



An  
Bord  
Pleanála

## Inspector's Report ABP-317685-23

### Question

Whether the completion of the entrance, roads and services associated with PI. Reg No. 15/600374 is or is not development or is or is not exempted development.

### Location

Scarnaglorane, Cahir, Co. Tipperary.

### Declaration

Planning Authority

Tipperary County Council

Planning Authority Reg. Ref.

S5/23/63

Applicant for Declaration

John O' Leary

Planning Authority Decision

Is not exempted development

### Referral

Referred by

Furey Consulting Engineers

Owner/ Occupier

John O' Leary

Observer(s)

None

Date of Site Inspection

9<sup>th</sup> August 2024

**Inspector**

Catherine Dillon

## **1.0 Site Location and Description**

- 1.1. The subject site is located on the north western side of the R639 which runs parallel to the M8 (Dublin to Cork) motorway and is close to the roundabout serving Junction 11 off the M8 motorway at Scartnaglorane, Cahir, Co.Tipperary. The site boundary onto the R639 is screened from the road, with the exception of a length of hedgerow that has been removed and replaced by a metal fence type structure.
- 1.2. A single storey building, a number of commercial vehicles and a storage container were visible within the site from the R639 along the gap within the hedge boundary. The eastern boundary of the site is screened by a substantial landscaped area along the local Scartnaglorane road (L33062) on the corner with the R639. There is an access into the site off the L-33062 which is shared with a bungalow.

## **2.0 The Question**

- 2.1. The question has arisen as to:

‘Whether the completion of the entrance, roads and services associated with the works already commenced under planning permission P.A Ref: 15/600374 is, or is not, exempted development.’

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

Pursuant to Section 5 of the Planning and Development Act 2000, as amended (hereinafter referred to as ‘the Act’), on the 10<sup>th</sup> day of July, 2023, the planning authority declared that the works proposed, were considered to constitute development and were not exempt development.

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

- 3.2.1. Planning Reports

The recommendation within the planner's report reflects the declaration issued by the planning authority dated 10<sup>th</sup> July 2023. The report can be summarised as follows:

- ABP Ref: PL23.237520 (P.A Ref:10/277), which was granted an extension of duration under P.A Ref: 15/600374, that related to the vehicular access into the subject site from a local road (L-33062) and not the R639.
- This entrance arrangement was revised under P.A Ref: 15/600824 which provided a new entrance to the south off the site via the R639, however the works under this planning permission were not substantially completed and therefore the provisions of Section 40 of the Planning and Development Act could not be relied upon to complete the works under this permission, as it had expired.
- The provisions of Class 9 Part 1 of Schedule 2 of the Planning and Development Regulations 2001 were considered applicable to the development. However, given the entrance onto the public road exceeded 4 metres in width and there were planning enforcement issues in respect to the entrance the development did not meet the exemptions outlined in Articles 9 (1)(a)(ii) & (vii) of the said Regulations.
- The P.A determined the completion of the entrance, roads and services as permitted under P.A Ref: 15/600824 constituted development and were not exempted development.

#### 3.2.2. Other Technical Reports

None

### 4.0 Relevant Planning History

4.1. There is an extensive planning history attached to this site. I have included the relevant planning history associated with this referral.

4.2. **ABP Ref: PL 23.237520 (P.A Ref: 10/277):** On 13/5/2011, ABP granted planning permission for temporary retention of an area to park trucks, a driver rest area, restaurant, and new access proximate to the M8 dual carriageway.

Of note on this appeal, condition 1 referred to the junction being in accordance with Access Option 1 as set out in the submission to the Board dated 9/9/2010 (i.e. from the L-33062).

Condition 4 required the retention of existing hedgerows and trees along the side and rear boundaries of the site.

4.3. **P.A Ref:15/600374:** On 2/7/2015 an Extension of Duration (EoD) of planning permission under Section 42 (1) (a) (ii) (l) of the Planning & Development Act 2000 as amended, was granted, for Ref: ABP Ref: PL.23.237520 & P.A Ref: 10/277. According to the planning report the development had not commenced at the time of this permission. This extension of duration was to cease to have effect on 13/5/2021.

4.4. **P.A Ref: 15/600824:** On 23/12/2016, planning permission was granted for the construction of a new entrance (onto R639), and a revised site layout for the previously permitted (P.A Ref: 10/277), and toilet facilities and all associated site development works.

Condition 1(b) of this permission stated 'Apart from any departures specifically authorised by this permission, the development shall be carried out and completed in accordance with the terms and conditions of the permission granted on 13/5/2011 under An Bord Pleanála appeal reference number PL.23.237520 (P.A Ref: No.10/277), and any agreements entered thereunder'.

4.5. **ABP Ref: 304104-19 ( P.A Ref: 19/600012):** On 2/9/2019, planning permission was refused by ABP for the revision of the permission granted under reference no. 10/277 to include extending the existing permitted restaurant at ground and first floor levels to include a 26m<sup>2</sup> shop and bedroom accommodation, provision of parking and hygiene services to accommodate 22 campervans, charging facilities for electric cars, provision of 34 other car parking spaces, 23 truck parking spaces and five coach parking spaces and relocation of the as granted sewage treatment system and percolation area together with associated site development works. Refusal on two grounds, relating to an off line motorway service area and conflicting traffic movements.

4.6. **P.A Ref: 23/70:** On 9/5/2023, planning permission for retention was refused for a) the as constructed entrance from that which was previously granted and Permission for b) car parking spaces including electric car charging points and c) the provision of

totem signage and all associated site works and services as the development was considered contrary to Spatial Planning & National Roads Guidelines and on traffic movements and residential amenity grounds.

#### **4.7. Enforcement**

**TUD-23-007:** Non-compliance with An Bord Pleanála PL23.237520 (P.A Ref:10/277) for opening of entrance onto R639.

### **5.0 Policy Context**

#### **5.1. Development Plan**

- 5.1.1. The Tipperary County Development Plan 2022-2028 is the operative plan for the area. The site is not zoned and is not within or adjacent to a designated landscape area and there are no recorded monuments on or in the immediate vicinity.

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

The site is not within a designated area. The referral site is 3.2km east of the Galtee Mountains SAC (site code: 000646) and 5.3km west from the Lower River Suir SAC (site code:002137) at its closest point.

#### **5.3. Environmental Impact Assessment**

The proposed development is of a type that does not fall within a class of development set out in Part 1 or Part 2 of Schedule 5 of the Planning and Development Regulations, 2001 (as amended). The need for screening for environmental impact assessment is therefore not required.

### **6.0 The Referral**

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

- Permission (P.A Ref: 10/277 & ABP Ref: PL. 23.237520) was granted on 13<sup>th</sup> May 2011 for the construction of a truck stop and drivers rest area including a

restaurant. An EoD was granted by Tipperary County Council for this permission (P.A Ref: 15/600374) on 2<sup>nd</sup> July 2015.

- The original entrance for the application required an agreement with third parties for access to the site and therefore a further application was lodged.
- Planning permission under P.A Ref: 15/600824 for the construction of a new entrance and a revised site layout from the previously permitted (planning ref 10/277) permission was granted on 23<sup>rd</sup> December 2016. This permission included a revised vehicular access onto the R639.
- The applicant contends that the proposed works are fully authorised under the existing permissions P.A Ref: 15/600374- EoD, and 15/600824- new entrance.
- The referrer has submitted copies of a 7 day commencement notice to Tipperary County Council with a commencement date of 19/10/2020, on foot of a Fire Safety Cert which was validated for the development P.A Ref: 10/277. The referrer contends as there is no process for lodging a commencement notice for an entrance it follows that the commencement notices for the development included the revised granted entrance.
- The development was completed to shell and core and the applicant is now in a position to finish the development. The completion of these works are essential infrastructure relating to the development and on this basis they are of the opinion that the development is substantially complete and the works to the entrance are exempted development in accordance with the provisions of Section 40 of the Planning and Development Act.
- They are therefore seeking clarification from the Board to confirm that the works to complete the development are exempted development under Section 40 in order to enable the development to be completed in accordance with the terms of the conditions of the permission.

## 6.2. Planning Authority Response

- The Planning Authority is satisfied that the decision to determine the works undertaken are not exempt development was appropriate, in the interest of the proper planning and development of the area.
- The P.A notes the argument presented by the applicant that the works undertaken were to be considered under Section 40 of the Planning and Development Act 2000, amended, and that the entrance and associated road infrastructure is necessary for or ancillary or incidental to the completed buildings.
- The attached planning report chronicles the long and complicated history on site and sets out the rationale for the P.A's decision. There is no additional information presented in the appeal documentation submitted to ABP, and the Council respectively submit, ABP uphold the decision of the Council to determine the works proposed to be development and not exempt development.

## 7.0 Statutory Provisions

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

7.1.1. Section 2 (1) of the Act provides the following definitions:

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

“structure” means any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined.

“unauthorised structure” means a structure other than-

(a) a structure which was in existence on 1 October 1964, or

(b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34 of this Act, being a permission which has not been revoked,



or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act);

“use” In relation to land, does not include the use of land by the carrying out of any works thereon.

**Section 3(1) of the Act** states the following in respect of ‘development’:

“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(2)(a)(i)** states that the ‘Minister’ may by Regulation provide for any class of development to be exempted development for the purposes of the Act.

**Section 4(4)** provides that development shall not be exempted development if an Environmental Impact Assessment (EIA) or an Appropriate Assessment (AA) of the development is required.

**Section 40- Limit of Duration of permission-**

(1) Subject to *subsection (2)*, a permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards—

(a) in case the development to which the permission relates is not commenced during that period, the entire development, and

(b) in case the development is commenced during that period, so much of the development as is not completed within that period.

(2) (a) Subsection (1) shall not apply—

(i) to any permission for the retention on land of any structure,

(ii) to any permission granted either for a limited period only or subject to a condition which is of a kind described in section 34(4)(n),

(iii) in the case of a house, shop, office or other building which itself has been completed, in relation to the provision of any structure or works included in the

relevant permission and which are either necessary for or ancillary or incidental to the use of the building in accordance with that permission, or

(iv) in the case of a development comprising a number of buildings of which only some have been completed, in relation to the provision of roads, services and open spaces included in the relevant permission and which are necessary for or ancillary or incidental to the completed buildings.

(b) *Subsection (1)* shall not affect—

(i) the continuance of any use, in accordance with a permission, of land,

(ii) where a development has been completed (whether to an extent described in *paragraph (a)* or otherwise), the obligation of any person to comply with any condition attached to the relevant permission whereby something is required either to be done or not to be done.

(3) In this section and sections 42 and 42A., “the appropriate period” means—

(a) in case in relation to the permission a period is specified pursuant to section 41, that period, and

(b) in any other case, the period of five years beginning on the date of the grant of permission.

## 7.2. Planning and Development Regulations, 2001

7.2.1. **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.”

7.2.2. Schedule 2 of Part 1: Exempted Development-

| Column 1: Description of Development  | Column 2 Conditions and Limitations                         |
|---|---|
| <i>Class 9:</i><br>The construction, erection, renewal or replacement, other than within or | The height of any such structure shall not exceed 2 metres. |

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| bounding the curtilage of a house, of any gate or gateway. |  |
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### 7.3. Restrictions on Exemptions

7.3.1. **Article 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-

- 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,
- (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,
- (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.

## 8.0 Assessment

### 8.1. Introduction

8.1.1. The works carried out to date on the site include the shell of the restaurant building, the replacement of an area of a hedge boundary along the R636 with a metal fence type structure, and the laying of hardcore on the site.

### 8.2. Is or is not development

8.2.1. Section 2(1) of the Act defines 'works' as including 'any act or operation of construction, excavation, alteration, demolition, repair or renewal'. Section 3 of the Planning and Development Act, 2000, as amended, defines "development" as 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.

8.2.2. Having regard to the above definitions, the completion of an entrance, roads and services associated with P.A Ref: 15/600374 constitute 'works' and are 'development' within the meaning of the Act.

8.2.3. Accordingly, having established that the construction of the entrance and access onto the R639 and associated works associated with P.A Ref: 15/600374, constitutes development, the question arises as to whether or not these works constitute exempted development.

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

8.3.1. The referrer contends the entrance onto the R639 formed part of a planning permission granted in P.A Ref: 15/600824 on 23/12/2016 and the proposed works as outlined in the referral are essential works to the implementation of the development as permitted. However, condition 1(b) of this permission required the development to be completed within the same time frame as the parent permission which ceased to have effect on 13/5/2021. Thus, any works granted in P.A Ref: 15/600824 ceased to have effect on 13/5/2021.

8.3.2. I note the referrer has provided a copy of a validation of a Certificate of Compliance on Completion by the Building Control Authority dated 17/11/2022, relating to P.A. Ref: 10/277 in which the date of expiry is stated as being 13/5/2021, which corresponds to the EoD permission. However, the certificate of compliance form is dated 7/10/2020 which is prior to the expiration date of the Extension of Duration. This would suggest that works had started on the site prior to the expiration of the planning permission as extended. Nevertheless, the development as granted was not completed by 13/5/2021, in which the parent permission ceased to have effect.

8.3.3. The referrer has enclosed a picture of the restaurant building which has been constructed, although not finished. From my site inspection it is not clear whether the 'works' as carried out on site can be considered as substantial works. The restaurant building has been constructed but is not operational, there is evidence of the laying of hardcore on the site, the site is not operational, there are no details provided regarding the services such as the decommissioning of the existing wastewater

treatment plant and the installation of a new system and percolation area, landscaping boundary treatments, loading bays, financial contributions etc., which formed part of the parent permission. I note in the planning authority report the entrance onto the R639 was first noted in a recent application P.A Ref: 23/70 on 4/4/2023 at the site, and subsequently became the subject of enforcement proceedings.

- 8.3.4. Having established the subject works formed part of a previous planning permission but these works ceased to have effect on 13/5/2021 under P.A Ref: 15/600374 EoD, it is necessary to revert to the question as to whether or not the works can be considered exempt. The development has not been completed in accordance with condition 1(b) of the Extension of Duration permission i.e completed by 13/5/2021. Therefore, the rights to undertake development permitted by the permission are discontinued, and a new planning application is required.
- 8.3.5. The proposed access onto the R639 would not be exempt by virtue of Article 9 (1) (a) ii of the Planning and Development Regulations as the R639 exceeds 4metres in width.
- 8.3.6. The development which would include the completion of the entrance, roads and services associated with the P.A Ref: 15/600374 at Scarnaglorane, Cahir, Co.Tipperary, is development and is not exempted development.

#### 8.4. **Section 40 of the Act**

- 8.4.1. The referrer has made reference to Section 40 of the Planning and Development Act 2000 as amended. However, Section 40 is a separate process to a Section 5 declaration. An application to extend or further extend the appropriate period of a planning application is made to the planning authority, and I consider this is not a matter for the Board to determine in this instance. Section 40 of the Planning Act does not relate to exempted development.

#### 8.5. **Restrictions on exempted development**

- 8.5.1. I have concluded that the development cannot benefit from the exempted development provisions under Article 4 of the Act or Article 6 and related schedules of the Regulations for the reasons outlined above.

## 8.6. Appropriate Assessment

- 8.6.1. Having regard to the existing development on site, the nature of the development referenced in the question above, the location and the separation distance to the nearest European site, 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.

## 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 completion of the entrance, roads and services associated with the works already commenced under planning permission 15/600374 is or is not development, or is or is not exempted development:

**AND WHEREAS** John O’Leary c/o Furey Consulting Engineers, requested a declaration on this question from Tipperary County Council and the Council issued a declaration on 10<sup>th</sup> July 2023, stating that the matter was development and was not exempted development:

**AND WHEREAS** John O’Leary c/o Furey Consulting Engineers, referred this declaration for review to An Bord Pleanála on the 26<sup>th</sup> day of July, 2023:

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

- (a) Sections 2, 3, 4 of the Planning and Development Act, 2000, as amended,

- (b) Articles 6 and 9 of the Planning and Development Regulations, 2001, as amended,
- (c) Class 9 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (d) Section 40 of the Planning and Development Act 2000, as amended,
- (e) The planning history of the site, and
- (f) The documentation on file, including submissions on behalf of the referrer, Tipperary County Council and the report of the Inspector;  
and

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

- (a) The completion of the entrance, roads and services associated with Planning Application Ref: No. 15/600374 is development as defined in Section 3 of the Planning and Development Act 2000, as amended.
- (b) This permission ceased to have effect on 13/5/2021.
- (c) The completion of the works are therefore development and are not exempt development.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Act, as amended hereby decides that the completion of the entrance, roads and services associated with the works already commenced under planning permission 15/600374 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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Catherine Dillon  
Planning Inspector

25<sup>th</sup> September 2024