



An  
Bord  
Pleanála

## Inspector's Report ABP-315789-23

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<b>Question</b>	Whether the widening and alteration of a gateway, is or is not development and is or is not exempted development.
<b>Location</b>	Darrynane More, Caherdaniel, Co. Kerry.
<b>Declaration</b>	
Planning Authority	Kerry County Council.
Planning Authority Reg. Ref.	EX 1045.
Applicant for Declaration	John Cox.
Planning Authority Decision	Is not exempted development.
<b>Referral</b>	
<b>Referred by</b>	John Cox.
<b>Owner/ Occupier</b>	John Cox.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	14 February 2024.
<b>Inspector</b>	Daire McDevitt.

## 1.0 Site Location and Description

The site is located at Derrynane More, c 1km west of Caherdaniel. The gateway which is the subject of this referral is located off a local road that also serves Derrynane House (located to the southeast of the site). It is located immediately south of the junction with the Caherdaniel/Waterville Road which links to the N70 further north. The gateway serves as access to lands which comprise of an area where the woodland has been cleared. There is a concurrent section 5 referral under 315791-23 for this land holding relating to the development of a well as a water source.

Access to the lands is via a gated vehicular access and pedestrian access/gate.

## 2.0 The Question

The Requester asks:

*Is the widening of a gateway exempted development?*

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

*Whether the widening and alteration of a gateway and provision of a pedestrian gateway is or is not development and is or is not exempted development*

## 3.0 Planning Authority Declaration

### 3.1. Declaration

The planning authority issue a Declaration under Section 5 of the Planning and Development Act 2000 as amended on the 16<sup>th</sup> January 2023 which set out:

- a) *The widening and alteration works to the gateway in question would constitute works that would come within the scope of section 2(1) of the Planning and Development Act 2000 (as amended),*
- b) *The said works would constitute development that comes within the scope of section 3(1) of said Act and*

c) *The works would fall for consideration under exemption provided at Class 9, Part 1 of Schedule 2 of the Planning and Development Act (as amended) but would contravene the restrictions on exemption set out under Article 9 of said Regulations as the works would endanger public safety by reason of traffic hazard.*

*Therefore, the proposed works would constitute development which is not exempted development.*

### **3.2. Planning Authority Reports**

#### **3.2.1. Planning Reports (13/01/23)**

Sets out location, context, planning history and assessment. Points of note include:

- The planning authority concluded that having regard to the location of the site and the minor nature of works, EIA is not required in this case.
- The planning authority concluded that notwithstanding the location of the site within Kenmare River SAC, having regard to the minor nature of the works, AA is not required.
- The planning authority concluded that the widening and alterations to the gateway constituted development and not exempted development for the reasons set out in the Declaration.

#### **3.2.2. Other Technical Reports**

None.

## **4.0 Planning History**

**PA Ref. 21/1324** refers to 2021 application by Brisin Health & Leisure Ltd for the retention permission to retain 2 mobile homes, shipping container and the associated site services and all ancillary site works for a period of 3 years. KCC concluded that KCC was precluded from considering the application as a) the retention being sought required AA, conclusion reached by ABP under ABP 309122 (20/673), conclusion made by KCC in original AA screening in 2020 (20/673) and d) section 177U of the Act.

The Planning Authority in correspondence associated with PA Ref. 21/134 refer to PA Ref. 20/673 (ABP 309122-21), an application to retain and complete pasteurisation/pump room, offices, machinery shed, new entrance road onto public road and all associated ancillary site works. Construct two digestion tanks, a storage silo, an esb substation for the completion of an agricultural anaerobic digestion facility at Dromkeen, Co. Kerry.

**PA Ref. 21/112** as per 21/1234. Invalid application.

PA reference in Planning Report to Open Enforcement File to the lands served by the gateway the subject of this referral pertaining to mobile homes. (No mobile homes or shipping containers observed on site on the 14<sup>th</sup> February 2024).

Concurrent Section 5 Referral under ABP 315791-23 relating to the development of a well as a water source or is not development and is or is not exempted development.

## **5.0 Policy Context**

### **5.1. Development Plan**

The relevant plans are the West Iveagh Local Area Plan 2019-2025 and the Kerry County Development Plan 2022-2028.

### **5.2. Natural Heritage Designations**

The site is located within Kenmare River SAC (site code 002158)

## **6.0 The Referral**

### **6.1. Referrer's Case**

The owner (John Cox) lodged a section 5 referral with An Bord Pleanála on the 13<sup>th</sup> February 2023 following a decision by Kerry County Council. The question: Is the widening and alteration of a gateway Exempted Development.

The owner has submitted the following argument why they consider it is exempted development:

- The pillars were realigned and repaired after storm damage from falling trees. The pillars were hung realigned by less than 600mm and a pedestrian gate added. There was no material change to the sightlines by these changes. Entrance in place over 20 years.
- No change to sightlines, therefore the ruling that works would endanger public safety by reason of traffic hazard is incorrect.
- No traffic report on file and it is submitted that they were advised they were not entitled to the sightline report.
- It is submitted that the works did not change the sightlines so the minor nature of the works should be classed as exempted development.

## **6.2. Planning Authority Response**

Correspondence sets out the planning history and notes that the Council have ongoing and active enforcement file in relation to the matter. While there is correspondence between the applicant and the Council in relation to this matter on the enforcement file the Council wish to exert legal privilege over this file at this stage.

## **6.3. Further Responses**

None.

## **7.0 Statutory Provisions**

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

In order to assess whether or not the activity constitutes development that is exempted development, regard must be had to the following items of legislation:

Under Section 2, the following is the interpretation of '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) (a) – (l) sets out what is exempted development for the purposes of this Act and includes the following:

*"(ia) development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road) or works ancillary to such road development, where the road serves forests and woodlands."*

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.*

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

Article 6 (1) 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.”*

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) (a) Development, to which Article 6 relates, shall not be exempted development for the purposes of the Act if the carrying out of such development would –*

*(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,*

*(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.*

*(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.*

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

Schedule 2, Part 1 Exempted Development – General.

Column 1 Description of Development	Column 2 Conditions and Limitations
<i>Sundry works</i> Class 9	The height of any such structure shall not exceed 2 metres.

The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway.	
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## 8.0 Referrals database

Following a review of the Board's database of referrals, I note there are a number of referrals relating to matters raised in this referral such as to gate, gateway, vehicular access, pedestrian access, repairs to gateways. Which I do not proposed to summarise each one given the extent listed, I refer to Board to ABP 301512 relating to 'the widening of an existing entrance to facilitate the extraction of timber from a forestry plantation' at Attimus, Kilnagross, Co. Leitrim and ABP 306672 which relates to 'whether the widening of existing private access, infilling marl-hole and restoration and re-use of existing derelict house as a habitable dwelling' at Ballina Upper, Blackwater, Co. Wexford

## 9.0 Assessment

### 9.1 Is or is not development

The first part of the question to be examined is whether or not 'development' has taken place within the meaning of the Act. If no development has occurred, no further question arises but if on the other hand, the widening and alteration of a gateway is considered to be development, the second part of the question arises as to whether or not the development is exempted development by reference to the Act and Regulations.

Section 2 (1) of the Planning and Development Act, 2000 (as amended) provides an interpretation of 'works' as including 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'. Clearly, the material widening and alterations of the gateway/access in question, involving acts of construction, extension and alteration, represents 'works' under the interpretation within the Act.



Section 3 (1) states that '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.'

Development has therefore taken place in the form of 'works' on land in this case.

## **9.2 Is or is not exempted development**

The subject development comprises of the widening and alteration of a gateway and provision of a pedestrian gateway. 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.

From the site inspection it is clear the owner has carried out development by altering, widening the gateway and the provision of a separate pedestrian access/gate. 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.

'Class 9, Part 1 of Schedule 2 applies in this instance as the development relates to the construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway

I have inspected the site and am satisfied the development meets this criteria as the height of which is less than 2m.

## **9.3 Restrictions on 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 evidence to suggest an entrance was in place since 2009 (see google images). The owner has submitted that the entrance has been in place for over 20 years, I have no evidence of same. Furthermore the

entrance visible of the images from 2009 refer to what resembles an agricultural gate which served as access to an overgrown/wooded area. I have no evidence before me that this access was used by vehicles prior to the widening and alterations. I note tracks on the land at the time of my inspection and can therefore deduce that vehicles have accessed the land via this entrance (gateway). I also note from the planning history associated with the site that 2 mobile homes were placed on the lands but have since been removed.

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 consists of or comprises the formation, laying out or material widening of a means of access to a public road, the width of which is less than 4m at this point.

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 would endanger public safety by reason of traffic hazard or obstruction of road users. The development is located south of the junction with the Caherdaniel to Waterville Road with limited sightlines due to the vertical and horizontal alignment of the road at this point.

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 within Kenmare SAC (site code 002158). Having regard to the nature and small scale of the subject development (ie the widening and alterations to gateway and provision of a

pedestrian access/gateway) 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.

**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)(iii) restrictions on Article 6 exemptions, whereby the development consists of development that would endanger public safety by reason of traffic hazard or obstruction of road users.

## **10.0 Appropriate Assessment**

Please refer to Appendix 1 Screening the need for Appropriate Assessment  
Screening Determination

Notwithstanding the location of the site which is subject of this referral within Kenmare River SAC (site code 002158), having regard to the nature and scale of the development 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 widening and alteration of a gateway and provision of a pedestrian gateway is or is not development or is or is not exempted development:

**AND WHEREAS** John Cox requested a declaration on whether the widening and alteration of a gateway is or is not development or is or is not

exempted development from Kerry County Council and the Council issued a declaration on the 16<sup>th</sup> day of January, 2023 stating that the matter was development and was not exempted development:

**AND WHEREAS** John Cox requested a declaration on *whether the widening and alteration of a gateway* is or is not development or is or is not exempted development to An Bord Pleanála on the 13th day of February, 2023:

**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 Class 9 including the relevant Conditions and Limitations,
- (c) the planning history of the site,
- (d) the pattern of development in the area,
- (e) the submissions of the Requester
- (f) the report of the Inspector:

**AND WHEREAS** An Bord Pleanála has concluded that the widening and alteration of a gateway and provision of a pedestrian gateway

- (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 9, 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)(iii) as it constitutes the widening and alteration of a gateway and provision of a pedestrian gateway that would endanger public safety by reason of traffic hazard or obstruction of road users.

**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 widening and alteration of a gateway and provision of a pedestrian gateway 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.

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Dáire McDevitt  
Senior Planning Inspector

7<sup>th</sup> May 2024

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## Appendix 1

### Screening the need for Appropriate Assessment

#### Screening Determination

I have considered the development which is the subject of this section 5 referral, comprising the widening and alteration of a gateway and provision of a pedestrian gateway in light of the requirements S177U of the Planning and Development Act 2000 as amended.

The subject site is located within Kenmare River SAC (site code 002158)

The development comprises the widening and alteration of a gateway and provision of a pedestrian gateway

No nature conservation concerns were raised by the planning authority in their assessment of the section 5 referral.

Having considered the nature, scale and location of the project, I am satisfied that it can be eliminated from further assessment because there is no conceivable risk to any European Site. The reason for this conclusion is as follows:

- small scale and nature of the development

I conclude that on the basis of objective information, that the proposed development would not have a likely significant effect on any European Site either alone or in combination with other plans or projects.

Likely significant effects are excluded and therefore Appropriate Assessment (stage 2) (under Section 177V of the Planning and Development Act 2000) is not required.