



An  
Bord  
Pleanála

## Inspector's Report ABP-318947-24

### Question

Whether the alteration and reduction in size of boundary fencing is or is not development or is or is not exempted development.

### Location

Tirquin, Dublin Road, Cavan, Co.  
Cavan

### Declaration

Planning Authority

Cavan County Council

Planning Authority Reg. Ref.

344

Applicant for Declaration

Cavan County Council.

Planning Authority Decision

No declaration

### Referral

Referred by

Cavan County Council.

Owner/ Occupier

JB Trident Property Limited.

Observer(s)

Declan Sheridan.

Date of Site Inspection

14<sup>th</sup> of August 2024.

**Inspector**

Stephanie Farrington

## 1.0 Site Location and Description

- 1.1. The subject site is located in the south-eastern environs of Cavan Town approximately 1 km from the town centre. It is situated to the south of the R212, the main road linking the N3/N55 interchange with the town centre. It is located to the west of the slip road running southwards from the R212.
- 1.2. The boundary fence surrounding the site comprises of a c.1.2m high metal green clad structure and gate. The site is currently undeveloped. There is a residential dwelling to the immediate northeast of the site and there is a public house and associated car park to the immediately to the north of the site. There are no other structures in the immediate vicinity of the site.

## 2.0 The Question

- 2.1. The original question raised by the referrer relates to whether *“the alteration and reduction in size of an unauthorised existing boundary fencing, subject to ABP Refusal 3159/23, is considered to be exempted development”*.
- 2.2. The Section 5 was referred to An Bord Pleanála by Cavan County Council with the following revised question:  
  
*“whether or not the alteration and reduction in height of an unauthorised fence is or is not exempted development”*.
- 2.3. For the purposes of clarity, I will proceed on the basis of the question raised by the planning authority.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

- 3.1.1. The referral was directed to An Bord Pleanála by Cavan County Council in accordance with Section 5 (4) of the Planning and Development Act 2000, as amended on the 22<sup>nd</sup> of January 2024.

## 4.0 Planning History

4.1. The following planning history relates to the site:

PA Ref: 22/278

4.2. Cavan County Council refused planning permission on the 12<sup>th</sup> of August 2022 for the retention of a perimeter boundary fence/gate with a maximum height of 2m and all associated works at Tirquin, Cavan. Permission was refused for the development on the basis that the proposed development would have an adverse effect on the visual amenities of the area and would represent a haphazard piecemeal and disorderly development and would set an undesirable precedent for similar type development in the area.

PA Ref: 22/492, ABP Ref: 315969-23

4.3. Cavan County Council issued a notification of decision to grant permission for the following development on the 8<sup>th</sup> of February 2023 (1) to retain perimeter boundary fence/gate and all ancillary works carried out and (2) permission for modifications to existing fence and all ancillary works at Tirquin, Cavan, Co. Cavan. The submitted application drawings illustrated that the fence is 2m in height. Condition no. 2 of the Council's notification of decision to grant permission for the development restricted the duration of the permission to 3 years from the date of the decision.

4.4. The decision of the Council to grant permission was subject to 3<sup>rd</sup> party appeal to An Bord Pleanála (ABP Ref:315969-23). Permission was refused for the development on the 30<sup>th</sup> of June 2023 in accordance with the following reasons and considerations:

*Having regard to the design and location of the fence for which retention of planning permission is sought, it is considered that the fence, notwithstanding the proposed artificial screening, the development for which retention is sought would have an adverse impact on the visual amenities of the area on a prominent approach road to Cavan Town, would represent haphazard piecemeal and disorderly development, would set an undesirable precedent, and would, therefore be contrary to the proper planning and sustainable development of the area.*

Cavan County Council Ref: Section 5 Declaration 332:

- 4.5. A Section 5 was submitted to Cavan County Council questioning whether the erection of a new 1.2m height perimeter boundary fence/gate and all ancillary works carried out is or is not exempted development.
- 4.6. By Order dated 03<sup>rd</sup> of October 2023 Cavan County Council issued a declaration outlining the following:

*“Having regard to the Exemption Schedule , Part 1, Exempted Development – General Class 11 of the Planning and Development Regulations (S.I. NO. 600 OF 2001, AS AMENDED) the proposed work is regard as exempted development”.*

#### Enforcement History

PA Ref: ENF 22-034

- 4.6.1. On the 9<sup>th</sup> of June 2022 a Warning Letter was issued to the landowner in respect of an unauthorised boundary fence at Tirquin, Cavan, County Cavan.

#### **Relevant Referrals**

- 4.7. I have examined the Boards database of references and referrals. The following cases are relevant in the context of the issues raised in the current referral:
- RL3357 – On the question of whether the erection of fencing, double gate and fencing off of open space of land is or is not development or is or is not exempted development. The Board decided (2015) that the erection of fencing, double gate and fencing off of open space of land was development and was not exempted development, as follows: - the erection of the fencing and double gate constituted “works” that was development per S.2 and 3 of PDA, 2000 - the fencing was not exempt under Class 5 of Part 1 of Schedule 2 as it comprised a security fence - the gateway was not exempt under Class 9 of Part 1 of Schedule 2 as the height exceeded two metres - the fencing was not exempt under Class 11 of Part 1 of Schedule 2 as it exceeded 1.2 metres and was not a replacement fence.
  - RL 3499 – A question arose as to whether the erection of a post and wire fence along a road is or is not development or is or is not exempted

development at at Treanboy, leading to Middleton House, Killashee, Co. Longford. The Board decided (February 2017) that the fence was not exempted development having regard to the provisions of Article 9(1)(a)(iii), (x) and (xi) of the Planning and Development Regulations, 2001, as amended as detailed as follows: (i) the erection of the fence comprised works, which constitutes development, (ii) the fence comes within the scope of the exempted development under Class 11(a) of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, (iii) the fence, as constructed, does not provide adequate width for passing vehicles, or adequate passing bays, and entrance splays are excessively narrow, which constrains access and results in additional and conflicting manoeuvring movements by large vehicles, (iv) the fence, therefore, endangers public safety for vehicles and pedestrians by reason of traffic hazard and obstruction of road users.

- RL3572: The Board decided (July 2018) that the construction of a fence measuring 1.8 metres high within the quarry complex of Fountain Cross, Ballyneillan, Ennis, Co. Clare is development and is not exempted development having regard to the following considerations: (a) The construction of the subject fence would constitute works that come within the scope of Section 3 (1) of the Planning and Development Act, 2000, as amended, and therefore constitutes development; (c) The development would come within the scope of the exemption afforded by Class 4 of Part 3 of the Second Schedule to the Planning and Development regulations, 2001, as amended, but (d) The development would not be exempted development as it would contravene a condition of a planning permission, that is, condition number 21 of planning permission register reference number 04/1064 (An Bord Pleanála reference number PL03.216138), in the absence of any evidence of the written agreement of the planning authority pursuant to the terms of this condition (which applies to the entire quarry complex), and therefore the restriction on exemption under Article 9 (1)(a)(i) of the Planning and Development regulations 2001, as amended, applies in this instance.

## Court Cases

- ABP–301055–18 and ABP–301064–18 - Ballivor County Meath: These applications relate to the same site and the same subject matter, whether the change of use of a permitted Nursing Home (permitted under TA/140621) to a residential drug rehabilitation facility is or is not development or is and is not exempted development. Following the Board’s determination on both referrals the site owner, Norconon Trust, brought judicial review proceedings against the Board’s determinations (2020, IEHC25 and 2021, IECA307).

Of relevance to the current referral, the Court of Appeal ruled that, ‘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’ the Board is precluded from determining a Section 5 referral.

## 5.0 Policy Context

### 5.1. Development Plan

Cavan County Development Plan, incorporating Local Area Plan for Cavan Town, 2022-2028

- 5.1.1. The site is zoned for ‘General Enterprise and Employment uses’ and “Amenity and Open Space purposes” within the Cavan County Development Plan.
- 5.1.2. The “General Enterprise and Employment” zoning objective seeks: *“to facilitate opportunities for compatible industry and general employment uses, logistics and warehousing in a good quality physical environment. This should be highly accessible well designed permeable and legible”*.
- 5.1.3. The “Amenity and Open Space” zoning objective seeks to *“Protect and provide for amenity and open space areas”*.

## 5.2. Natural Heritage Designations

- 5.2.1. There are no designated European Sites in the vicinity of the subject site. The Lough Oughter and Associated Loughs SAC (site code 00007) is c. 5 km to the northwest of the subject site.

## 6.0 The Referral

### 6.1. Referrer's Case

- 6.1.1. The referral was submitted to Cavan County Council by Declan Sheridan. The subject matter of the referral relates to whether *“the alteration and reduction in size of an unauthorised existing boundary fencing, subject to ABP Refusal 3159/23, is considered to be exempted development”*. The following provides a summary of the key points raised in the referral:
- The adjoining landowner carried out works to the existing unauthorised fence along the boundary of the referrer's property.
  - The referral refers to Article 9 1(a) of the Planning and Development Regulations 2001 (as amended) (“Regulations”) which specifically relates to restrictions on exemption arising under the regulations – Article 9(1) (a) states that works that “consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or structure the use of which is an unauthorised use” shall not be exempted development”.
  - The referral outlines that the fence falls within the definition of structure as set out within the Planning and Development Act 2000.
  - The referral refers to the planning history of the site wherein permission was previously refused for a fence at this location PA Ref: 22/278 and PA Ref: 22/429, ABP Ref: 315969-23. It is stated that the unauthorised fence was not removed from the lands and is an unauthorised structure. In this regard the referral outlines that the works carried out is not the construction of a new fence rather an alteration to an existing unauthorised fence.



- The referral outlines that any works to remove or alter an already unauthorised fence cannot rely upon the exempted development provisions under the Planning and Development Act as amended.
- The referral refers to works carried out in November 2023 to reduce the height of the unauthorised fence and it is stated that the fence as originally constructed remains in situ. The works carried out relate to alterations to an unauthorised fence and therefore cannot rely on exempted development provisions.

## 6.2. Planning Authority Response

- 6.2.1. The referral was directed to An Bord Pleanala by Cavan County Council in accordance with Section 5 (4) of the Planning and Development Act 2000, as amended.
- 6.2.2. The planner's report prepared in respect of the referral provides a summary of the referral and details of the planning history pertaining to the site. The report recommends the referral of the case to An Bord Pleanala having regard to the following considerations:

*"Having considered the previous decision by An Bord Pleanala to refuse permission for a development at this location, to the referrer's submission and plans submitted on the 19th of December 2023, which asks the question as to whether or not the alteration and reduction in height of an unauthorised fence is or is not exempted development, and having regard to the declaration previously issued by the Cavan County Council, by order dated the 3rd of October 2023, for a development – erection of a new 1.2m high perimeter boundary fence/gate and all ancillary works carried out at Tirquin, Cavan, I recommend that the matter be referred under Section 5(4) of the Act to An Bord Pleanala for decision.."as to whether or not the alteration and reduction in height of an unauthorised fence is or is not exempted development".*

## 6.3. Owner/ occupier's response

- None received.

## 6.4. Further Responses

### Observation from Referrer

6.4.1. An observation was received from the Referrer Declan Sheridan. The following provides a summary of the key points raised:

- The observation provides a summary of the background to the development and warning letters issued by CCC (ENF 11-034).
- The observation refers to an application for Section 5 submitted to the Planning Authority to “erect a new 1.2m height perimeter boundary/fence gate and ancillary works carried out”. The observation refers to a declaration from the planning authority that the development was deemed exempted development.
- The observation relates to works undertaken to the fence in December 2023 including lowering the height of the existing fence by cutting it. The observation outlines that the alteration and reduction in size of the existing unauthorised boundary fence for which retention has been refused cannot be considered as “Exempted Development” on this basis.
- The observation refers to the planner’s report dated October 2023 in respect of the Section 5 application and outlines that the planner’s seems to have overlooked the situation on the ground. The observation outlines that there is no reference in the report to the presence of an existing fence comprising unauthorised development on the site.
- The observation refers to the correspondence from CCC to the Board which refers to a referral from adjoining landowner with rationale for exemption. The observation outlines that the corrected reference should relate to correspondence from the adjoining landowner setting out why the work carried out is not exempted development.

## 7.0 Statutory Provisions

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

#### Section 2 (1) – Interpretation

- “Structure” means any building, structure, excavation or other thing constructed or made on, in or under land or any part of structure so defined and where in the context so admits includes the land on, in or under which the structure is situate.
- “Works” includes any Act or operation of the construction, excavation, demolition, extension, alteration, repair or renewal.
- “Alteration” includes—
  - (a) plastering or painting or the removal of plaster or stucco, or
  - (b) the replacement of a door, window or roof,that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures;
- “Fence” - includes a hoarding or similar structure but excludes any bank, wall or other similar structure composed wholly or mainly of earth or stone;

#### Section 3 – Development

- Section 3 (1) - 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 - Exempted Development

Section 4(1): sets out developments that shall be exempted development for the purposes of this Act.

Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations 2001-2020.

#### Section 5 - Declaration and referral on development and exempted development.

Section 5(1): If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

Section 5(3)(a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration. (b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

Section 5(4): Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

## Part 8 – Enforcement

### Section 152- Warning Letter -

(1) Where—

(a) a representation in writing is made to a planning authority by any person that unauthorised development may have been, is being or may be carried out, and it appears to the planning authority that the representation is not vexatious, frivolous or without substance or foundation, or

(b) it otherwise appears to the authority that unauthorised development may have been, is being or may be carried out,

the authority shall issue a warning letter to the owner, the occupier or any other person carrying out the development and may give a copy, at that time or thereafter,

to any other person who in its opinion may be concerned with the matters to which the letter relates.

#### Section 154 - Enforcement notice.

**154.—(1)** (a) Where a decision to enforce is made under **section 153** or where urgent action is required under **section 155**, the planning authority shall, as soon as may be, serve an enforcement notice under this section.

(b) Where an enforcement notice is served under this section, the planning authority shall notify any person who made representations under **section 152(1)(a)** and any other person, who in the opinion of the planning authority may be concerned with the matter to which the notice concerned relates, not being a person on whom the enforcement notice was served, of the service of the enforcement notice.

#### Section 160 Injunctions in relation to unauthorised development.

#### Section 163 - Permission not required for any works required under this Part

**163.—**Notwithstanding *Part III* F686[or *section 293*], permission shall not be required in respect of development required by a notice under **section 154** or an order under **section 160** F687[(disregarding development for which there is in fact permission under *Part III* F686[or *section 293*] or in respect of which a certificate has been issued by the Dublin Docklands Development Authority under section 25(7)(a)(ii) of the Dublin Docklands Development Authority Act 1997 or by the Custom House Docks Development Authority under section 12(6)(b) of the Urban Renewal Act 1986)].

## 7.2. **Planning and Development Regulations, 2001**

### **Part 2 – Exempted Development**

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.

## Class 11 of Part 1, Schedule 2

<i>Class 11</i>	<i>Conditions and Limitations</i>
<p>The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of —</p> <p>(a) any fence (not being a hoarding or sheet metal fence), or</p> <p>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres.</p> <p>2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.</p>

### Article 9 (1) – Restrictions on Exemption

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—

(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,

## **8.0 Assessment**

### **8.1. Introduction**

### **8.2. Background- The Board's Jurisdiction to Determine this Referral**

- 8.2.1. At the outset in considering the subject matter of the referral, I refer to the planning and referral history pertaining to the site as summarised in Section 4. The decision issued by Cavan County Council under PA Ref: 332 is of particular relevance wherein the planning authority issued a Declaration stating that: *“the erection of a new 1.2m height perimeter boundary fence/gate and all ancillary works carried out”* is development and is exempted development.

8.2.2. Having reviewed the documentation submitted in support of the referral and also the site's referral history, it is my view that a key issue to be addressed at the outset is the Board's jurisdiction to make a decision on this referral, with reference to the Narconon Trust v An Bord Pleanala judgement, where An Bord Pleanala made a determination on a similarly worded Section 5 Referral under PA Ref: 307077-20 in January 2021.

8.2.3. In Narconon Trust v An Board Pleanala (2021, IECA 307), the Court of Appeal granted an order of Certiorari, quashing two decisions made by the Board under Section 5 of the Act, whereby the Board decided that a change of use from a nursing home development to a residential drug rehabilitation facility is development and is not exempted development. In its conclusion, the Court stated as follows: -

*“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. It had jurisdiction to receive the referral and to commence its determination. Once it became apparent that the question referred was the same, or substantially the same, and in respect of the same land, and that there was no evidence of any change in the planning facts or circumstances, it ought to have concluded that: the referral by the notice parties amounted to an impermissible attack on the 2016 declaration, which, in substance, amounted to questioning the validity of the section 5 declaration other than by way of s. 50; that such a challenge is prohibited by s. 50(2); and that for the Board to proceed further to determine the referral on the merits amounted to facilitating a breach of s. 50(2) and was, accordingly, ultra vires.”*

8.2.4. The Narconon judgement is important to the subject referral as it requires two issues to be addressed by the Board prior to a determination being made: (1) Is the question referred the same, or substantially the same, and in respect of the same land and (2) Has there been any change in the planning facts or circumstances since the previous determination was made. I consider the points raised in turn as follows:

(1) Is the question referred the same, or substantially the same, and in respect of the same land:

- 8.2.5. The referral relates to the same landholding as PA Ref: 33/2 i.e lands at Tirquin, Dublin Road, Cavan as the previously determined Section 5. I note that the Declaration issue under PA Ref: 33/2 related to *“the erection of a new 1.2m height perimeter boundary fence/gate and all ancillary works carried out”*
- 8.2.6. The subject referral relates to the following: *“whether or not the alteration and reduction in height of an unauthorised fence is or is not exempted development”*. I consider that the questions posed under PA Ref: 33/2 and within the current referral are sufficiently different in that the previously determined referral related to a new fence and the subject referral relates to alterations to an existing unauthorised fence.
- (2) Has there been any change in the planning facts or circumstances since the previous determination was made.
- 8.2.7. Having reviewed the contents of the file submitted it is my view that there has been no change in information submitted to the Board. There have been no changes to the planning facts or circumstances in the interim period since the previous planning authority determination was made.
- 8.2.8. On the basis of the above, it is my view that the question posed in the current referral is sufficiently different to that posed under PA Ref: 332.

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

- 8.3.1. The first question to consider is whether or not the proposal constitutes development under the definitions contained in the Planning Act. Section 3(1) of the Act 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’. In terms of determining whether development has occurred, the relevant tests to apply is to establish whether ‘works’ were carried out and/or whether there was a material change in the use of the structure or land.



8.3.2. Within Section 2, (1) of the Planning Act, 'works' are defined as 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'. Alteration is defined within the Act as including—

(a) plastering or painting or the removal of plaster or stucco, or

(b) the replacement of a door, window or roof,

that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures;

8.3.3. Alteration is defined within the Oxford English Dictionary as "*the action or process of [altering](#) or being altered*". Altering is defined as a "*change in character or composition, typically in a [comparatively](#) small but significant way*".

8.3.4. The alteration of the existing fence as described within the referral involved the carrying out of works as defined in the Act and therefore constitutes development.

#### 8.4. Is or is not exempted development

8.4.1. The second question to answer is whether the development is or is not exempt development. In this regard I would refer the Board to Class 11(a) of Part 1 of Schedule 2 of the Regulations which states that "*the construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of – any fence (not being a hoarding or sheet metal fence) is exempted development*". The fence in question is not within or bounding the curtilage of a house and is not a hoarding or sheet metal. Therefore, the fence would come within the scope of Class 11(a).

8.4.2. The conditions and limitations attached to Class 11 provide that 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. On site inspection I note that the existing boundary fence/gateway is less than 1.2 metres in height so therefore would comply with the limitation attached to Class 11 (a).

8.4.3. Having regard to the above, I consider that the development complies with the description, limitations and conditions of Class 11(a) of Schedule 2 Part 1 of the Planning and Development Regulations.

## 8.5. Restrictions on exempted development

8.5.1. Development within the context of Section 3 (1) of the Planning and Development Act 2000, (as amended), has been carried out on the site. Article 9(1) states that 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 meet one or more of a series of matters arising. While Article 9(1)(a) includes a number of considerations, I consider that the following, as cited by the referrer, is of relevance to the referral:

*if the carrying out of such development would –*

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

8.5.2. I refer to the planning and enforcement history of the site as summarised in Section 4 of this assessment. I note that a warning letter was issued under ENF 22-034 on the 9<sup>th</sup> of June 2022 in respect of the unauthorised boundary fence. I refer to the subsequent applications to retain the structure (PA Ref: 22/278 and PA Ref:22/429, ABP Ref: 315969-23). Under ABP Ref: 315969-23 permission was refused by An Bord Pleanála on the 8<sup>th</sup> of February 2023 (1) to retain perimeter boundary fence/gate and all ancillary works carried out and (2) permission for modifications to existing fence and all ancillary works at Tirquin, Cavan, Co. Cavan. The boundary fence proposed for retention in this instance was a 2m high fence and located in the same location of the existing fence. Having regard to the planning history and enforcement history, it is clear that there was an unauthorised boundary fence at this location.

8.5.3. The referrer asserts that works were carried out in November/December 2023 to reduce the height of the unauthorised fence, and it is stated that the works involved the lowering in height of the existing fence posts and panels in situ by cutting them and the existing gates were taken off site. The referral outlines that the works carried

out relate to alterations to an unauthorised fence and cannot rely on exempted development provisions on the basis of the restrictions on exemption set out under Article 9 (1)(a). I have no evidence to confirm whether or not the fence which was previously in situ was altered or replaced. However, having reviewed the photographs attached to ABP Ref: 315969-23 and the contents of the referral and having carried out a site inspection I acknowledge that there are clear similarities between the fence in place in June 2023 and the existing structure. In this regard I consider that it is possible that the fence previously in place was altered.

- 8.5.4. I refer to the provisions of Part 8 (Enforcement) Section 163 of the Planning and Development Act entitled “Permission not required for any works required under this part”. The wording of this section is set out as follows:

*163.—Notwithstanding Part III F686[or section 293], permission shall not be required in respect of development required by a notice under section 154 or an order under section 160 F687[(disregarding development for which there is in fact permission under Part III F686[or section 293] or in respect of which a certificate has been issued by the Dublin Docklands Development Authority under section 25(7)(a)(ii) of the Dublin Docklands Development Authority Act 1997 or by the Custom House Docks Development Authority under section 12(6)(b) of the Urban Renewal Act 1986)].*

- 8.5.5. I have considered the question posed within the referral in light of the provisions of Section 163 of the Planning and Development Act 2000 and having regard to the planning history of the site. On review of the file history, it is apparent that a Warning Letter was issued in respect of an existing fence at this location under Ref. No. ENF 22-034 in accordance with Section 152 of the Planning and Development Act. Section 163 of the Act specifically refers to development required by notice under Section 154 (Enforcement Notice) and Section 160 (Injunctions in relation to unauthorised development). A Section 152 Warning Letter is not listed under Section 163. In this regard I do not consider that the provisions of Section 163 are applicable in this instance.

8.5.6. I note the subject matter of the referral “whether or not the alteration and reduction in height of an unauthorised fence is or is not exempted development”. I consider that works which may have been carried out to alter and reduce the height of the structure from 1.8/2m to 1.2m would have been carried out to comply with the exempted development provisions under Class 11(a) of the Planning and Development Regulations.

8.5.7. Notwithstanding the above, I consider that the alteration of an unauthorised structure would be subject to the restrictions on exemption as set out under Article 9(1)(viii) and would therefore not be exempted development. In my view, the exemption provided under Class 11(a) of Part 1 of Schedule 2, cannot be availed of by virtue of the restriction on exemption imposed under Article 9(1)(a)(viii) of the said Regulations.

#### 8.6. **Appropriate Assessment**

8.6.1. Having regard to the nature and scale of the proposed development and nature of the receiving environment together with the proximity to the nearest European site (c.5km away), no Appropriate Assessment issues arise, and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

### 9.0 **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 alteration and reduction in height of an unauthorised fence at Tirquin, Cavan, Co. Cavan is or is not development or is or is not exempted development:

**AND WHEREAS** Declan Sheridan requested a declaration on this question from Cavan County Council on the 19<sup>th</sup> of December 2023:

**AND WHEREAS** Cavan County Council referred this declaration for review to An Bord Pleanála on the 23<sup>rd</sup> day of January 2024:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) Section 163 of the Planning and Development Act, 2000 as amended,
- (e) article 6(1) and article 9(1)(a)(viii) of the Planning and Development Regulations, 2001, as amended,
- (f) Class 11 (a) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (g) the submissions on file;
- (h) the planning history of the site,
- (i) the pattern of development in the area:

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

- (a) The alteration and reduction in height of the fence would constitute “works” that is development as defined under Sections 2 and 3 of the Planning and Development Act 2000 (as amended),
- (b) The development would comprise exempted development under Class 11(a) of Part 1 of Schedule 2 of the Planning and Development Regulations 2001, as amended, and

- (c) The alteration and reduction in height of an unauthorised fence would “*consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure*” and would therefore not be exempted development having regard to Article 9(1)(a)(viii) of the Planning and Development Regulations, 2001 (as amended);

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the alteration and reduction in height of an unauthorised fence at Tirquin, Cavan, Co. Cavan would constitute development which would not be 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.

---

Stephanie Farrington  
Senior Planning Inspector

18<sup>th</sup> of October 2024