



**Question**

Whether the use of the existing entrance to a cottage is or is not development and is or is not exempted development.

**Location**

Ballycloona, Carrick-on-Suir, Co. Tipperary.

**Declaration**

Planning Authority	Tipperary County Council
Planning Authority Reg. Ref.	S5/24/109
Applicant for Declaration	Walter Power
Planning Authority Decision	Is not exempted development

**Referral**

Referred by	Will McGarry and Ass.
Owner/ Occupier	On behalf of Walter Power.

**Date of Site Inspection** 7<sup>th</sup> of May 2025

**Inspector** Caryn Coogan

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## 1.0 Site Location and Description

- 1.1. The subject referral site is in a townland called Ballycloona, to the northwest of Carrick on Suir, in Co. Tipperary. The site is positioned on the western side of the N-76 (National Road) and is to the north of the junction with the R696 (from Carrick on Suir). The N76 is the main Clonmel to Kilkenny route. The R696 is a Regional Road connecting Carrick-On-Suir to Kilkenny. The site is visible from the junction of the R696 with the N76.
- 1.2. There is an existing old cottage on site that has been partially restored (re-roofed) with some new windows and a patio door to the rear. It does not appear that the house is habitable.
- 1.3. There is a direct access onto the N76, field gate not recessed. It would appear some of the roadside boundary ditch has been removed adjacent to the cottage.
- 1.4. It is noted that the N76 is a busy route. The site is within the 80km/h speed limit. The road a designated Strategic Road as defined in the Tipperary County Development Plan 2022.

## 2.0 The Question

- 2.1. Whether the use of an existing entrance to a cottage is or not development and is or is not exempted development.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

On the 23<sup>rd</sup> of October 2024, Tipperary Co. Co. issued a Section 5 Declaration stating the development does constitute development and it is not exempted development.

### 3.2. Planning Authority Reports

#### 3.2.1. *Planning Reports*

The report is dated the 23<sup>rd</sup> of October 2024. A summary of the relevant issues is as follows:

The report outlines the site location, planning history, and legislative context.

- The applicant has submitted letters from 6No locals attesting to the fact the site was served by a vehicular entrance. It is submitted since it has been demonstrated the entrance was in place, its reuse is exempted development.
- The declaration asks the same question under S5/23/58. The reference to a refusal reason set out in the accompanying cover letter is somewhat misleading. The purpose of the declaration is to give an opinion in planning.
- Google Streetview photos are included from 2009-2011, 2017, 2019. As illustrated the dwelling was in a poor state of repair in 2009. By 2011 the entrance had been closed, and by 2019 the site was overgrown.
- The Declaration relates to the reactivation of the use of the original entrance which serves the residential property on site. It is noted the querist has not sought a declaration as to whether the restoration of the house on the site constitutes development.
- The central question is that of abandonment. The reactivation of its use would constitute a material change in use of the land.
- The owner bought the site in 2006 and wanted to refurbish it and rent it to one of his children. It was occupied up until 2006. In 2009 the entrance was closed using a chainlink fence to prevent dumping. The septic tank was registered in 2013. The period of discontinuance of use should not be considered abandonment of use.
- Yvonne Scannell has 4 tests for abandonment of use. The site was last occupied in 2006. The entrance was closed in 2009. It is not sufficient for the owner to simply not have intention to abandon the use, the use had been abandoned, constitutes development.
- The previous residential use on the site cannot be relied upon so as to reactivate/ resume the use of the entrance. The access must be assessed de novo. No details of the form of the gate were provided.

## 4.0 Planning History

### 4.1 ABP 317633-23 (P.A. S5/23/58)

On the 6<sup>th</sup> of July 2023, Tipperary County Council, determined that that:

*The works, the reactivation of the use of the existing entrance to a former residential dwelling at Ballycloona, Carrick on Suir, Co. Tipperary constitute development and are not exempted development.*

An Bord Pleanala upheld that declaration under case ABP 317633 on the 23<sup>rd</sup> of May 2024. (Order included in Appendix).

### 4.2 TUD-23-013

An enforcement file opened by Tipperary Co. Co. in respect of the renovation of the cottage and the use of the entrance on site.

## 5.0 Policy Context

### 5.1. Development Plan

#### 5.1. *Tipperary County Development Plan 2022-2028*

**Section 12** Sustainable Transport.

Figure 12.2 provides a Map of the County showing the Strategic and Non-Strategic Roads. The N76 is a Strategic National Primary route.

Section 12.5.2 refers to Safeguarding the Strategic Road Network.

**Policy 12.4** seeks to: *Maintain and protect the safety, capacity and efficiency of Tipperary's roads network and associated junctions in accordance with the Spatial Planning and National Roads Guidelines for Planning Authorities, (DECLG, 2012) and the Trans-European Networks Regulations and to avoid the creation of additional access points to national roads to which speed limits greater than 60kmh apply.*

### 5.2. Natural Heritage Designations

The subject site is located c.2.6kms from the Lower River Suir SAC,

c.14.6kms from the River Barrow and River Nore SAC and  
c.14.9kms from the Comeragh Mountains SAC.

## 6.0 The Referral

### 6.1. Referrer's Case

6.1.1 Will McGarry Consulting Engineers has made this submission on behalf of the applicant. Under the previous decision by An Bord Pleanala under ABP reference 317633-23, it was not satisfied that the previous vehicular access existed. There are attached letters from neighbours, including a road overseer, a retired garda, a retired postmaster all stating there was an entrance in place to the cottage.

It is submitted that the entrance existed and was not formed or laid out and there was no material widening of the access.

6.1.2 In a supporting letter from the property owner, Mr. Walter Power, the following is summarised:

In a previous decision by An Bord Pleanala, Ref. No. 317633-23, the Board were not satisfied a previous authorised vehicular access existed. There are letters attached from neighbours, a roads overseer, a retired Garda and Postmaster all clearly stating the entrance was in place and is therefore authorised.

The entrance was existing, and a new entrance was not formed or laid out, there was no material widening of the access. The previous ruling of An Bord Pleanala was based on unsatisfactory evidence relating to the existence of the entrance.

Mr. Power bought the property in 2008 with the intention of repairing and cultivating the wonderful garden which has Glasha stream running beside it. It was bought from the estate of Patrick Maher who spent years doing improvements to the house himself. The longterm plan was it provide a home for his family, or a retirement home for himself and his wife. They currently reside 6km away from the site.

The title deeds to the property were in a mess and took a number of years to get the deeds in order.

He commenced tidying up the property in 2008. While bringing in a digger he knocked one of the entrance piers. The timber gates at the entrance were rotten, so

a wire fence was erected to secure the property because there was a lot of illegal dumping happening in the yard. There was also a pedestrian gate at the northern end of the property which ponies grazing the garden use to enter. The septic tank was registered in 2013.

The house was incomplete because of building crash in 2008. Then the milk quotas were lifted in 2015, and he was focused on farming. His children going to university at that time. The Referrer had other financial priorities. The house was not abandoned. The house was made secure and not abandoned. The house was bought during the boom and maintained during the bust. He only started back at the refurbishments in 2022, there was over €40,000 spent on it in 2022 including services, wiring, insulation, roofing, windows and doors and groundworks.

The Irish government have recently introduced a vacant property refurbishment grant, to bring properties back to use and provide accommodation in that area. It should be lived in again.

## 6.2. Planning Authority Response

The planning authority has nothing more to add to the planning authority.

# 7.0 Statutory Provisions

## 7.1. Planning and Development Act, 2000

Section 2(1) - Interpretation

In this Act, except where the context otherwise requires –

- “**habitable house**” means a house which—
  - (a) is used as a dwelling,
  - (b) is not in use but when last used was used, disregarding any unauthorised use, as a dwelling and is not derelict, or
  - (c) was provided for use as a dwelling but has not been occupied;

- “**house**” means a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building;
- “**structure**” as any building, structure, excavation or other thing constructed or made on, in or under any land, or part of a structure so defined, and-
  - (a) where the context so admits, includes the land on, in or under which the structure is situate
- “**use**”, in relation to land, does not include the use of the 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) states that:

- In this Act, ‘development’ means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land’.

Section 4(1) of the Act sets out various forms and circumstances in which development is exempted development for the purposes of the Act. Of note this includes:

Section 4(1)(h)

- Development consisting of the carrying out of works for the maintenance, improvement or alteration of any structure, being works which only affect the interior of the structure or which do not materially affect the external appearance so as to render it inconsistent with the character of the structure or neighbouring structures.

Section 4(1)(j)

- Development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;

- Section 4(2) of the Act notes 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, as amended.
- Section 4(4) 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.

## Section 5

- This section provides the details of the process of a declaration and referral on development and exempted development and facilitates a review by An Bord Pleanala on the determination.
- Section 5(1) provides in summary that any person may seek a declaration on a referral from the planning authority.
- 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.

## 7.2. Planning and Development Regulations, 2001

### Article 6(1) Exempted Development

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

### Article 9 Restrictions on exemption.

- (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

### **Schedule 2 Part 1 *Exempted Development – General***

<p><i>Development within the curtilage of a house</i></p> <p><b>CLASS 1</b></p> <p>The extension of a house, by the construction or erection of an extension (including a conservatory) to the rear of the house or by the conversion for use as part of the house of any garage, store, shed or other similar structure attached to the rear or to the side of the house</p>	<p>1. (a) Where the house has not been extended previously, the floor area of any such extension shall not exceed 40 square metres.</p>
<p><b>CLASS 5</b></p> <p>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.</p>	<p>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 1.2metres.</p> <p>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</p>

	<p>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.</p> <p>3. No such structure shall be a metal palisade or other security fence.</p>
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Note I have only included the limitations on Exemption that maybe of relevance.

## 7.2 Relevant Case Law

### 7.2.1 Dublin County Council v. Tallaght Block Co. Ltd.

This case determined that a use of land can be abandoned and that a change of use will occur when an abandoned use is recommenced. Hederman J in the Supreme Court stated: "Where a previous use of land has been not merely suspended for a temporary period and determined period, but has ceased for a considerable time, with no evidenced intention of resuming it at any particular time, the tribunal of fact was entitled to find that the previous use had been abandoned, so that the resumption constituted a material change of use."

## 8.0 Assessment

### 8.1. Introduction

The Commission has previously considered this subject matter under reference ABP-317633-23. The Commission ruled on 13/05/2024 that the formation of a vehicle access serving a dwellinghouse at Ballycloona, Carrick-on-Suir is development and is not exempted development. According to the Order this

decision was made on the basis there is no evidence on file that a previous authorised vehicular access existed and served the existing house, is being or has been re-activated.

## 8.2. Is or is not development

- 8.2.1. Section 3 (1) of the Planning and Development Act, 2000 (as amended) states that development “means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land”.
- 8.2.2. From my site inspection it is clear neither the cottage or the site has not been used as a dwelling or access to same for a considerable length of time. The submissions on file, the photographs in particular those included on the Planning Report on file, reveal the roadside boundary has changed over time since the Referrer purchased the property in 2008. .
- 8.2.3. I note that works have taken place to the original cottage, which currently does not appear to be habitable (*2009 photo shows the difference and it is noted that re-roofing and additional roofing on what appeared to have been a flat roofed side element has taken place. In addition new windows have been inserted to the cottage*). The external appearance of the cottage has changed and in this respect regard is had to Section 4(1)(h) of the Planning and Development Act 2000 (as amended). Any refurbishment works to the original dwelling are not the subject of the current Referral which refers to the use of the existing entrance. In addition, it must be noted that, if there is any unauthorised development that, planning enforcement is a matter for the planning authority, and does not fall within the jurisdiction of the Board.
- 8.2.4. It is now submitted by the Referrer the entrance was existing, a new entrance was not formed or laid out and no material widening of the access has occurred. The Referrer claims the existing entrance was always authorised and the supporting documents will support this claim. It is stated that a pier was demolished during construction works in 2008. It is also indicated a six-foot chain-link fence had been erected across the entrance in 2009 to secure the site as there was dumping

occurring. Currently, part of the chain link fence was removed to facilitate access to the site during refurbishments works to the cottage. There are currently double gates across the entrance with the chain link fence continuing in front of the cottage. The entrance exceeds 4metres in width.

8.2.5 It is clear from the Google Streetview dating from 2009 -2019, the site and the entrance had been closed, and the site had become overgrown. The use of the property as a residential dwelling had discontinued for over a period of ten years or more. This is also evident from the Planning Report on file, and it was evident from the assessment of the previous case, ABP 317633-23.

8.3.3 According to the applicant the construction works commenced on the cottage in 2022 whereby the site and the entrance were reactivated/ reopened. In response to the previous Referral assessed by the Coimisiun, under reference ABP 317633-23, there letters from a Road Overseer with Tipperary Co. Co., a retired Garda and a retired postmaster stating there was always an entrance at the cottage. It is submitted by the Referrer on this basis, the entrance is established, authorised and is therefore exempted development.

8.3.3 The Referrers case presented does not address the issue of 'abandonment of use' in planning terms. The Referrer presents a case that the property was not abandoned by him and the access has always existed. The current Section 5 Declaration application is essentially the same as the Coimisiun decided upon under ABP 317633-23 except the Referrer is now claiming the access was not reactivated and always existed. The Google Streetview and condition of the cottage would state otherwise. It is obvious the use of the site including the entrance had been abandoned for a considerable length of time. The Referrer has not presented a case regarding the abandonment of use from 2009 to the present day.

8.3.4 The previous case concluded that in view of the time period that lapsed and the fact the house was not habitable, and the site was fenced off and the access was no longer in use, that the use of the cottage and the entrance was abandoned, and the resumption of the entrance constitutes a material change of use. I would agree with this finding under ABP 317633-23, and that of the planning authority under both assessments.

8.3.5 Based on case law some suggested tests of abandonment relevant to this issue are referred to in 'Environmental and Planning Law in Ireland' (Yvonne Scannell, 1995) i.e:

- The intention of the owner and/or occupier to abandon or not abandon.
- The period during which the use was discontinued. The longer the period the more likely the use is to be abandoned.
- Whether or not there have been any intervening issues.
- The physical condition of the land or structure.

8.2.5. It is clear from the assessment relating to both cases, the Planning Authority is satisfied the use/ occupation of the house and the entrance had been abandoned. The house had not been lived in since 2006, and the entrance was fenced off in 2009. The evidence would suggest the site and entrance was reopened in 2022. The evidence from Google Streetview indicates the entrance was fenced off and had not been used for 13 years. I would concur with the planning authority's assessment and conclusion that the reactivation of the entrance in this context would constitute a material change of use.

8.2.6. Having regard to sections 2 and 3 of the Planning and Development Act 2000, as amended I consider the works, in terms of fencing, clearing, removal of fence, provision of gates to the roadside boundary of the site constitutes 'development' within the meaning of the Act, being the carrying out of an act of construction (i.e. 'works') on land.

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

8.3.1. I refer to Article 9(1)(a) of the Regulations which states that development to which Article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of the development would contravene a condition attached to a permission issued under the Act or if it would be inconsistent with any use specified in a permission under the Act. Also the following which are of note:

- (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,

(ii) endanger public safety by reason of traffic hazard or obstruction of road users.

8.3.2 Fundamentally, although the applicant has presented letters indicating there was an entrance pre-existing dating back to when the house was last known occupied in 2006, I do not consider this issue to be relevant to the abandonment of use associated with the overall site for over thirteen years. Effectively, the access has been reactivated or reopened after being fenced off and inactive for over thirteen years.

8.3.6 Article 6 (1) states 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.

8.3.7 9 (1) Development to which article 6 relates shall not be exempted development for the purposes of 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

8.3.8 The site fronts onto and has direct access onto a National Secondary Road (N76) connecting Clonmel to Kilkenny. The carriageway exceeds 4metres in width. The reactivated entrance is onto a National Road is at a point where 80km per hour speed limit applies. It is also in close proximity to a busy junction with a Regional Road leading to Carrick-on-Suir. The access, in my opinion, constitutes a traffic hazard. The traffic turning movements associated with the entrance will result in an obstruction of road users in close proximity to a heavily trafficked junction onto a National Road.

#### **8.4 Appropriate Assessment**

8.4.1 Notwithstanding the conclusion arrived at that the development in question is not exempted development and as such the restriction in respect of Appropriate Assessment is not relevant, I have considered the potential for significant effects on European sites in the interests of completeness.

8.4.2 Having regard to the nature and scale of the proposed development which relates to reactivation/ reopening of an entrance which is not within or in close proximity to any European sites, 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 Commission should decide this referral in accordance with the following draft order.

**WHEREAS** a question has arisen, as reformulated by the Coimisiun, as to whether the reactivation/ reopening use of access to a cottage at Ballycloona, Carrick-On-Suir, Co. Tipperary is is not development or is or is not exempted development:

**AND WHEREAS** Walter Power care of Will McGarry and Associates Consulting Engineers of 15 Mary Street, Clonmel requested a declaration on this question from Tipperary Council and the Council issued a declaration on the 23<sup>rd</sup> day of October, 2024 stating that the matter was development and was not exempted development:

**AND WHEREAS** Walter Power referred this declaration for review to An Coimisiun Pleanála on the 7<sup>th</sup> day of November, 2024:

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

- (a) Section 2, 3 and 4 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,
- (d) the submissions on file,
- (e) the report of the inspector:

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

- (a) The reactivation/ reopening use of a vehicular access involves the carrying out of works and is, therefore development under section 3 of the Planning and Development Act, 2000, as amended,
- (b) On the basis of the documentation on the file, the evidence suggests the pre-existing access had been closed off and the residential use associated with the site and the access had been abandoned, therefore to a material change of use has occurred in reactivating/ reopening the entrance,
- (c) The vehicular access directly adjoins and accesses onto the N76 National Secondary Road. This road has a surfaced carriageway width of more than 4metres. Article 9 of the Planning and Development Regulations, 2001, as amended, restricts the formation, laying out or material widening of a means of access to a public road of which the surface carriageway exceeds 4metres,
- (d) The formation of a vehicular access, being established as development, does not come within the scope of any other provision for exempted development, as set out in the Planning and Development Act 2000, as amended or the Planning and Development Regulations, 2001, as amended.

**NOW THEREFORE** An Coimisiun Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the is/ is not development and is/ 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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Caryn Coogan  
Planning Inspector

2<sup>nd</sup> of December 2025