



An  
Bord  
Pleanála

## Inspector's Report RL3501

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### Question

Whether works to develop a roadway capable of accommodating heavy machinery and delivery vehicles is or is not development or is or is not exempted development.

### Location

Toberkeen, Dungloe County Donegal

### Declaration

Planning Authority

Donegal County Council

Planning Authority Reg. Ref.

S5 16/27

Applicant for Declaration

Daniel Mulligan

Planning Authority Decision

Is development and is exempted development

### Referral

Referred by

Daniel Mulligan

Occupier

Mr Noel McBride and Ms Laura Houston

Date of Site Inspection

8 December 2016

Inspector

Dolores McCague

## 1.0 Site Location and Description

- 1.1. The site is located at Toberkeen, Dungloe about 3km south west of Dungloe. The site is an east west strip of land which runs between two north south private roads, where work has been carried out to create a link between the private roads. The north south roads run from a local road connecting Dungloe to Machery (An Machaire). The site is in a scenic area overlooking the Atlantic Ocean a short distance away.
- 1.2. Of the two north south private roads the eastern one is an old narrow road which serves several houses and has recently been surfaced dressed from its junction with the public road to a point before the termination of the route. The western road is black topped but the road finish has worn away in places. Also an old roadway, it serves, in addition to houses and land, as access to the shoreline where an oyster fishery has become established.
- 1.3. It is agreed by the parties that trackways extended off both private roads. In the case of the western road there was a spur to the east. The eastern road had a trackway spur to the west. The parties disagree as to whether or not these trackway spurs were connected up. It is not contested that the spur from the western road terminated at a wall, but it is argued by the responder that an old trackway connected this spur to the other spur.
- 1.4. Since the work was carried out (commencing in December 2014) the roadway has facilitated the movement of heavy goods vehicles via the western private roadway to locations at the end of the eastern private roadway.
- 1.5. The western private road is referred to in documentation on the file as having been the subject of a LIS, or local improvement scheme, at some time in the past, but it is not in the charge of Donegal County Council and its maintenance is therefore the responsibility of those who use the road. Similarly, the recently surface dressed eastern private is the responsibility of residents along the road.
- 1.6. The work which has been carried out to the spur trackways and link comprises the deposition of assorted stone, with some quite large boulders. In some sections this deposition is quite deep, such as where a dip existed in the ground levels or where the ground is soft; in other areas it is of less depth. The deposition has eased the

natural rise and fall in the ground levels. In some places there appears to have been a boundary to the trackway, however, over much of the route, boundaries either may not have existed or have been obliterated / covered over by the work. The planning authority state that the route is between 3.5 and 4m in width. These dimensions are representative of most of the route, in some locations it is wider than 4m. The entire route is about 350m in length; the contested link section is about 200m long.

- 1.7. The route appears to run through numerous land ownerships / properties.

## **2.0 The Question**

- 2.1. The question which has been referred to the Board is whether works to develop a roadway capable of accommodating heavy machinery and delivery vehicles is or is not development or is or is not exempted development. The planning authority formulated the question from the documentation provided by the referrer.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

The planning authority declared that the work is development and is exempted development

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

#### **3.2.1. Planning Reports**

The documentation on the subject planning file is sparse because the question is a restatement of a question previously addressed to the planning authority under ref. S5 16/03 by the same party and the current question was submitted, at the invitation of the planning authority, in order to provide the opportunity of making the referral. Mr Mulligan (the referrer) was away from home when the previous decision was made and was unable to refer that decision to the Board within the appropriate period.

In the assessment of the previous question, S5 16/03, the planning report relied on the Planning and Development Regulations 2001, Schedule 2, Part 1 Exempted Development General, Class 13:

*'The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving 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 single condition to this exemption is that *'the width of any such private footpath or paving shall not exceed 3 metres'*.

The report states that the per the County Donegal Development Plan 2012-2018, as varied, the subject site is located within a rural area defined as an area under strong urban influence and is not otherwise located within an area of Especially High Scenic Amenity or Natura 2000 site.

On the basis that the proposal involved the laying of broken stone on lands over a distance of approximately 180m and a width of 3.5 to 4 metres, it was considered that the development constitutes 'development' as defined under Section 3 (1) of the above Act. The information available to the planning authority from a number of different 3<sup>rd</sup> party sources was that there was a pre-existing road at this location which had become overgrown. It was considered that the laying of broken stone constituted the repair or improvement of an existing road and the development therefore falls within the scope of Class 13, Part 1 Exempted Development General, Schedule 2, Planning and Development Regulations 2001 (as amended).

In addition, on the basis of the nature and location (a significant distance from the nearest Natura 2000 site) it was not considered that screening for appropriate assessment, nor therefore appropriate assessment, is required under S.177U of said Act.

## 4.0 Planning History

**S5 16/03** referred to above. The question was raised by Mr Mulligan and the determination was the same as in the subject case. The current question is a restatement of the previous question in order to facilitate the making of this referral.

**UD 14 254** a warning letter issued to Mr Noel McBride and Ms Laura Houston in relation to unauthorised development at Toberkeen, Dungloe. A letter subsequently issued to Mr Mulligan stating that the Council had conducted a lengthy investigation into the case and had concluded the works constitute the upgrade/improvement of a pre-existing roadway and is therefore classed as an exempted development.

## 5.0 Policy Context

### 5.1. Development Plan

County Donegal Development Plan 2012-2018 is the operative plan. The site is located within an area under strong urban influence.

### 5.2. Natural Heritage Designations

The nearest Natura site is Rutland Island and Sound SAC, site code 002283, which is c200m from the subject site and includes the Atlantic shoreline.

## 6.0 The Referral

### 6.1. Referrer's Case

Mr Mulligan who made the referral has submitted a case including:

- The work the subject of the referral commenced in December 2014 and coincided with the construction of a dwelling by Mr McBride & Ms Houston in June 2015. One reason as to why the work was carried out, as proposed by the referrer, was to avoid transporting construction materials across the

recently surfaced dressed private road to the east. Transportation of construction materials for the dwelling, and since then other heavy loads to other sites, has taken place via the western private road using the link provided by the subject work / site. Initially many loads of material were required for the road construction itself. The link is now in place and can be similarly used in the future. All the heavy goods type traffic, which the subject work has generated and continues to generate, has led to deterioration in the condition of the western private road.

- Most of the arguments advanced are in relation to the link section and to its non-existence prior to the carrying out of the work. In this regard the referrer states that he walked the route, from the western end and that it came to an end at a solid wall. He states that he was also familiar with the eastern spur.
- The case is made that the construction of the road was to facilitate the construction of Mr McBride and Ms Houston's dwelling and should have been part of the details in their planning application; he would appreciate clarification on this matter.
- The change of opinion by Donegal County Council having served a warning notice is questioned.
- The case is made that the use of the link by heavy vehicles has caused the deterioration in the private road which serves the referrer's dwelling as well as other dwellings.
- The case is made that the link continues to remain in place now following completion of the construction work on the house and can continue to be used by heavy goods vehicles.
- Photographs of the construction of the roadway have been submitted and photographs of the use of the roadway have also been submitted.
- Photographs of the condition of the western private roadway have been submitted.

## 6.2. Planning Authority Response

- The planning authority has responded referring the Board to the planning report on S5 16/03.

## 6.3. Occupier's response

The occupiers Mr McBride and Ms Houston, being the parties who arranged for the carrying out of the work, have responded to the referral, including:

- The work carried out was the repair of a roadway that already existed. The route had become overgrown through disuse.
- Supporting statements have been submitted from numerous people who lived in the area or did business with residents of the area, recollecting visiting houses in this area via the link track. A now derelict dwelling, used as a temporary school in 1942/43 is stated to have been accessed via the link road, including by the teacher using a car. Delivery vehicles owned by The Cope, are stated to have used the link. Letters from former drivers who worked for The Cope have been submitted. A letter from Mr John Houston, the father of Laura Houston has been submitted. He was born in 1949 and from earliest memory the road in question provided the only vehicular access to their family home. The road they now use to access their home was in fact only a pathway at that time and it was not until a later date that this road was made accessible to vehicles.
- The case is made that there were old dwellings along the link which had no other means of access. In support of their case they have submitted maps showing the original route taken to the old Houston family home; the location of properties on Mr Mulligans laneway; the location of derelict properties on the disputed roadway; the location of properties on the secondary route to the Houston home.
- They considered the work exempted development and therefore did not include it in their planning application. Donegal County Council never wrote to them stating that the surfacing was unauthorised development. They invited them to submit evidence that the road had previously existed.

- Photographs of the condition of the western private roadway, prior to development work on their house, have been submitted. They make the case that road was in a state of disrepair prior to the commencement of their development. They challenge Mr Mulligan's assertion that the deterioration in the road condition was as a result of the construction of their house. Other factors such as the traffic to the oyster farm: a local business that provides much needed employment in the local area, are cited. There is a lot of traffic associated with this business: employee traffic and tractors with considerable weight/ One of the properties on the lane is under reconstruction and the road has experienced heavy traffic due to this.
- They assured Mr Mulligan that when work was completed on their home they would make reasonable repairs on the road. They spoke to every resident on the road and also reassured them that they would make reasonable repairs. None of the residents had an issue with this. One resident provided them with a number of loads of stone to resurface the road.
- They have responded to Mr Mulligan's photographs which they state were captured 14/8/2016. More than a year earlier on 18/7/2015 and prior to the commencement of heavy traffic to their site, they captured a number of images of the laneway Mr Mulligan lives on, which they submit. They request the Board to consider the condition of the road prior to development in comparison with its current condition.
- They refer to the caravan placed along the route and that the link track was the only possible means by which that site could have been accessed.

#### 6.4. Further Responses

The referrer (Mr Mulligan) has responded to the occupier's response, including:

- He refers to historic mapping and to various accesses serving dwellings directly from the Dungloe / Maghera road, as depicted on these maps, and to the fact that the maps do not include the link section. He comments further that there is no record of a continuous track but there can be seen a number of tracks that led directly to now derelict properties in the vicinity of the constructed road,



consequently the properties were not accessed from the constructed road location.

- Although Mr McBride and Ms Houston's have now put in writing that they would make reasonable repairs (to the private road) they continue to oppose the closure of the constructed road; this is important as it can continue to be used for heavy deliveries.
- Mr Mulligan raises the question that the road opens up a land bank for future development.
- The case is made that the description of the work as resurfacing is incorrect. An unknown but significant amount of 20 ton loads of rock and gravel were used in its construction. Part of the terrain is marsh and could never have previously supported heavy goods vehicles, or cars; over a long stretch of the route, c180m; there was nothing visible to resurface.
- Responding to the occupier's photos 18/7/2015 – he has no way of knowing when the photos were taken. The damage was as a result of the construction work.
- He refers to dates of photographs: theirs of 18/7/2015, his of 1/7/15, at the site of the planned dwelling, when a mechanical digger was in use. He regards this as evidence that work had begun on construction before their photograph was taken.
- He refers to his photos – number 1 shows a large mechanical digger that had previously driven up the road working on the disputed road date 14/12/2014. The digger is located close to a land boundary wall; photo 2 shows a different mechanical digger having been employed clearing shrubbery on 16/12/2014; and photo 3 shows a 20 ton mechanical digger commuting down the road in front of his home on 15/12/2014. He has no photos of the surface of the road prior to construction works but states that it was adequate.
- He states that he attempted to walk the track in 2008 and found that it came to an end at a stone boundary wall and that beyond that the ground was rough and marshy.

- Rebutting comments made regarding the route by which the caravan arrived, Mr Mulligan states that it likely arrived from the opposite direction.
- Regarding the assertion that a teacher drove her car along the route in 1942/1943, even now after construction of the roadway it would be extremely difficult to do so; and it is more likely that she drove along the established Houston road and along the 150m of track to the school.

## **7.0 Statutory Provisions**

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

Section 2 interpretation includes 'works'

'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

Section 3(1)

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

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

Article 6(1)

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempt 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(1)

Restrictions on exemption.

Development to which article 6 relates shall not be exempted development for the purposes of the Act—

if the carrying out of such development would –

(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,

(viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.

Schedule 2, Part 1 - Exempted Development — General

<b>Description of Development</b>	<b>Conditions &amp; Limitations</b>
<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. Previous Board Decisions on Referrals**

7.4. I have consulted the Board's database and note for the Board's consideration the following:

16.RL.2207 – that in relation to the development of a private track/path it did not come within the scope of class 6 not being development within the curtilage of a dwellinghouse and the provision of the path/track did not come within the scope of Class 13 as it did not come within the boundary of any private street, road or way and did not comprise a footpath by reason of its configuration and construction.

## **8.0 Assessment**

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

8.2. The first matter relates to whether or not the carrying out of works to develop a roadway capable of accommodating heavy machinery and delivery vehicles comprises development.

8.3. Having regard to sections 2 and 3 of the Planning and Development Act 2000, I consider that the deposition of various depths of assorted stone, along a route 3.5 to in excess of 4m width and c 350m in length constitutes 'development' within the meaning of the Act, being the carrying on of an act of construction on land. I note that this is not disputed by the parties.

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

8.4.1. The class 13 exemption which is cited in the planning authority's declaration, refers to '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 exemption is conditional on the width of any such private footpath or paving not exceeding 3 metres.

- 8.4.2. In relation to this exemption there is a conflict of evidence as to whether or not there was an existing track/path at this location over the entirety of the route. I am not in a position to determine that there was an existing track/path along the entirety of the route and I note that the burden of proof in this regard rests with the party claiming exemption.
- 8.4.3. Regarding the requirement that the works carried out are within the boundary of the street, road or way, in some locations small sections of a boundary can be seen, sufficient to indicate that the width of the work is wider than any pre-existing route.
- 8.4.4. The work carried out does not appear to me to be such as could be described as repair or improvement. I would describe the work as the development of a road bed or the construction of the base of a road.
- 8.4.5. In relation to the terms footpath or paving I note that both these terms are used to describe constructed routes that are intended for use only by pedestrians. In this regard the development as carried out is not intended for pedestrian use but for heavy vehicles. The development as constructed is not suitable for cars, (it doesn't have a wearing surface, sometimes termed a pavement) and although it is capable of being used by walkers, it is not intended for such use.
- 8.4.6. The term private is used twice in the exemption clause. The term private road is sometimes used, as it has been in this report, to identify a road which is not in the charge of the local authority by being listed on a schedule as having been taken in charge. Such roads although not 'public roads' are open to public use, with no gateway, barrier or other access control. The term private footpath or paving as used in the exemption clause appears to me to refer to work carried out within private property, which is somewhat at odds with the contention that a shared routeway existed on this site and also with the multiple ownerships of the land over which the route crosses.
- 8.4.7. The condition attached to the exemption requires that the width of any such private footpath or paving shall not exceed 3 metres. In this case the width exceeds 3m and the condition is not met, therefore the exemption does not apply.

## 8.5. Restrictions on exempted development

- 8.5.1. I note that the requirement for appropriate assessment would de-exempt an otherwise exempted development. Having regard to the nature and scale of the proposed development and nature of the receiving environment 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. This conclusion is in agreement with the planning authority's assessment that appropriate assessment is not required.

## 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 works to develop a roadway capable of accommodating heavy machinery and delivery vehicles is or is not development or is or is not exempted development is or is not development or is or is not exempted development:

**AND WHEREAS** Daniel Mulligan requested a declaration on this question from Donegal County Council and the Council issued a declaration on the 20 day of July, 2016 stating that the matter was development and was exempted development:

**AND WHEREAS** Daniel Mulligan referred this declaration for review to An Bord Pleanála on the 14 day of August, 2016:

**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) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the pattern of development in the area:

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

- (a) The works constitute development within the meaning of Section 3 of the Planning and Development Act 2000
- (b) The development does not come within the scope of Class 13 as it is not of the nature of repair or improvement, does not come within the boundary of any private street or way, is intended for use by motorised vehicles and exceeds 3m width.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the

development of a roadway capable of accommodating heavy machinery and delivery vehicles is development and is not exempted development. .

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Planning Inspector

21 March 2017

### **Appendices**

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| Appendix | 1 | Map and Photographs  |
| Appendix | 2 | Map extract showing the location of Rutland Island and Sound SAC |
| Appendix | 3 | Site Synopsis Rutland Island and Sound SAC, site code 002283     |