. The Section 5 Request to Kerry County Council included a number of enclosures such as the relevant application form and site location map.
- 6.1.2. The report includes a number of enclosures including an application form and a location map. The submission argues that a precedent for such occasional parking occurs in the locality already with a local farmer parking his vehicle adjacent to his cattle crush.
- 6.1.3. It is further submitted that a change of use application should not be required and that the case is not unlike cases covered by Class 37 Schedule 2 (exempted parking) where temporary parking is allowed for periods up to 15 days and not exceeding an aggregate of 30 days in any one year. notwithstanding the recent planning decision (PA ref 14/387 and ABP ref: PL08.243811), this is an application solely in relation to the Act of Occasional / Infrequent Parking and not in relation to change of usage or works.
- 6.1.4. It is finally submitted that with the exception of Section 37 of the Planning Acts do not deal with the case outlined above – and if the PA creates a precedent that such cases as this, requiring planning – then they are opening up a very fraught vista for themselves.

To the Board:

- 6.1.5. The referral to the Board sets out the current situation with regard to parking at the applicants' home, and identifies that the area the subject of this referral lies close to the house. The requirement to park on the land is to accommodate visitors to the

applicants' home, and in particular, his adult children for social and welfare visits to their parents. An application, and subsequent appeal to ABP, to utilise the small plot of ground as car parking associated with the house was refused, after which, it is submitted that the area was restored to be compatible with the prevailing zoning.

- 6.1.6. The applicant seeks to clarify the matter of 'infrequent parking' and the definition of 'development' vis-à-vis infrequent parking through the Section 5 Application route. The basis of the S5 was explained in the application form so that there would be no doubt as to what was required – ie not a change of use but on the act of occasional parking. The referrer considers that the Planning Authority has not addressed the fundamental question posed – is the occasional / infrequent parking of a car on private ground development? - before moving onto dealing with change of use.
- 6.1.7. It is submitted that if the parking of a car on private lands is not 'development', then there is no change of use. Given that the site in its current layout has been deemed to be restored to passive open space standard, the impact of occasional / infrequent parking of a car on the character of the area is questioned.
- 6.1.8. It is requested that the Board overturn the decision of the Planning Authority.
- 6.1.9. In addition to the above, the referrers have obtained legal opinion in support of their application from Aoife Lynch, Barrister-at-Law, Murphy, Healy & Co. LLP, Kenmare. The opinion sets out the background to the site and the necessity for the additional parking. The opinion is summarised as follows:
- The site was purchased in or around 2012 and is within 50m of the referrers home.
 - The site does not abut a public road or a road in charge.
 - Works were undertaken to prepare the site including:
 - The levelling of the site,
 - A chip surface on a hardcore base was laid
 - Access to the site was enabled by the removal of a section of wall
 - A low wooden fence was erected and hedging was planted around the boundary.

- The site has been used for the purposes of private car parking incidental to the enjoyment of the appellants house since 2013.

The above works were the subject of an Enforcement Notice in May 2013 and retention was sought in 2014 – PA ref: 14/378 refers. This application, and appeal, was unsuccessful.

Following the refusal of permission, it is submitted that the above works were dismantled, and the site was returned to its prior state.

- It is submitted that cars are not parked at the site unless there are visitors to the appellants home, and it is vacant and remains passive open space. The occasional and infrequent parking of cars on what is a green area cannot constitute a change of use and / or material change of use as alleged by the PA.
- The use of the site is ancillary to the enjoyment of the appellants home and is an integral part of same. If (which is not admitted) the use of the site constitutes ‘development’ within the meaning of S3(1) of the Act, it is exempted pursuant to S4(1)(j) as it is within the curtilage of the appellants’ house.
- The application does not concern, or relate to, ‘works’ within the meaning of Section 2 of the 2000 Act and the site has been returned to the condition in which it was.
- Whether or not there has been a material change of use must be determined as a matter of fact – the appellant relies on the seminal Supreme Court decision of **Butler v. Dublin Corporation 1 I.R. 565**.
- The Planner has not identified any grounds on which to support the contention that parking of a car or two constitutes a material change of use, and the minimal duration of such a change (if regarded as such) cannot be regarded as material.
- The Planner has not referred to any impact in planning terms – visual impact, traffic impact, water impact, air impact.
- The development that was refused by ABP does not compare to the site as it exists today.

- To suggest that the appellant is restricted in his use of the site is contrary to the purpose of the planning code and would constitute an unjustifiable, unreasonable and disproportionate interference with property rights.
- Having regard to the historical development, layout and ownership of the lands within the Appellants house and the applicant site are situate, the site is situate within the curtilage of the appellants house and the occasional parking of a car is exempted.

6.2. Planning Authority Response

None

6.3. 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)(j) includes:

“development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;”

7.1.5. 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.

7.1.6. 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.

7.1.7. 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”.

7.1.8. 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”.

7.1.9. In the context of the planning history of the site, and in particular, with regard to the previous referral on the site, I consider it appropriate to draw the Boards attention to S138 of the Planning and Development Act which provides as follows:

(1) The Board shall have an absolute discretion to dismiss an appeal or referral—

(a) where, having considered the grounds of appeal or referral or any other matter to which, by virtue of this Act, the Board may have regard in dealing with or determining the appeal or referral, the Board is of the opinion that the appeal or referral-

(i) is vexatious, frivolous or without substance or foundation, or

(ii) is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducement by any person, or

(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to-

(i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or

(ii) any previous permission which in its opinion is relevant.

(2) A decision made under this section shall state the main reasons and considerations on which the decision is based.

7.1.10. I include the above on the basis that a similar question has already been determined by the Planning Authority for this site.

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 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.

Given the proximity of the site to the adjacent Natura 2000 site, 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,”

7.2.3. Article 10 of the Regulations deals with changes of use and states as follows:

- (1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2 shall be exempted development for the purposes of the Act, provided that the development if carried out would not –
 - (a) Involve the carrying out of works other than work which are exempted development,
 - (b) Contravene a condition attached to a permission under the Act
 - (c) Be inconsistent with any use specified or included in such a permission, or
 - (d) Be a development where the existing use is an unauthorised use, save where such a change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.
- (2) A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of being specified in the said part of the said Schedule as a separate use,

8.0 Assessment

8.1. Introduction & Background

8.1.1. The application relates to the following question:-

Whether the use of an area of land measuring 6m by 12m approximately for the occasional/infrequent parking of a car, is, or is not development, or is, or is not exempted development, at Sound Road, Kenmare, Co. Kerry.

8.1.2. The Board will note the Local Authority considered the question on the basis that there has been a material change of use of the land, which constitutes development and would not fall for consideration within the scope of exemptions provided under the Planning and Development Act 2000 (as amended). The referrer considers that the Planning Authority has not addressed the fundamental question posed – is the act of occasional / infrequent parking of a car on private ground development - before moving onto dealing with change of use. It is submitted that if the parking of a car on private lands is not ‘development’, then there is no change of use. Given that the site in its current layout has been deemed to be restored to passive open space standard, the impact of occasional / infrequent parking of a car on the character of the area is questioned.

8.1.3. In addition, the Board will note the legal opinion submitted on behalf of the referrer which argues that the Planning Authority has not identified any grounds on which to support the contention that parking of a car or two constitutes a material change of use, and the minimal duration of such a change (if regarded as such) cannot be regarded as material. In addition, the PA has not referred to any impact in planning terms – visual impact, traffic impact, water impact, air impact.

8.1.4. In terms of the planning history of the site, the Board refused planning permission, PL 08.243811 refers, for the retention of a domestic private four bay car parking area to serve overflow car parking requirements ancillary to dwelling at Bay View, Kenmare Townland, Kenmare, County Kerry for the following reason:

The car park proposed to be retained is located on the southern approach to Kenmare town on the N71 national secondary route in an area of natural amenity which affords views over the Kenmare River towards the Iveragh

Peninsula and is zoned 'Passive Open Space' in the Kenmare Functional Area Local Area Plan 2010-2016. It is an objective of the planning authority, as set out in the said Plan, that uses in such areas should not detract from the primary use as passive open space. The car park, together with the associated boundary fencing, is obtrusive in views from the public road towards the Kenmare River and the Iveragh Peninsula and would, therefore, contravene materially the zoning objective set out in the said Plan and be contrary to the proper planning and sustainable development of the area.

The detail of the works carried out and the subject of the above retention are detailed in the legal opinion submitted in support of the referral and detailed in section 6.1.9 above.

- 8.1.5. While I would note the argument of the referrer that following the refusal of the above permission, the works carried out were dismantled and the site has returned to its prior state. However, it is clear that the section of the wall removed to provide access has not been restored and the erection of the fence and hedging remain in place. It is also noted that the surface of the site does not reflect that of the surrounding land to the north of the access road, so has not been returned to its prior state. I raise this here on the basis of the Boards previous reason for refusal – which included the visual impacts associated with the boundary fencing. The elements which remain on the site, or omitted from the site in the case of the stone wall boundary, might be construed as unauthorised, although this is not for the Board to determine.
- 8.1.6. Further to the above ABP decision, the Board will note the previous referral submitted by the applicant to Kerry County Council. Referral PA ref: EX985 sought a declaration with regard to the change of use of an area of land measuring 6m x 12m approximately to a car parking area was exempted development. The Planning Authority issued a declaration on the 29th March 2022 stating that the proposed change of use of the land to a car parking area would constitute development which is not exempted development. This declaration was not referred to the Board. The submission of the applicant in relation to the subject Referral before the Board seeks to submit that the application solely relates to the act of occasional / infrequent parking and does not relate to a change of usage or works. Therefore, the first question relates to whether the subject referral is asking the same question as already determined.

- 8.1.7. The recent Judgment from Quinn J. relating to Sweetman v ABP 2019/98 JR (relating to the Ballycumber Wind Farm) makes reference to Section 5 referrals and reiterates previous judgements (Narcannon) that a person cannot ‘ask’ the same question that has already been decided. In this regard, Mr. Justice Quinn notes that it is an ‘*impermissible collateral challenge*’ to an earlier declaration. If there has truly been a different question put or a change in the facts or circumstances such as the receiving environment, a subsequent s.5 referral or question would be permissible (Cleary Compost and Shredding Limited v. An Bord Pleanala [2017] IEHC 458).
- 8.1.8. In particular, I note that the applicant seeks to clarify the matter of ‘infrequent parking’ and the definition of ‘development’ vis-à-vis infrequent parking through the Section 5 Application route. It is suggested that there is a difference between providing a car parking area, which might be construed as a change of use / development, and the act of occasional parking on private ground, which is not ‘development’.
- 8.1.9. While there are differences in the wording of the current referral, the substance of the question put might reasonably be considered to be the same as that previously determined by the Planning Authority, and which was not referred to the Board. The Board’s previous decision on the site might also be considered relevant as the subject referral seeks to deem development previously refused as exempted development. In this context, the Board may wish to exercise its discretion pursuant to Section 138 of the Act and dismiss the referral as the applicant may be seeking to circumvent the statutory planning framework following two negative decisions relating to the same issue.
- 8.1.10. Should the Board disagree with the above assessment, I propose to continue with my consideration of the question posed.
- 8.1.11. 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.
- 8.1.12. 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. While the applicant seeks to suggest that there is a difference between providing a car parking area, which might be construed as a change of use / development, and the act of occasional parking on private ground, which is not 'development', I consider that the sole purpose of the laying out of the site is to provide car parking. In this regard, I am satisfied that the question posed and to which the referral relates is '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. 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)(j) includes:
"development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;"
- 8.3.2. The Board will note that the legal opinion submitted seeks to suggest that the subject site comprises the curtilage of the owner/occupiers' home, and as such, the use of

the site for occasional / informal parking should be considered exempted development. However, the site in question is detached from the applicants home and is separated by a number of residential properties. In terms of the definition of 'curtilage' in Irish Law, I refer the Board to the Criminal Law (Defence and the Dwelling) Act 2011 which states 'curtilage' in relation to a dwelling, means 'an area immediately surrounding or adjacent to the dwelling, which is used in conjunction with the dwelling, other than any part of that area that is a public place'.

- 8.3.3. As the site the subject of this referral lies outside the 'curtilage' of the dwelling, at a remove of approximately 60m by private road, I am satisfied that the exemptions provided for in Section 4(1)(j) of the Act do not apply in this case. The development is therefore not exempted development.
- 8.3.4. I also note the provisions of Article 10 of the Regulations which deals with changes of use and given that the site remains laid out with elements previously deemed to be unauthorised, I do not consider that the question posed falls within the exemptions afforded by this Article of the Planning and Development Regulations 2001 (as amended).
- 8.3.5. In the interests of completeness, the Board will note that the applicant had sought to suggest that the question posed falls under the exemptions provided for within Class 37, Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended). I note the comments of the Planning Authoritys SEE and would wholly concur with the conclusions reached in this regard. Class 37 relates to the temporary use of land for a local event and the placing of tents, vans or other moveable structures or objections on the land in connection with such use. As the question before the Board relates to the use of land for private car parking, the exemption provisions of Class 37 do not apply in this case.

Restrictions on Exemption

- 8.3.6. 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.”

- 8.3.7. The Kenmare River SAC (Site Code: 002158) lies approximately 24m to the west of the site. I note the previous works carried out at the site and the ongoing presence of both fencing and hedging around the western, northern and eastern boundary of the site. I also note that the surface of the site does not reflect that of the wider area and as such, has been altered. The works were carried out without the benefit of planning permission, and it is clear that Appropriate Assessment would have been required for the works in the first instance. In this regard, I note the comments of the previous Inspector who concluded that due to the proximity of the SAC, the certain hydrological and hydrogeological relationship between the site and the SAC, the potential for spillage of hydrocarbons within a car parking area and the escape of the hydrocarbons and sediment from the site and to the uncertainty of the in-combination effects of the proposed development and other plans or projects in the area, he could not be satisfied on the basis of the information provided with the application that the proposed development would not be likely to have a significant effect on the Kenmare River SAC. I would agree, and as such, given the lack of any clear detail of the works, I conclude that the works carried out cannot be considered to be exempted development.
- 8.3.8. 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 the use of an area of land measuring 6m by 12m approximately for the occasional/infrequent parking of a car, is, or is not development, or is, or is not exempted development, at Sound Road, Kenmare, Co. Kerry.

AND WHEREAS Sam Sleator, through his agent Frank Coffee Consulting Engineer, Daly's Lane, Killorglin, Co. Kerry, requested a declaration on this question from Kerry County Council and the Council issued a declaration on the 10th day of May 2022 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 3rd day of June 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) the location of the subject site in proximity to Kenmare River SAC (Site Code: 002158);
- (c) the nature of land use and the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the use of an area of land measuring 6m by 12m approximately for the occasional/infrequent parking of a car at Sound Road, Kenmare, Co. Kerry is works, and therefore constitute development.

(b) 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 use of an area of land measuring 6m by 12m approximately for the occasional/infrequent parking of a car at Sound Road, Kenmare, Co. Kerry, is development and is not exempted development.

A. Considine
Planning Inspector
7th March 2023