



An
Bord
Pleanála

Inspector's Report ABP-317541-23

Question

Whether the clearance of a hedgerow / trees within or bounding the curtilage of a house and the construction of a post and timber fence under 1.2m in height (with some post exceeding 1.2m by c.0.047m) within or bounding the curtilage of a house and adjacent to a non public road exempted development.

Location

Townlands of Mullauns, Ballina, Co. Mayo.

Declaration

Planning Authority

Mayo County Council

Planning Authority Reg. Ref.

Plan/H16/mg – (Section 152 (1) (B)

Planning Authority Decision

No Declaration

Referred by

Mayo County Council

Owner/ Occupier

Margaret Harte and Stephen Clarke

Observer

Michael Hunter

Date of Site Inspection

17th of January 2024

Inspector

Darragh Ryan

1.0 Site Location and Description

- 1.1. The subject site is located on a private road off a local road L5116 (Breaffy Road) approx. 2.5km south east of Ballina town centre. There are 5 houses and farm accessed off this private road. There is an existing bungalow dwelling on site, with a domestic entrance and block wall set back off the road and a post and rail fence facing the private road along the boundary.
- 1.2. The removal of hedging and trees and construction of the post and rail fence is the subject of this referral.

2.0 The Question

- 2.1. Whether the clearance of a hedgerow/trees within or bounding the curtilage of a house and the construction of a post and timber fence under 1.2m in height within or bounding the curtilage of a house and adjacent to a non-public road is exempted development.

3.0 Planning Authority Report Arising from Section 152 (1) (B) (Not a Declaration)

3.1. Planning Authority Reports

3.1.1. Planning Reports

- The planning authority report highlighted the fence height (1.247m) and road width (2.58m), along with clarified ownership details of the site.
- The report also outlined the site history, including reference to planning permission 09/672 and its relevant conditions (6, 7, and 18), particularly condition 6 which specified roadside boundary treatment. This included the provision of a stone wall set back 4.5m from the nearer edge of the carriageway. Condition 18 required retention of all trees and hedgerows on site.

- Article 6 Schedule 2 Part 1 of the Planning and Development regulations, specifically Class 5 and 13, were deemed relevant regarding exempted development in this instance.
- Following a review of planning conditions and Google Street View imagery, the planning authority concluded that the developer adhered to the planning permission granted regarding the boundary where the entrance is now located.
- The fence rails were within the development height restrictions, with only the fence posts slightly exceeding, albeit insignificantly at .047m.
- The planning authority determined the proposal to be exempt as the applicant complied with the conditions of the original planning permission.
- Furthermore, it was deemed contrary to the spirit of planning law to impose conditions that would de-exempt developments previously completed in accordance with their original planning permission and subsequently seeking to avail of planning exemptions.

3.1.2. Other Technical Reports

None

4.0 Planning History

PA ref number – P09/672 – Permission granted for a dwelling house to Margaret Harte and Stephen Clarke on the 18/01/2010

Condition 1 – The development shall be carried out in accordance with the plans, elevations and documentation submitted to Mayo county Council on 30/06/09, 01/12/09 and 23/12/09 except as amended by conditions hereunder.

Condition 6 of the planning permission stipulates that the existing front fence must be removed and replaced with a stone wall set back at least 4.5m from the nearest edge of the adjacent tarred carriageway. The area between the new wall and the carriageway must be excavated, filled, levelled, and suitable for parking vehicles. A bound material surface must be used for the layby to prevent debris from entering the public road, and roadside drainage must be maintained. The new front boundary

fence/wall should not exceed 1.2m in height. Additionally, the hedgerows must be reinstated with new boundaries using the same species as those being removed, as agreed with the Ballina Area Engineer.

Condition 18- All existing trees/ hedgerows shall be retained on site. Additional screen planting of native deciduous trees and shrubs shall be planted along all site boundaries.

5.0 Policy Context

5.1. Development Plan – Mayo County Development Plan 2022 - 2028

Objective NEO 4

To protect and enhance biodiversity and ecological connectivity in County Mayo, including woodlands, trees, hedgerows, semi-natural grasslands, rivers, streams, natural springs, wetlands, stonewalls, geological and geo-morphological systems, other landscape features and associated wildlife, where these form part of the ecological network.

5.2. Natural Heritage Designations

None

6.0 Responses/ Observations.

6.1. Observer – Michael Hunter received 31/08/23

- The positioning of the new fence is seen as an encroachment onto land, hindering the smooth operation of the farm due to the reduced road size. This has caused practical difficulties, such as restricting access for agricultural machinery, including harvesters, balers, and slurry tankers, as well as hindering deliveries by articulated lorries, leading to financial strain on the farm.
- The placement of the fence poses a road safety hazard as there is no provision for vehicles to pull off the road to avoid oncoming traffic, particularly concerning given the presence of a large drain on the far side of the road.

- The narrowing of the road and removal of splayed accesses due to the new fence exacerbate the situation, resulting in a potential traffic safety risk and an obstruction to road users.
- Despite planning permission being granted for a dwelling with specific conditions regarding boundary treatments under P09/672, the fence exceeds the permitted height of 1.2m at various points and therefore does not fall within the exemption classes outlined in the Planning Regulations.
- Article 9(1)(a) of the Planning Regulations states that development to which Article 6 relates shall not be exempted if it contravenes a condition attached to a permission or endangers public safety due to a traffic hazard or obstruction to road users. The proposal is deemed in breach of the planning permission granted under P09/672 as it fails to adhere to the required setback indicated on the site layout plan submitted. The absence of an adequate setback in the recently installed fencing raises significant traffic safety concerns and obstructs access for agricultural machinery along the private road.

6.2. Planning Authority Response received 19/09/23

The development was brought to Mayo County Council enforcement unit by way of a complaint on the 13th of June 2022. A site inspection, report and recommendation on the matter was prepared by Executive Planner and endorsed by Senior Executive Engineer. A decision was taken based on the report that no further action be taken. The Planning Authority was thereafter requested to seek a Section 5 declaration on the matter.

6.3. Owner/ occupier's response – Margaret Harte received 25/09/23

- The claim of a clear land grab is refuted, as the planning authority report confirms that there is no encroachment upon the actual width of the carriageway surface. The removal of the hedgerow was undertaken to enhance road visibility, rather than for any ulterior motive. Furthermore, the installation of the fence has not resulted in safety issues; the road remains fully accessible to vehicles of all sizes, including large lorries, trucks, and farm

machinery. Feedback from other neighbours and road users indicates satisfaction with the improvements.

- The planning permission granted allowed for the planting of a new hedgerow at the location in question. The decision to install a fence at the same spot as the proposed hedgerow was made for maintenance considerations. Contrary to assertions, there is no difficulty in turning onto Breaffy Road, as the fence does not impede access to the junction.
- Additionally, the claim regarding the existence of a layby is erroneous, as there was never an intention for one to be included in the planning application.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1) – Interpretation

The following are relevant to the subject question:

structure means –

‘any building structure excavation or other thing constructed or made on in or under any land, a part of any structure so defined and

(a) where the context so admits, includes the land on, in or under which the structure is situate and

(b) in relation to a protected structure or proposed protected structure includes

(i) the interior of the structure

(ii) the land lying within the curtilage of the structure

(iii) any other structures lying within that curtilage and their interiors and

(iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to. In some paragraphs (i) or (iii)’

works

‘includes 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.'

Section 3(1) - Development

In the 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.'

Section 4 (1) sets out development that is exempt from requiring planning permission.

Section 4(4) ‘Exempted development’

‘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.’

7.2. Planning and Development Regulations, 2001 as amended

- Article 6.

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

- As provided for in Article 9(1)(a), the following development to which article 6 relates, shall not be exempted development, if the carrying out of such development would, inter alia:

- (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act;
- (iii) endanger public safety by reason of a traffic hazard or obstruction to road users

CLASS 5

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.

Conditions or limitations

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.

Class 11

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), or (b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.

Conditions or limitations

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.
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.

Class 13

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

Conditions or limitations

The width of any such private footpath or paving shall not exceed 3 metres.

7.3 Relevant Referrals

I have not found any referral cases that are directly related to the case.

8.0 Assessment

8.1. Background

- 8.1.1. Under planning permission 09/672, Margaret Harte and Stephen Clarke were granted permission for a dwelling house. In a further information submission, the applicant provided a revised site layout detailing proposed alterations to the boundary facing the private road. These alterations included the removal of a section of hedgerow from point a-b (outlined on the site layout provided) and the construction of a front boundary wall and entrance. The proposed wall and entrance were to be set back 4.5 meters from the edge of the carriageway, fulfilling part of condition 6 imposed by the planning authority.
- 8.1.2. I find that the applicant fully complied with this aspect of the condition. However, condition 6 also required the reinstatement of hedging behind the new setback as agreed with area engineer. I find this aspect of the condition to be ambiguous and unclear. The site layout only shows one aspect of the site boundary to be set back which was a portion of front boundary and entrance. It's my opinion that the condition intended a new hedgerow behind the new setback wall and not for the entirety of the site as indicted by the third party.

The homeowner proceeded to remove the boundary hedging from point A on the site layout plan to its junction with Breaffy Road (L5116) and replaced it with a post and rail fence. This fence has a height of 1.2 meters, with the fence posts measuring

1.247 meters in height. The width of the road is 2.58 meters. The focus of this referral pertains to this specific section of roadway rather than the site entrance.

- 8.1.3. Following receipt of complaint Mayo County Council Planning Authority made a determination that the removal of hedging and erection of a fence was exempted development under Article 6 of the Planning and Development Regulations 2001 – 2022 . The matter was then referred to An Bord Pleanála by Mayo County Council seeking a Section 5 declaration on the matter.
- 8.1.4. It should be stated at the outset that the purpose of the referral is not to determine the acceptability or otherwise of the post and rail fence and removal of boundary hedging in respect of the proper planning and sustainable development of the area, but rather whether or not the matters in question constitute development, and if so, fall within the scope of exempted development. Likewise, planning enforcement is a matter for the Planning Authority and does not fall within the jurisdiction of the Board.

8.2. Is or is not development

- 8.2.1. Having regard to Section 2(1) and Section 3(1) of the Planning and Development Act 2000 as amended, it is considered that the following elements constitute ‘works’ and ‘development’ within the meaning of the Act;

- Removal of boundary hedging & erection of a fence along boundary

- 8.2.2. Having established that the proposed ‘works’ amount to ‘development,’ the next issue to be considered is whether the development is exempted development or not. Development can be exempt from the requirement for planning permission by either Section 4 of the Planning and Development Act 2000 as amended, or by Article 6 of the Planning and Development Regulations 2001 as amended.

8.3. Removal of boundary hedging & erection Is or is not exempted development

- 8.3.1. The removal and replacement of front boundary hedging can be interpreted as the removal of a fence or hedging under **Class 11** of Part 1 of Schedule 2 of the Regulations. Therefore, the removal of hedging falls within the category of exempted development. Additionally, the erection of boundary fencing, specifically a post and rail fence measuring 1.2 meters in height, is permitted under **Class 5**. The

development satisfies **Criteria (i)**, as the exceedance of the post height beyond 1.2 meters by 0.047 meters is considered negligible. As standalone development, the post and rail fence can be regarded as exempt from planning permission requirements under Article 6.

8.4. Restrictions on exempted development

8.4.1. Article 9(1)(a) provides that following development to which article 6 relates, shall not be exempted development, if the carrying out of such development would, inter alia:

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

Condition 18 of Grant of Planning Permission under P09/672 states:

“All existing trees/hedgerows shall be retained on site. Additional screen planting of native deciduous trees and shrubs shall be planted along all site boundaries save at the entrance where sight visibility shall be retained.”

Having regard to the above, its my opinion that the removal of boundary hedging was **not** permitted by condition 18 of Grant of Planning Permission as Article 9 (1) (a) is applicable in this instance. Article 9 de-exempts various development that would otherwise be exempted development under Article 6. Based on the provisions as stated I consider the development is not exempted development.

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 removal of front boundary hedging, and erection of a fence is or is not development or is or is not exempted development:

AND WHEREAS Michael Hunter requested a declaration on this question from Mayo County Council and the Council issued a declaration on the

day of 24th of June , 2022 stating that the matter was development and was exempted development:

AND WHEREAS Mayo County Council referred this declaration for review to An Bord Pleanála on the 30th day of June, 2023:

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

- (a) Section 2(1) and Section 3(1) of the Planning and Development Act, 2000, as amended,
- (b) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (c) the planning history of the site and the drawings submitted in respect of the referral:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The removal of hedgerow and erection of a fence constitutes development.
- (b) The proposed development contravenes condition 18 attached to planning permission P09/672 , therefore Article 9 (1) (a) applies in this instance. Therefore, the development as carried out is 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 development as carried out 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.

Darragh Ryan
Planning Inspector

21st February 2024