



An  
Bord  
Pleanála

## Inspector's Report ABP-318166-23

### Question

Whether the construction of a field access and associated roadway on to a cul-de-sac at field is or is not development and is or is not exempted development.

### Location

Upper Burncourt, Burncourt, Co.  
Tipperary, E21 A890

### Declaration

Planning Authority

Tipperary County Council

Planning Authority Reg. Ref.

S5/23/90

Applicant for Declaration

Sharon Duke & James Joseph  
Kearney.

Planning Authority Decision

Is exempted development

### Referral

Referred by

Sharon Duke & James Joseph  
Kearney

Owner/ Occupier

Patrick Cusack

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 land the subject of this referral is located in a rural area known as Upper Burncourt in the southwest of County Tipperary. The site lies c.1.3km to the north of Burncourt village and to the south of the M8 (Cashel to Mitchelstown stretch) and is located between the Galtee Mountains to the north and Knockmealdon Mountains to the south.
- 1.2. Access to the site is via a local road the L-3311 which connects the R639 to Burncourt village and the M8. A narrow cul de sac road (L-33115) spurs off the L3311 and leads to the subject site. This road is one car width wide with a tree/hedge embankment on either side and leads to a dwelling with a number of outbuildings.
- 1.3. The referral site relates to an embankment area and an associated agricultural field to the south western end of the cul de sac and lies to the west of the dwellinghouse. ESB lines cross the field and referral area.

## **2.0 The Question**

- 2.1. The question before the Board is as follows:

Whether the construction of a field entrance onto the L-33115, the construction of a new field passage access, the erection of fencing and a field gate, at Upper Burncourt, Burncourt, County Tipperary is or is not development and is or is not exempted development.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

- 3.1.1. On the 20<sup>th</sup> September 2023 Tipperary County Council made a declaration that the construction of an agricultural entrance onto the L-33115, the construction of a new field passage (measured to be 3m in width), the erection of fencing and a field gate is development and is exempted development.

3.1.2. This Section 5 request was submitted by Sharon Duke and JJ Kearney to the Council.

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

#### 3.2.1. Planning Reports

The recommendation within the report of the Planning Officer reflects the declaration issued by the Planning Authority (P.A). The report can be summarised as follows:

- Notes the Council issued a declaration with respect to similar works at the site under P.A Ref: S5/23/16.
- Determined that the proposal constituted development as it involved works on the subject site.
- In the report it is stated Article 9(1)(a) (ii & iii) of the Planning & Development Regulations 2001 (PDR), which relates to the creation of an access point onto a public road, did not apply to the former Section 5 declaration. Therefore, it was concluded as there were no substantive change in the nature of the current proposal, it was reasonable to determine that these restrictions on exempted development did not apply again.
- The proposed gate was exempt development by virtue of Class 9 of Part 1 of Schedule 2 of the PDR as it had a maximum height of 1.5metres.
- The proposed fencing was exempt development by virtue of Class 4 of Part 3 of Schedule 2 of the PDR, as it had a height of 1.2 metres.
- The proposed roadway was measured by the Enforcement Officer and was noted to have a width of 3metres and was therefore exempt by virtue of Class 13 of Part 1 of Schedule 2 of the PDR.
- It was considered given the small-scale nature of the development, its location to the nearest European sites, intervening land uses and the absence of a direct pathway to any European site, the development would not be likely to have a significant effect on the Natura 2000 network.

#### 3.2.2. Other Technical Reports

None

## 4.0 Planning History

### Referral site:

4.1. **P.A Ref: S5/23/16:** Section 5 request made to Tipperary County Council by Danny Fortune (stated as owner on form) regarding the construction of a field access onto a cul de sac at Upper Burncourt, Burncourt, Co.Tipperary, E21 A890 . On 31<sup>st</sup> March 2023, Tipperary County Council determined that the formation of a new entrance onto the L-33115, the erection of a gate and fencing, is exempted development, but the formation of a new passageway (greater than 3m in width) was not exempted development.

### 4.2. Planning Enforcement History

**P.A Ref: TUD23-115:** Planner's report dated 18/9/2023 provides that there is a current planning enforcement file P.A Ref: TUD23-115 for an alleged unauthorised entrance. I note in the detail submitted with the referral that this file was closed on 19<sup>th</sup> September 2023, as the P.A considered the entrance to be exempt development and the laneway falls under Class 13, Part 1 of Schedule 2 of the PDR.

## 5.0 Policy Context

### 5.1. Development Plan

The relevant Development Plan is Tipperary County Development Plan 2022-2028. The site is designated as 'open countryside' and there are no designations for the site. It is not within or adjacent to an ACA nor are there any protected structures or recorded monuments in the immediate vicinity. The site lies outside the Primary Amenity Area but borders the River Suir Central Plain Landscape Character zone which is classified as a Class 1 landscape (low sensitivity to change).

Burncourt is a 'Local Service Centre' within the Settlement Plan Hierarchy for the County and lies to the south of the subject site. The subject site does not lie within the settlement boundary for Burncourt.

## 5.2. Natural Heritage Designations

- Lower River Suir SAC (site code 002137) is c.2.7km to the south and 3.9km to the south east (at its closest points) to the site.
- Galtee Mountains SAC (site code: 000646) are c.3km to the northwest of the site.
- Blackwater River (Cork/Waterford) SAC is c.12.8km to the southwest of the site.

## 6.0 The Referral

6.1.1. James Joseph Kearney and Sharon Duke (occupiers of the dwelling house to the east of the subject site) applied to Tipperary County Council for a Section 5 Declaration (P.A Ref: S5/23/90); in respect of the following:

- Whether the construction of a field access and associated roadway onto a cul de sac at Upper Burncourt, Burncourt, Co..Tipperary, is development and is exempted development.

6.1.2. Tipperary County Council on 20<sup>th</sup> September 2023 determined the works were development but were exempted development.

6.1.3. The referral was accompanied by the following documentation:

- Letter with map attached by TCC Roads Department to Daniel Fortune indicating road ownership (Map dated 3/6/2022 and signed). This indicates the laneway extending to the frontage of the referrer's dwelling is taken in charge by the Council. The roadway beyond the frontage of the dwelling is not within the charge of Tipperary County Council as a public road.
- Folios TY67200F& TY20504 of lands in the referrer's ownership (6.26 ha).
- Folio TY59356F owned by P.Cusack (12.03 ha).
- Photographs of works carried out on site to date.
- Copy of plans submitted with S5/23/16 (not to scale).

## 6.2. Referrer's case

6.2.1. The referrer considers the Planning Authority did not consider a number of issues in considering the Section 5 declaration. These are summarised as follows:

- Works on the Section 5 gateway has not commenced.
- Works have commenced on the roadway within the field.
- Their property is at the end of the laneway that is charged to the Council.
- Concerned about damage to trees along the boundary to their property, and works are not being carried out by a qualified arborist. Loss of Leylandii tree at the back of property.
- Health and safety grounds due to the proximity of ESB powerlines.
- Traffic hazard as laneway is in poor condition and could not sustain the additional heavy traffic of tractors, trailers etc from the neighbouring farm. Laneway is too narrow to allow vehicles to pass. If farm machinery breaks down on the laneway, prohibits access for emergency vehicles such as ambulance.
- Location of gateway and new road is directly opposite their farm entrance. Maintain the Council have allowed their lands to be used as a turning circle to facilitate neighbour.
- Two other farmers bound the laneway, and the Council have allowed them to access onto the laneway by virtue of the Section 5 issued.
- New roadway will run parallel with their house entrance and to the back of their property, resulting in loss of privacy and devaluation of property.
- New road entrance would exit onto existing storm drain and stop it working effectively and will impact on the existing French drain system causing flooding.
- Due to field being at a higher level than their site, the new roadway has already caused hydrology to be altered, and their property is exposed to flooding.
- Use of access route for Mr.Cusack is not essential to farm.

### **6.3. Planning Authority Response**

6.3.1. No further comments to make.

### **6.4. Owner/ occupier's response**

- 6.4.1. A response was received from an agent on behalf of his client Patrick Cusack (owner of the field), stating that a declaration under Section 5 of the Planning and Development Act 2000 was granted by Tipperary County Council under Ref: S5/23/16 for the construction of a field access and associated roadway onto a cul de sac and, as there were no appeals/objections to the declaration his client commenced works.
- 6.4.2. The agent on behalf of his client considers the period for the current appeal is time barred and should not therefore be considered by the Board.

## **7.0 Statutory Provisions**

### **7.1. Planning and Development Act, 2000**

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

“public road” has the same meaning as in the Roads Act, 1993.

“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.

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

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

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

“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.”

**Section 4 (1)** sets out various forms and circumstances in which development is exempted development for the purposes of the Act.



**Section 4 (2)(a)** of the Act enables certain classes of development to be deemed exempted development by way of regulation.

**Section 138 Board may dismiss appeals or referrals if vexatious, etc.**

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

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

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

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

or

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

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

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

**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 certain conditions and limitations.

**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,

(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.

**Schedule 2 of Part 1** of the Regulations set out the classes of exempted development. The following are of relevance to this referral:

**Schedule 2 Part 1- Exempted Development - General**

Column 1 Description of Development	Column 2 Conditions & Limitations
<p><b><i>Sundry Works</i></b></p> <p><b>CLASS 9</b></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><b>CLASS 11</b></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</p>

	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.
<b>CLASS 13</b>  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.	The width of any such private footpath or paving shall not exceed 3 metres.

### 7.3. Roads Act, 1993

“” public road” means a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority;”

“” road” includes-

- (a) any street, lane, footpath, square, court, alley or passage,
- (b) any bridge, viaduct, underpass, subway, tunnel, overpass, overbridge, flyover, carriageway (whether single or multiple), pavement or footway,
- (c) any weighbridge or other facility for the weighing or inspection of vehicles, toll plaza or other facility for the collection of tolls, service area, emergency telephone, first aid post, culvert, arch, gully, railing, fence, wall, barrier, guardrail, margin, kerb, lay-by, hard shoulder, island, pedestrian refuge, median, central reserve, channelliser, roundabout, gantry, pole, ramp, bollard, pipe, wire, cable, sign, signal or lighting forming part of the road, and
- (d) any other structure or thing forming part of the road and-
  - (i) necessary for the safety, convenience or amenity of road users or for the construction, maintenance, operation or management of the road for the protection of the environment, or
  - (ii) prescribed by the Minister.”

#### **7.4. Relevant Legal Cases**

#### **7.5. Court of Appeal 2022/232 Narconon Trust v ABP**

- 7.5.1. A challenge to two An Bord Pleanála (ABP) decisions pursuant to Section 5 PDA 2000, whereby ABP decided that the change of use from a nursing home to a residential drug rehabilitation centre was development and was not exempt development.
- 7.5.2. The High Court quashed both determinations and the Board appealed the decisions. In its judgment November 2021, the Court of Appeal found that “the Board was precluded from determining a Section 5 referral in circumstances where a planning authority has previously determined the same, or substantially the same question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority’s determination”.

### **8.0 Assessment**

#### **8.1. Introduction**

- 8.1.1. It should be stated at the outset that the purpose of the assessment of this referral is not to determine the acceptability or otherwise of the agricultural access onto the L-33115 or the construction of the new field road/passageway, erection of fencing and a field gate in respect of the proper planning and sustainable development of the area, but rather, whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.
- 8.1.2. In assessing the merits of this case, I have reviewed all documentation on file and inspected the site. I have also considered previous relevant declarations made by the Board and a previous Section 5 declaration on the site P.A Ref: S5/23/16.
- 8.1.3. The main parties to this referral are as follows:
- Sharon Duke & JJ Kearney (Referrer)
  - Tipperary County Council
  - Patrick Cusack (Landowner)

### **The Question**

- 8.1.4. The referrer based on the documentation as submitted are appealing the declaration as determined by the P.A.in S5/23/90. I therefore consider the question as follows:
- Whether the construction of an agricultural entrance onto the Local Road L-33115, the construction of a new field passageway, erection of fencing and the installation of a field gate at Upper Burncourt in County Tipperary is or is not development or is or is not exempted development.
- 8.1.5. The plans submitted with this referral are those that were submitted in the previous Section 5 declaration on the site P.A Ref: S5/23/16 submitted by Danny Fortune the previous owner and current owners of the dwellinghouse to the east. The plans indicate a new vehicular entrance off the L-33115 cul de sac, which would lead to a new roadway within an agricultural field to the west of the existing embankment which separates the existing cul de sac and the neighbouring property. The roadway would be enclosed on both sides by a 1.2m high concrete post and mesh fence and a 1.5m high gate which would be erected along the road way set back from the vehicular entrance. It states on the drawing the gate would open inward from the adjacent carriageway into the owner's property.
- 8.1.6. The plans are not to scale but include measurements which indicates the roadway would be fenced on either side and have a width of 3.656m. It is stated the roadway would be made up of granular fill material to a depth of 250mm and completed with 40-60mm of a fine material. On completion of the works, all fences, gate and roadway would be located within the ownership of Mr.Cusack.
- 8.1.7. During my site inspection I noted the vehicular access from the agricultural field onto the L-33115 had not been constructed and there was evidence of some excavations works along the embankment area within the field, but that no roadway or gate had been constructed.
- 8.1.8. Many of the matters raised by the referrer such as inter alia; the removal of trees, the proposed field road/passageway impacting on trees on their lands, damage to their storm drain, increase in flooding, loss of privacy and devaluing of their property, are outside the scope of the specific question that is before the Board.

- 8.1.9. As stated in paragraph 8.1.1, issues regarding the proper planning and sustainable development of the area, is not a consideration in this referral. The trees on the referrer's lands and along the embankment are not protected trees and issues regarding damage to trees or the storm drain on the referrer's lands as a result of any development on the adjoining lands, would be a civil matter between both parties. Any damage to ESB cable lines or health and safety issues, except road safety issues under Article 9 (1) (iii) of the PDR, would be a matter between the relevant parties concerned and would not be a matter for the Board.
- 8.1.10. I consider there are no material changes in the facts or circumstances, between this referral and that determined by Tipperary County Council in both S5/23/16 and S5/23/90, and the plans as submitted in this referral are the same as those submitted in S5/23/16. In S5/23/16 the P.A considered the proposed roadway which had a width greater than 3m was not exempt, however in S5/23/90 having measured the roadway the P.A were satisfied the roadway was less than 3m and was therefore exempt. That declaration was not challenged.
- 8.1.11. I refer to the legal case Narconon Trust and An Bord Pleanála referred to in Section 7.4 of this report, where the Court of Appeal held that ABP was precluded from determining a Section 5 referral in circumstances where a P.A has previously determined substantially the same question in respect of the same land and where there is no evidence of a change in planning facts and circumstances since the P.A's determination.
- 8.1.12. I consider the question asked by the referrer, in substance, is the same as that previously considered by the P.A in both S5/23/16 and S5/23/90, wherein the P.A considered the formation of a vehicular entrance from an agricultural passageway on agricultural lands onto a Local Road L-33115, erection of fencing along the passageway and the installation of a field gate is exempted development.
- 8.1.13. Under Section 138 (1) of the Planning & Development Act 2000, as amended, the Board has the absolute discretion to dismiss a referral where the Board is satisfied that in particular circumstances, the referral should not be further considered, having regard to the nature of the referral or any previous referral which in its opinion is relevant.

8.1.14. As the construction of the agricultural access and a new field road/passageway and the erection of fencing and a gate within an agricultural field has previously been considered exempted development and there are no material changes in facts or circumstances, I consider that this referral should not be further considered.

## **8.2. Restrictions on exempted development**

8.2.1. In accordance with Section 4(4) of the Act, no development can be exempted development if it requires an Environmental Impact Assessment (EIA) or an Appropriate Assessment (AA).

## **9.0 Environmental Impact Assessment (EIA)**

9.1.1. In relation to EIA, the development is not a class for the purposes of EIA as per the classes of development set out in Schedule 5 of the Planning and Development Regulations 2001, as amended. No mandatory requirement for EIA therefore arises and there is also no requirement for a preliminary examination or screening assessment. Refer to Appendix 1.

## **10.0 Appropriate Assessment (AA)**

10.1. The subject site is not located within any European Site. The nearest European site is the Lower River Suir SAC (site code: 002137) which is between 2.7km and 3.9km to the south and south east respectively from the site. There is a watercourse c.67m to the west of the subject site, EPA name Toor\_More which is hydrologically connected to the Lower River Suir SAC. The lands are not identified as being subject to flooding on the [www.floodmaps.ie](http://www.floodmaps.ie) site (accessed on 8<sup>th</sup> January 2025).

10.2. Having regard to the nature and scale of the project proposed and to the nature of the receiving environment and separation distance from the nearest designated site, no appropriate assessment issues arise or were raised in the referral. 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 :

- The nature of the works being small scale.
- Taking into account the screening report by the Planning Authority.

10.2.1. 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 an Appropriate Assessment (stage 2) (under Section 177V of the Planning and Development Act 2000) is not required.

## **11.0 Recommendation**

11.1. I recommend that the Board dismiss this referral under Section 138 (1)(b)(ii) of the Planning and Development Act, 2000 as amended.

## **12.0 Reason and Considerations**

The referral relates to the construction of a vehicular access off the L-33115 into the agricultural field and construction of fencing and a gate and a new field road/passageway within the adjoining field were considered by Tipperary County Council under references S5/23/16 and S5/23/90.

As it has previously been determined by Tipperary County Council that the vehicular access, and the construction of fencing and a gate and the field road/passageway were development and were exempted development, the Board is therefore satisfied that there has been no change in the planning facts or circumstances, and that in the particular circumstances, this referral should not be further considered having regard to the nature of the appeal and previous Section 5 declarations made by Tipperary County Council for the same development, and

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

12<sup>th</sup> March 2025





**Form 1**  
**EIA Pre-Screening**

<b>An Bord Pleanála Case Reference</b>	ABP Ref: 318166-23		
<b>Proposed Development Summary</b>	Whether the construction of a field access and associated roadway onto a cul de sac at field is or is not development or is or is not exempted development.		
<b>Development Address</b>	Upper Burncourt, Burncourt, Co.Tipperary, E21 A890		
<b>1. Does the proposed development come within the definition of a 'project' for the purposes of EIA?</b> (that is involving construction works, demolition, or interventions in the natural surroundings)		<b>Yes</b>	✓
		<b>No</b>	No further action required
<b>2. Is the proposed development of a CLASS specified in Part 1 or Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended)?</b>			
<b>Yes</b>			Proceed to Q3
<b>No</b>	✓		No further action required
<b>3. Does the proposed development equal or exceed any relevant THRESHOLD set out in the relevant Class?</b>			
<b>Yes</b>			EIA mandatory EIAR required
<b>No</b>			Proceed to Q4
<b>4. Is the proposed development below the relevant threshold for the Class of development [sub-threshold development]?</b>			
<b>Yes</b>			Preliminary examination required (Form 2)
<b>5. Has Schedule 7A information been submitted?</b>			
<b>No</b>	✓	<b>Screening determination remains as above</b>	

		(Q1 to Q4)
Yes		Pre-screening Determination required

**Inspector:** \_\_\_\_\_

**Date:** 12<sup>th</sup> March 2025