



An
Bord
Pleanála

Inspector's Report ABP-313930-22

Question

Whether the construction of a fence, a pedestrian gate and a vehicular gate on the road is or is not development and is or is not exempted development.

Location

Former Anglers Rest, Doonass
Demense, Clonlara, Co.Clare, V94
K735.

Declaration

Planning Authority

Clare County Council.

Planning Authority Reg. Ref.

R2044.

Applicant for Declaration

Fiona MacCarthy.

Planning Authority Decision

No Declaration.

Referral

Referred by

Clare County Council.

Owner/ Occupier

Derek Cox & Michelle Caffrey.

Observer(s)

Fiona MacCarthy.

Date of Site Inspection

27 November 2023

Inspector

Daire McDevitt

1.0 Introduction

A Section 5 Declaration was issued by An Bord Pleanála under ABP 308442-20 dated 26th February 2021 was quashed by Order of the High Court, perfected 10th May 2022). The High Court directed that the application be remitted back to An Bord Pleanála for determination. Following a Board Meeting held on the 25th August 2022 Board Direction BD-011163-22 sets out the steps to be taken in relation to the remitted referral.

- The referral is remitted back to the point in time immediately following the receipt of the submission of Fiona MacCarthy received on the 2nd September 2020.
- Inspectors Report dated 5th February 2020 removed from file and a new Inspector report to be a completed by a different Inspector.
- Upon completion of the section 131 process, file to be referred to the Director of Planning for allocation to a new Inspector to carry out a de novo assessment.

2.0 Site Location and Description

The site is located on the northern banks of the River Shannon in the townland of Doonass c.2.8 km southeast of the village of Clonlara in County Clare. Doonass graveyard immediately adjoins the site to the east. The River Shannon (and county boundary between Clare and Limerick) flows along the southern boundary and is separated from the buildings by grassed areas.

The site is located at the end of a local cul de sac road running south east from Clonlara and serves as access to the graveyard and numerous residential properties. The former Anglers Rest is located at the end of the cul-de-sac set back from the public road. A dwelling bounds the site to the north and is separated from the site by defined boundaries.

The site at present comprises a former public house (Anglers Rest) which has been converted to a residential dwelling. The carpark associated with the former use of the

site is overgrown and not in use. There is no evidence that that the structures associated with the former use as a public house remain in operation. The car parking area has been fenced off with a locked gates for vehicles and locked pedestrian gate (signage erected referring to High Court Order). There is no access to the River Shannon along the western side of the site at present. An area which appears to be in use as a private amenity space is located to the north of the 'dwelling' and is fenced off. A front door and porch/canopy is located on the eastern gable of the 'dwelling'.

The fence, pedestrian gate and vehicular gate which are the subject of this referral provide a defined boundary that separate the property from the public road. In the interest of clarity, the matters considered under assessment are those items labelled 'New Fence', 'New Gate' and 'New Pedestrian Gate' as per Drawing Number D-120920-1 as submitted with the original request for a Declaration to Clare County Council date stamped 29/09/20.

3.0 The Question

The Requester asks-

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

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

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

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

In the interest of clarity I wish to highlight to the Board that I am considering the question as follows:

Whether the construction of a fence, a pedestrian gate and a vehicular gate on the road is or is not development and is or is not exempted development.

4.0 Planning Authority Declaration

4.1 Declaration

The planning authority in correspondence received by An Bord Pleanála on the 19th of October 2020 that they have not made a declaration in this instance and referred the matter to An Bord Pleanála for a determination under Section 5 (4) of the Planning and Development Act, 2000 as amended.

5.0 Planning History

With the exception of the quashed section 5 Declaration under ABP 308442-20.

There does not appear to be any recent planning history on this site and this is also acknowledged in the submitted planners report from Clare County Council.

There are historical applications dating from 1964, 1969, 1987 relating to works to the Angler's rest.

The Requester in their submission refer to PA Ref. 00/30, an application "*to retain buildings*" at Doonass, Clonlara, Co. Clare. Permission was granted on the 28/05/2001 subject to 3 conditions. There is no other information available on file or online in relation to this application.

6.0 Policy Context

6.1 Development Plan

The referral submitted in 2020 refers to the Clare County Development Plan 2017-2023. This was also the Plan in place at the time of remittal by the High Court. Under this Plan the site was located in a Rural Area Under Strong Urban Pressure and not within a Settlement Boundary. And Appendix 6- Public Rights of Way did not include reference to the site.

The current operative plan is the Clare County Development Plan 2023-2029 which came into effect in April 2023.

- The site is located in an area identified as a “Rural Area Under Strong Urban Influence.”
- There are no recorded protected structures identified on site.
- There are no recreational routes identified on Map I12.
- The site includes Trees for Preservation as identified on Map I12
- Appendix 6 – Public Rights of Way & Recreational Routes does not identify Rights of Way for this site.

Section 10.15 Public Rights of Way

Established public rights of way constitute an important amenity and the Council recognises the importance of maintaining these and supporting initiatives for establishing walking routes in the County. The Development Plan is required under the Planning and Development Act, 2000, as amended, to preserve public rights of way which give access to seashore, mountain, lakeshore, riverbank or other places of natural beauty or recreational utility. The Act requires that such public rights of way shall be identified both by marking them on at least one of the maps forming part of the development plan and by including a list with their location appended to the Plan.

The inclusion of a public right of way in this plan is based on evidence of such a right of way existing and in particular of its compliance with the specific requirements of Section 10(2)(o) of the Act. This is not an exhaustive list and does not affect the existence or validity of any other public rights of way which are not included in the Plan. Public rights of way are set out in Appendix 6 of this Plan including a list of locations and associated maps.

Development Plan Objective: Public Rights of Way CDP10.13

It is an objective of Clare County Council: a) To encourage the preservation of existing public rights of way within the Plan area; and b) In accordance with the provisions of the Planning and Development Act, 2000 (as amended), including

Sections 10 and 14, to preserve public rights of way which give access to seashore, mountain, lakeshore, riverbank or other places of natural beauty or recreational utility, as set out in the maps associated with this Plan.

11.2.12 Public Rights of Way Public rights of way constitute an important amenity and an economic and social asset. They enable enjoyment of the County's high-quality landscape and are important for tourism development, recreation, and engagement with the County's cultural heritage. In accordance with the requirements of the Planning and Development Act, 2000, as amended, Appendix 6 of this Plan contains a list and maps of the public rights of way in County Clare that give access to seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational activity. Any consideration of public right of way extinguishments will have regard to RPO152 of the RSES.

Development Plan Objective: Public Rights of Way CDP 11.20

It is an objective of Clare County Council: To encourage the preservation of the existing public rights of way within the County, as set out in Appendix 6.

6.2 Natural Heritage Designations

A portion of the southern boundary of the site is located within the Lower River Shannon SAC (site code 002165)

The development which is the subject of this referral is located c.50m north of the SAC.

7.0 The Referral

7.1 Requestor's Case to the planning authority.

The request to the planning authority by Fiona MacCarthy is summarised as follows:

- The fence gate and pedestrian gate were constructed during the Covid 19 lockdown without consultation with neighbours, the local community or any of the various groups that enjoy the amenities of the river and the walks that are now block.

- The occupants of the former 'Anglers Rest' are responsible for this construction and subsequent locking of the gates, thus preventing the enjoyment of the aforementioned amenities for the first time in history according to locals.
- The referral is accompanied by drawings and what appears to be a signed list/petition of people in support of the declaration request.

7.2 Referrer's Case to An Bord Pleanála/Planning Authority Reports

The planning authority referred the matter to An Bord Pleanála for a determination under Section 5 (4) of the Planning and Development Act, 2000 as amended.

7.2.1 Planning Reports

Reports dated the 14th and 16th of October 2020 have been received from the planning authority. Below is a brief summary of points of note raised, these include inter alia:

- The application comprises a number of things including background information regarding the construction of the development whereby it is stated that the development carried out is blocking/obstructing access to the amenity of the river near Anglers Rest.
- The report refers to a number of statutory provisions in the Planning Act and Regulations and in particular Schedule 2 Article 6 Part 1 Exempted Development —General Class 11 which includes for the construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of (a) any fence (not being a hoarding or sheet metal fence) subject to conditions and limitations.

The report dated the 14th of October concluded that:

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

I wish to highlight to the Board that this question is not reflected in the referral received by An Bord Pleanála which posed the question:

'Whether the construction of a fence, a pedestrian gate and a vehicular gate on a road at Doonass, Clonclara, Co. Clare is or is not development and is or is not exempted development'.

7.2.2 Other Technical Reports

None on file.

7.3 Owner/Occupier's response

The Owners and occupiers (Derek Cox & Michelle Caffrey) in their response received by An Bord Pleanála on 16th November 2020 to this declaration request raised inter alia the following points:

- They purchased property for use as a family dwelling in 2017. They refurbished the property in 2018. Due to sporadic incidents of trespass they were forced to erect a garden fence and gates in June 2019.
- The property operated until its closure in 2011 as a public house known as the Angler's Rest. The previous owners allowed access with conditions across their property for people walking towards the river.
- Those who passed across this space while in use as a public house and subsequently while vacant following its closure believe there is an ongoing entitlement to do so even when it is in use as a private residence.
- The site is in use as a residential dwelling.
- The property appears to date back to the mid-19th century. The use as a public house was abandoned in 2011.
- The car park to the north of the property is not in use, save for occasional funeral parking which the current owners facilitate in conjunction with the local graveyard committee.
- The original dwellings front elevation addresses the River Shannon. The fence and gates subject of the Section 5 are located to the rear of the property and come within the exemption height limits.
- The local authority referred the Section 5 application unaltered.

- The owners challenge the Planners Report 'site location' description and state a road does not access the river. The public road ends at the entrance to the council owned graveyard. From this point the property is served by a driveway that wraps around the front of the building.
- The status of the lands identified by the Local Authority as 'OPW land' is queried. A solicitor acting for the owners of the site has determined that actual ownership of these lands cannot be ascertained.
- It is suggested that the question to be asked is:

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

- The original declaration does not refer or make claims to a 'Right of Way'. The subsequent local authority referral does refer to a Right of Way but their referral question to the Board was not revised accordingly.
- There is no registered 'Right of Way' in existence across the subject property (Folio No. CE58407F). A letter in support of this is submitted from the owners solicitor. There are limited sporting rights for permitted fishing which is managed by the ESB who have responsibility in this area. Access is provided across the property to the north for fishing which avoids the private residence.
- The owners are of the view that the fence and gate erected is development and constitutes exempt development under Schedule 2 Article 6 Class 5 of the Planning and Development Regulations.
- The local authority introduced the question of an informal right of way in order to provide a basis to de-exempt the works under Article 9(1)(a)(x). It is submitted that there is no evidence to substantiate the claim that this route has been habitually used for a period of 10 years prior to the erection of the gate and fence and as such Article 9(1)(a)(x) should not be considered.

7.4 Further Responses

7.4.1 Response from Referrer (Fiona Mac Carthy) received by An Bord Pleanála on the 2nd December 2020 to the referral by the planning authority of the matter to An Bord Pleanála.

The response broadly reiterates matters raised in the original referral request. Point of note include inter alia:

- The matters for referral meet the criteria that would qualify as “development” within the meaning of Section 3 of the Planning and Development Act. It has also caused a material change of use of the land within the terms of this section in that the habitual access over the land can no longer be enjoyed.
- The development is of such a standard that it qualifies as “works” within the meaning of section 2 of the Act.
- The developments referred to had the effect of closing off traditional access to a space used for parking cars associated with graveyard visits, and also pedestrians to the bank of the River Shannon and to the turret at the well-known ‘Fall of Doonass’ by means of the ‘Cead Mile Failte’ Steps.
- The development is not exempt under the provisions of Article 9 (1)(a)(x) of the Planning and Development Regulations 2000 as amended.
- An enclosure is include with the response with 57 signed and duly witnessed (by a Peace Commissioner) testimonies to such use for at least 10 years from members of the local community.
- This access roadway has been in public use since the 19th century. There is a de facto right of way which may be recorded somewhere in the planning authority records or CDP as a formally recognised Right of Way.
- There is no record of planning permission sought or granted for material change of use from silent licenced business premises to that of a private dwelling house.
- A material change has taken place, the main entrance has been changed from the south side to the east side of it. The change has been highlighted by

the addition of an external porch so this entrance is now a feature of the new frontage of the house.

- It is requested that the Board to look at the need for permission for change of use and associated changes which may have led to difficulties in the community.
- The Observer/Requester details that she has only become aware that it is possible for a Public Right of Way to be protected by the County Council, legally, by its inclusion in the County Development Plan.
- The observation submission includes the following
 - a chronology of obstruction as referred to the council.
 - Historical record of visits to 'St Senans weel' dating back 80 years- includes reference to the Anglers Rest Hotel.
 - Birdwatch Ireland notes dated 22/07/2018 which reference the Anglers Rest.
 - Planned walking circuit submission by Clonlara Development Group.
 - An aerial map/photograph of a planned loop walk indicated with handwritten annotations.
 - A new site layout plan style drawing identifying the works and planning irregularities.
 - Photographs of the gates and fences.

7.4.2 Response from Owners/Occupiers (Derek Cox & Michelle Caffrey) dated 30th September 2022 to the response by Fiona Mc Carthy dated 2nd December 2020 on foot of a section 131 request by An Bord Pleanála dated 13th September 2022.

The response broadly refutes matters raised in the Requester's response. Outlines a summary of events and refers to alleged incidence of trespass and intimidation (which are not within the scope of this report and are matters for the relevant authorities to investigate). Point of note include inter alia:

- No issue has been raised regarding the height, design. Colour, materials, visual impact etc of the fence/gates. There are no claims that the development is offensive from a planning perspective or incongruous in this rural area.

Right of Way:

- The section 5 is being used as a platform to mount an argument that the property is the subject of some form of public rights of way for recreational use, access and park vehicles.
- There are no rights of way registered on the property. The Board has no function in determining legal rights. Reference to case law.
- Section 5 is vexatious.
- There is no evidence of habitual use for the past 10 years or lawful access.
- Absence of correlation with exiting law, which refers to periods of 20 or 12 years and is unrelated to the establishment to of public rights.
- Reference to RL.08.RL3525 and High Court Case Dennehy v An Bord Pleanála which has parallels with the current question pertaining to right of way over private property.
- Dennehy case sets precedence and gives guidance on how Article 9(1)(a) must be interpreted by the Board.

Exempted Development:

- The public road (L-30501) ends at the property boundary and does not enter the property (reference to 2021 correspondence with Clare County Council).
- The fence and gate fall within the exempted development provision of section 4(1)(j) of the Planning and Development Act 2000 as amended which states *“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”*.
- It is submitted that the Referrer does not dispute that the development falls within the exempted provision of the Regulations in particular Classes 5,9 and 11.

- It appears that the focus of the referral pertaining to ‘right of way’ and not the development itself.
- Claims by the requestor relating to public use, fishing stances, etc are incorrect. Reference to ‘de facto right of way’ shows there is no lawful basis for the claims.
- Submission contains a number of factual inaccuracies which are addressed by the owner/occupiers.
- The graveyard committee were given a key to use the car park when required. It was never open to the public since the owners purchase the property.
- The existence of steps (Cead Mile Failte steps) is irrelevant for public rights of way as lands on both sides are privately owned and not subject to right of way or the dedication of land for the purpose of creating a ‘loop walk’ over the property.
- Query the statutory declarations and signatures submitted by the Referrer.
- Query how a new submission by the Clonlara Development Group can be included with the documentation when they had no involvement in the original submission.
- Birdwatch Ireland were given permission to enter the lands in 2018.
- Map submitted by the requester is inaccurate.

7.4.3 Response from Fiona MacCarthy received by An Bord Pleanála on 29th

September 2022 on foot of a section 131 request by An Bord Pleanála dated 13th September 2022.

The response refers to the High Court remittal and it is submitted that the High Court remitted the matter back to An Brod Pleanála with remittal to take effect from the point in time immediately following receipt of the submission by the first named notice party received 2/12/2020. ***(I wish to highlight to the Board here that the submission received on the 2/12/2020 was from Fiona MacCarthy not the owner/occupiers i.e Derek Cox & Michelle Caffrey).***

- No access to the Board file to view submissions.

- Correspondence from An Bord Pleanála dated 13/09/2022 invites submission in relation to the order of the High Court. However it is submitted that they had no access to the notice of motion of the Court on which the High Court Order was based, this was not supplied by the Board so it is unclear in respect of the breadth of submission that is permitted.
- Request that the Board give her the opportunity to make a further submission based on clearer terms of reference.
- The Council's statement that there is no planning history associated with the site is incorrect. There are 4 files of relevance to the site as follows:
 - P8/16 refers to a 1964 grant of permission for the construction of an annex to Anglers Rest.
 - P8/2719 refers to a 1969 grant of permission for alterations to Anglers rest and additional accommodation.
 - 24854 refers to a 1987 grant of permission to retain development and further additions to Angler's Rest.
 - 00/30 refers to a 2001 grant of permission to retain buildings
- Works carried out would not be exempted development under any of the classes reviewed by the board having regard to Article 9(1)(a)(x) relating to fencing/enclosing of land habitually open to the public. The use of the site for residential purposes is, therefore, ultimately not the kernel of the issue.
- Section 4(l)(j) of the Act refers to 'use' not 'works'.
- Article 9(1)(a)(x) applies. Evidence submitted that the land was habitually open to or used by public during 10 years preceding the fencing. It is submitted it was open from time immemorial.
- Irrelevant that there are no findings of right of way/public rights of way registered. Refer to Article 9(1)(a)(xi) which states that any development should not 'obstruct any right of way'.
- What is involved is 'works and is 'development' and is not exempted development having regard to the provisions of Article 9(1)(a)(x) of the

Planning and Development Regulations 2001, as amended and likely Article 9(1)(a)(xi).

8.0 Statutory Provisions

8.1 Planning and Development Act, 2000 (as amended)

Section 2 provides the following definitions:

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

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

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

Section 3 (1) defines ‘development’ as follows:

“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.”

‘Public Road’ is defined in Section 2 as having the same meaning as the Roads Act, 1993. (Roads Act, 1993 Section 2 (l) defined public road as ‘a means over which a public right of way exists and the responsibility for the maintenance of which lies on a roads authority’.)

Section 4 (1) sets out what is exempted development for the purpose of the Act and includes a number such developments including-

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

Section 4 (2) (a) states-

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

Section 4 (3) states-

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

(a) any of the developments specified in subsection (1), or

(b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.

8.2 Planning and Development Regulations, 2001 (as amended)

Article 5 provides the following interpretations for this Part-

“business premises” means—

(a) any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons,

(b) a hotel, hostel (other than a hostel where care is provided) or public house,

(c) any structure or other land used for the purposes of, or in connection with, the functions of a State authority;

“excluded premises” means—

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

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

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

Article 6(1) states:-

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

Article 9(1) details development to which article 6 relates and shall not be exempted development for the purposes of the Act. In particular the following are relevant-

9. (1) Development to which article 6 relates shall not be exempted development for the purposes of the Act—

(a) if the carrying out of such development would—

(ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width,

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

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

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

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

(xi) obstruct any public right of way

Schedule 2, Part 1 Exempted Development – General.

<p style="text-align: center;">Column 1</p> <p style="text-align: center;">Description of Development</p>	<p style="text-align: center;">Column 2</p> <p style="text-align: center;">Conditions and Limitations</p>
<p>CLASS 5</p> <p>The construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or wooden fence or a wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<ol style="list-style-type: none"> 1. The height of any such structure shall not exceed 2 metres or, in the case of a wall or fence within or bounding any garden or other space in front of a house, 1.2 metres. 2. Every wall other than a dry or natural stone wall bounding any garden or other space shall be capped and the face of any wall of concrete or concrete block (other than blocks with decorative finish) which will be visible from any road, path or public area, including public open space, shall be rendered or plastered. 3. No such structure shall be a metal palisade or other security fence.
<p>CLASS 7</p> <p>The construction or erection of a porch outside any external door of a house.</p>	<ol style="list-style-type: none"> 1. Any such structure shall be situated not less than 2 metres from any road. 2. The floor area of any such structure shall not exceed 2 square metres. 3. The height of any such structure shall not exceed, in the case of a structure with a tiled or slated pitched roof, 4 metres or, in any other case, 3 metres.
<p><i>Sundry Works</i></p> <p>CLASS 9</p> <p>The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway.</p>	<p>The height of any such structure shall not exceed 2 metres.</p>
<p>Class 11</p>	

<p>The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of</p> <p>(a) any fence (not being a hoarding or sheet metal fence), or</p> <p>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres.</p> <p>2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.</p>
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PART 4 Schedule 1 Exempted development – Classes of Use

CLASS 1 Use as a shop.

CLASS 2 Use for the provision of—

(a) financial services,

(b) professional services (other than health or medical services),

(c) any other services (including use as a betting office), where the services are provided principally to visiting members of the public.

CLASS 3 Use as an office, other than a use to which class 2 of this Part of this Schedule applies.

CLASS 6 Use as a residential club, a guest house or a hostel (other than a hostel where care is provided).

CLASS 12 Use as a Public House, meaning a premises which has been licensed for the sale and consumption of intoxicating liquor on the premises under the Licensing Acts 1833 to 2018.

S.I. No. 30/2018 - Planning and Development (Amendment) (No. 2) Regulations 2018, (February 2018).

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

“(6)(a) In this sub-article—

‘habitable room’ means a room used for living or sleeping purposes but does not include a kitchen that has a floor area of less than 6.5 square metres;

‘relevant period’ means the period from the making of these Regulations until 31 December 2021.

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

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

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

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

(iii) the structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development,

then the proposed development for residential use, and any related works, shall be exempted development for the purposes of the Act, subject to the conditions and limitations set out in paragraph (d).

(d) (i) The development is commenced and completed during the relevant period.

(ii) Subject to sub-paragraph (iii), any related works, including works as may be required to comply with sub-paragraph (vii), shall affect only the interior of

the structure and shall not materially affect the external appearance of the structure so as to render its appearance inconsistent with the character of the structure or of neighbouring structures.

(iii) Any related works for the alteration of existing ground floor shop fronts shall be consistent with the fenestration details and architectural and streetscape character of the remainder of the structure or of neighbouring structures.

(iv) No development shall consist of or comprise the carrying out of works to the ground floor area of any structure which conflicts with any objective of the relevant local authority development plan or local area plan, pursuant to the Part 1 of the First Schedule to the Act, for such to remain in retail use, with the exception of any works the purpose of which is to solely provide on street access to the upper floors of the structure concerned.

(v) No development shall consist of or comprise the carrying out of works which exceeds the provision of more than 9 residential units in any structure.

(vi) Dwelling floor areas and storage spaces shall comply with the minimum floor area requirements and minimum storage space requirements of the “Sustainable Urban Housing: Design Standards for New Apartments — Guidelines for Planning Authorities” issued under section 28 of the Act or any subsequent updated or replacement guidelines.

(vii) Rooms for use, or intended for use, as habitable rooms shall have adequate natural lighting.

(viii) No development shall consist of or comprise the carrying out of works to a protected structure, as defined in section 2 of the Act, save where the relevant planning authority has issued a declaration under section 57 of the Act to the effect that the proposed works would not materially affect the character of the structure or any element, referred to in section 57(1)(b) of the Act, of the structure.

(ix) No development shall contravene a condition attached to a permission under the Act or be inconsistent with any use specified or included in such a permission.

(x) No development shall relate to any structure in any of the following areas:

(I) an area to which a special amenity area order relates;

(II) an area of special planning control;

(III) within the relevant perimeter distance area, as set out in Table 2 of Schedule 8, of any type of establishment to which the Major Accident Regulations apply.

(xi) No development shall relate to matters in respect of which any of the restrictions set out in subparagraph (iv), (vii), (viiA), (viiB), (viiC), (viii) or (ix) of article 9(1)(a), or paragraph (c) or (d) of article (9)(1), would apply.

(xii) No development shall consist of or comprise the carrying out of works for the provision of an onsite wastewater treatment and disposal system to which the code of practice made by the Environmental Protection Agency pursuant to section 76 of the Environmental Protection Agency Act 1992 relates and entitled Code of Practice — Wastewater Treatment and Disposal Systems Serving Single Houses together with any amendment to that Code or any replacement for it.

(e)(i) Where a person proposes to undertake development to which subparagraph (b) relates, then he or she shall accordingly notify the planning authority in whose functional area that the change of use concerned will occur in writing at least 2 weeks prior to the commencement of the proposed change of use and any related works.

(ii) Details of each notification under subparagraph (i), which shall include information on—

(I) the location of the structure, and

(II) the number of residential units involved, including the unit sizes and number of bedrooms in each unit,

shall be entered in a record by the planning authority maintained for this purpose and the record shall be available for inspection at the offices of the planning authority during office hours and on the planning authority's website.

(iii) During the years 2019, 2020, 2021 and 2022, each planning authority shall provide information to the Minister on the number of notifications received by it under this paragraph during the preceding calendar year, including details of the information so received for the purposes of subparagraph (ii).”.

S.I. No. 75/2022 - Planning and Development Act (Exempted Development) Regulations 2022 amended Article 10 of the Planning and Development Regulations as amended by Statutory Instrument No. 30 of 2018, to provide an exemption for the change of use, and any related works, of certain vacant commercial premises to residential without the need to obtain planning permission. The amendment relates to existing buildings that have a current commercial use and which fall under Class 1, 2, 3, and 6 of Part 4 to Schedule 2 of the Regulations.

The change of use, and any related works, must occur between when the 2018 Regulation came into operation on 8 February 2018 until 31 December 2025. Therefore, while the exempted development will be permanent in nature, the exemption can only be availed of for a temporary period.

8.3 Referrals Database

Following a review of the Board's database of referrals, I note there are a number of referrals relating to individual matters raised in this referral such as right of way, land habitually open to or used by the public during the 10 years preceding, change of use, primary and subsidiary/ancillary uses. There are a significant number relating to fence, gate and vehicular access. Which I do not proposed to summarises given the extent listed. However, I have not been able to find a previous referral that I consider to be comparable to the subject referral.

I note that owners have referred to a 2017 Declaration (RL.3525) “Whether the erection of a gate across a lane is or is not development or is or is not exempt development” which was quashed by the High Court

9.0 Assessment

9.1 Introduction

The purpose of this referral is not to determine the acceptability or otherwise of the construction of a fence, a pedestrian gate and a vehicular gate on the road but rather whether or not the matter in question constitutes development, and if so is or is not exempted development.

Section 5 of the Planning and Development Act (as amended) provides a mechanism by which questions as to whether something is or is not development and/or is or is not exempted development can be asked. The default position per Section 32 of the Planning and Development Act is that there is a general obligation to obtain permission for development that is not exempted development. The Act defines “development”, and, along with the Regulations set out provisions for exempted development. If a development is not among these provisions, then it is not exempted development.

The main parties in this referral are as follows:

- Fiona Mac Carthy (Requester to Clare County Council)
- Clare County Council (Referrer to the Board)
- Derek Cox & Michelle Caffrey (Owners/occupiers).

Clare County Council sought a declaration from An Bord Pleanála in respect of whether the erection of a fence, a pedestrian gate and a vehicular gate on the road is or is not development or is or is not exempt development.

The crux of the issues raised by the requester in this case relates to the view that the erection of the fence and gates has enclosed land habitually open to and used by the public during the 10 years prior to the erection of the fence, pedestrian gate and a vehicular gate on the road as a means of access to *Cead Mile Failte Steps* and a walkway to a ‘Turret’ at the ‘Falls of Doonass’.

The landowner in their response to the Board states that there is no right of way entered as burden on their property folio or in the County Development Plan, that there has been no habitual use or access to the preceding 10 years and a such the

works are not the subject restrictions on exempted development set out in Article 9(1)(a)(x) or (xi)

9.2 Is or is not development

The subject development comprises of the construction of a fence, a pedestrian gate and a vehicular gate on the road. I am satisfied that due to the nature of the proposed works, that these would fall within the definition of 'works' under Section 2 of the Act and thus are considered to constitute 'development' for purposes of Section 3 of the Planning and Development Act.

9.3 Is or is not exempted development

Section 4(2) of the Planning and Development Act sets out that the 'Minister' may by regulations provide for any class of development to be exempted development. Article 6 of the Planning and Development Regulations details specific classes for exempted development in column 1 of Part 1 of Schedule 2 subject to conditions and limitations specified in column 2 of the said Part 1.

Based on available information there is substantial evidence to suggest a structure has been in-situ at this site in some form or other prior to 1963 with aerial photography dated from 1995 appearing to show the footprint of a structure which is similar to the current structure on site. Based on the information presented I have no reason to doubt the historical use of the structure as a public house with ancillary accommodation. I note that the structure ceased to be used for this purpose in 2011. The current owners purchased it in 2017, carried out works and currently use it as a private residence.

The status of the residential use of the former Angler's Rest is not the subject of this referral by Clare County Council and this referral does not purport to assess the status of same and whether or not the change of use from public house with ancillary accommodation to residential use constitutes exempted development or not. For the purpose of this referral I draw the Boards attention to the definition of house in the Regulations as *house means a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied...*

It is clear from the information on file that part of the structure/building is used solely for residential purposes and as a 'House' in accordance with the interpretation of house as per section 2 of the Act. There is no evidence on file to suggest planning permission was granted for the use of this structure as a house and I note the Requester in her submission on the referral to the Board has queried if this constitutes a material change of use that requires planning permission. The Planning and Development Regulations provide an exemption for a change of use to residential use from Class 1, 2, 3 or 6 of Part 4 to Schedule 1 of the Regulations.

Based on the information available to me, and for the purpose of determining the subject referral, I am relying on the definition of house and Regulations introduced by the Minister which are extended to 2025 pertaining to the conversion of buildings to residential units. Therefore the development subject to this referral falls within Schedule 2, Part 1 Exempted Development – General Class 5 of the Regulations i.e. the construction, erection or alteration, within or bounding the curtilage of a house, of a gate, gateway, railing or wooden fence.

4 (1) (h) of the PDA's and the porch appears to be exempted development under Schedule 2, Part 1 Class 7 of the Regulations.

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

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

I have inspected the site and am satisfied the development meets this criteria.

9.4 Restrictions on exempted development

Article 9 of the PDR's details development to which article 6 and Class 5 of Schedule 2 Part 1 of the PDR's relates and details circumstances that these shall not be

exempted development for the purposes of the Act. The following restrictions on exempted development are considered pertinent and addressed.

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

(ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width.

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

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

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

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

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

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

The development which is the subject of this referral is located c50m from the Lower River Shannon SAC (site code 002165). Having regard to the nature and small scale of the subject development and the distance from the nearest European site, no Appropriate Assessment issues arise, and it is not considered that the proposed development would be likely to have a significant effect, individually, or in combination with other plans or projects, on a European site.

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

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

It is submitted that unauthorised development and use have taken place other than those matters raised in the referral. No evidence has been submitted to support the claims made and the planning authority did not raise concerns in this regard. Based on the information provided I have no reason to dispute the planning authority's opinion.

Issues pertaining to the residential use of the property or the erection of a porch were not included in the question which is before the Board. Furthermore, the matter of enforcement falls under the jurisdiction of the Planning Authority and not with An Bord Pleanála.

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

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

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

The crux of the third party referrer in this case relates to the view that the erection of the fence, a pedestrian gate and a vehicular gate on the road has enclosed land habitually open to and used by the public during the 10 years prior to the erection of the fence, a pedestrian gate and a vehicular gate as a means of access to the *Cead Mile Failte Steps* and a walkway to a 'Turret' at the 'Falls of Doonass' and that the erection of the fence, pedestrian gate and vehicular gate obstructs this public access.

The landowner in their response to the Board states that the gate and lands are in their ownership and that there are no right of ways entered as burden on their property folio or in the County Development Plan.

Article 9(1)(a)(x) - 'consist of the....enclosure of any land habitually open to or used by the public...'. The 'land' referred to in this case relates to the land to the east of the buildings on site. Based on the information on file there is conflicting evidence submitted relating to whether or not the 'land' was 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 the riverbank or other place of natural beauty or recreational utility.

In the Owners submission on this referral it is stated that there erected a fence in in 2019 to *'provide security as there were instances when individuals not known to the family would pass within a few metres of the house and on occasion would loiter in their private amenity space'*.

Included with the third party referrers submission to An Bord Pleanála are 57 signed which are stated to be duly witnessed by a Peace Commissioner, testimonies declaring that each signatory has-

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

I have no reason based on the information on file to doubt the bona fides of this document. The habitual use is disputed by the Owners/occupiers who submit that occasional use occurred by patrons of the public house until 2011 and after that permission (with consent) to other parties. Occasional use (argued to be trespass has occurred) but that this does not *constitute 'land habitually open to or used by the public during the 10 years preceding'* and that the lack of evidence submitted to support the use is evidence that it was not habitually open or used by the public during the 10 years preceding the erection of the fence, pedestrian gates and vehicular gate on the road.

This matter could be explored further if the Board consider it appropriate. However, based on the information before me I must conclude that it has not been clearly demonstrated that the lands enclosed by the fence, pedestrian gates and vehicular gate on the road does not relate to lands that were 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 the riverbank or other place of natural beauty or recreational utility. Therefore I must conclude based on the information on file that Article 9(1)(a)(x) restriction applies.

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

(xi) obstruct any public right of way

The planning Authority have referred the subject referral to An Bord Pleanála for determination. The matter of works obstructing a public right of way while raised in the Planners Report dated the 14th of October do not form part of the question referred.

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

Having reviewed Appendix 6 of the Clare County Development (current and previous Plans) it is clear that the site which is the subject of this referral does not have identified public right of way. Furthermore, matters relating to determining rights of ways are not ones for An Bord Pleanála. When disputes arise in these instances it is considered they are matters for the Courts to determine. Therefore in the absence of any evidence that the subject development obstructs any public right of way I do not consider the restriction on exemptions to be applicable in this instance.

9.5 Conclusion:

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

10.0 Appropriate Assessment

Having regard to the nature and scale of the development, the nature of the receiving environment and proximity to the nearest European site Lower River Shannon SAC (site code 002165) no appropriate assessment issues arise and it is

not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

11.0 Recommendation

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

WHEREAS a question has arisen as to whether the construction of a fence, a pedestrian gate and a vehicular gate on the road is or is not development or is or is not exempted development:

AND WHEREAS Fiona Mac Carthy requested a declaration on this question from Clare County Council and the Council did not make a Declaration in this instance.

AND WHEREAS Clare County Council referred this declaration for determination by An Bord Pleanála, received on the 19th day of October 2020.

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

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

(f) the report of the Inspector:

AND WHEREAS An Bord Pleanála has concluded that the construction of a fence, a pedestrian gate and a vehicular gate on the road

- (a) Does constitute the carrying out of works which comes within the meaning of development in Section 3(1) of the Planning and Development Act, 2000 as amended
- (b) Does come within the scope of Class 5, Part 1 of Schedule 2 to the Planning and Development Regulations, 2001 as amended, and
- (c) The development would not be exempted development, having regard to Article 9(1)(a)(x) as it would constitute the construction of a fence, a pedestrian gate and a vehicular gate on the road which encloses land habitually open to or used by the public during the 10 years preceding the construction of the fence, a pedestrian gate and a vehicular gate on the road for *recreational purposes or as a means of access to any riverbank or other place of recreational utility,*

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the construction of the fence, a pedestrian gate and a vehicular gate on the road subject to this referral is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Dáire McDevitt
Senior Planning Inspector

21st December 2023