



An
Bord
Pleanála

Inspector's Report

RL08.RL3525

Question	Whether the erection of a gate across a lane is or is not development or is or is not exempt development
Location	Fossa, Killarney, Co Kerry
Declaration	
Planning Authority	Kerry County Council
Planning Authority Reg. Ref.	EX525
Applicant for Declaration	Kerry County Council
Planning Authority Decision	n/a
Referral	
Referred by	Kerry County Council
Owner/ Occupier	Cornelius Anthony Dennehy Donal Coffey
Observer(s)	None
Date of Site Inspection	12 th March 2017
Inspector	Mary Crowley

Contents

1.0 Site Location and Description	3
2.0 The Question	3
3.0 Planning Authority Declaration.....	3
3.1. Declaration.....	3
3.2. Planning Authority Reports	3
4.0 Planning History.....	3
5.0 Policy Context.....	5
5.1. Development Plan.....	5
5.2. Natural Heritage Designations	5
6.0 The Referral.....	5
6.1. Referrer's Case	5
6.2. Planning Authority Response.....	8
6.3. Owner/ occupier's response (<i>where not the referrer</i>).....	9
6.4. Further Responses.....	10
7.0 Statutory Provisions.....	11
7.1. Planning and Development Act, 2000.....	11
7.2. Planning and Development Regulations, 2001	11
7.3. Other (<i>as appropriate</i>).....	Error! Bookmark not defined.
8.0 Assessment.....	13
8.1. Is or is not development.....	13
8.2. Is or is not exempted development	14
8.3. Restrictions on exempted development	Error! Bookmark not defined.
9.0 Recommendation.....	15

1.0 Site Location and Description

- 1.1. The gate in question is located on a private lane south of Fossa Village, about 400m from the junction of the lane with the N72 National Secondary Road. The gate comprises a separate vehicular and pedestrian access with vertical bars, a security key pad, concrete foundations and signs related to trespassing, CCTV and private property. A set of photographs of the site and its environs taken during the course of the site inspection is attached. I would also refer the Board to the photographs and maps available to view throughout the appeal file.

2.0 The Question

- 2.1. A referral case has been received by the Board pursuant to section 5(4) of the Planning and Development Act 2000 whereby Kerry County Council have sought a determination as to *whether or not the erection of a gate across a laneway in Fossa, Killarney is or is not development or is or is not exempted development.*

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. No declaration was issued by Kerry County Council.

3.2. Planning Authority Reports

- 3.2.1. The **Local Authority Planner** in their report (6th December 2016) recommended that having regard to the application with supporting documentation received on 11th November 2016 from Dr Donal Coffey and the submission received on 29th November 2016 from Mannix & Co Solicitors on behalf of the land owner that this application be referred to the Board. There are no other **technical reports** available on the appeal file.

4.0 Planning History

- 4.1. There is no evidence of any previous planning application or appeal at this location. Reference is made to two similar cases decided by An Bord Pleanála (1)

RL08.RL3219 and (2) RL08.RL3154 in the referrers case to Kerry County council that may be summarised as follows:

RL08.RL3219 - The question related to agricultural fencing extending for several kilometres around Fenit Island. The fencing largely followed the high tide mark or a cliff edge or along sand dunes around the island, and crossed several land ownerships. Parts of the fencing extended along dunes which were part of an SAC. The Board decided that the fence was development and was not exempted development, for the following reasons:

- The erection of the fence constituted “works” and “development” per S.3(1) of PDA, 2000
- The works and use came within the terms of Schedule 2 Part 3 Class 4 of PDR, 2001
- The erection of fencing around the coastline of Fenit Island came under the restrictions on exemption per Article 9(1)(a)(x) of PDR, 2001 (land that had been habitually open to the public)
- The erection of the fencing (partly) within an SAC required AA and was therefore restricted per S.4(4) of PDA, 2000, as amended

RL08.RL3154 - The referral related to whether or not the erection of fencing on land that was previously open to the public was or was not exempted development. The site was located at a coastal beach in County Mayo, and the c.1 metre post and wire fence had been erected around a rectangular piece of land. Its purpose was apparently to facilitate the grazing of sheep. The referral was made by a Third Party consequent to the Planning Authority's declaration that the development was exempted development. The Board determined that the development was not exempted development, as follows:

- the erection of the fencing constituted “works” that were development per S.3(1) of PDA, 2000 and did not come within the scope of exempted development for the purpose of agricultural use per S.4(1)(a) or S.4(1)(l) of PDA, 2000
- the works fell within a class of exempted development under article 6 (Schedule 2 Part 3 Class 4)

- the works fell within the restrictions on exemption under article 9(1)(a)(x) of PDR, 2001 (fencing of land that had been habitually open to the public for the preceding 10 years)

5.0 Policy Context

5.1. Development Plan

- 5.1.1. The operative plan for the area is the **Kerry County Development Plan 2015-2021**. The site is within the development boundary for Fossa as identified in the **Tralee / Killarney Hub Functional Area Local Area Plan 2013 – 2019**.

5.2. Natural Heritage Designations

- 5.2.1. The site is not located within a designated Natura 2000 site. The relevant European sites are the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC (Site No 000365) and the Killarney National Park SAC (Site No 004038).

6.0 The Referral

6.1. Referrer's Case

- 6.1.1. A Section 5 Declaration is sought from Kerry County Council as to *whether the erection of a gate across a lane is or is not development or is or is not exempt development*. Maps and photos attached.
- 6.1.2. The referral relates to a gate which has been erected across a private laneway which connects the N72 at Fossa Village to the northern shore of Loch Leane.
- 6.1.3. The referral is accompanied by the Section 5 application form submitted to the Planning Authority on 11th November 2016.
- 6.1.4. **Planning Authority** – Report signed 6th December 2016 stated that having regard to the application with supporting documentation received on 11th November 2016 from Dr Donal Coffey and the submission received on 29th November 2016 from Mannix &

Co Solicitors on behalf of the land owner recommended that this application be referred to the Board.

6.1.5. **Dr Donal Coffey** - Section 5 Application was submitted to Kerry County Council by Brian Coffey on behalf of Dr Donal Coffey, Lake Isle House, Fossa, Killarney, Co Kerry (date stamp 11th November 2016). Accompanied by Section 5 Application Form, Supplementary Information and Site location maps.

- Declaration requested as to whether the erection of a gate across a private road that accesses the lake shore of Lough Leane is considered exempt development or not.
- The road is owned by three parties (map attached) (1) Donal Coffey, (2) Cornelius Anthony Dennehy and (3) Sir Maurice O'Connell.
- The private road is approximately 710m in length and is the primary public access between the N72 and the lakeshore of Lough Leane. It also serves as access to a number of houses, a hotel and undeveloped lots currently used for agricultural purposes. Cornelius Anthony Dennehy has erected a gate on this road.
- Under the Fossa Development Plan the road is not designated a specific zone (zoning map attached). From time immemorial the road has been used as a public access route to the shore of Lough Leane; historical OS maps refer (OS map attached).
- Attached a number of statements from members of the public confirming they have used this road to access the shore of Lough Leane in the ten years prior to this gate being erected. The road is referred to locally as the Coffey / Dennehy Road.
- The applicant states that there is public, personal and commercial interest in the road access.
- As part of Reg Ref 96/1965 Cornelius Anthony Dennehy sought retention for his existing dwelling. Noted that the public notices were located at the front of his house on this road as opposed to at the junction with the N72 therefore acknowledging the public use of this road.

- Interpretation of Legislation - The erection of a gate constitutes “works” and a “structure” as defined by the Planning and Development Act. The erection of the gate constitutes development as it involved the carrying out of works on land. The erection of the gate can be regarded as enclosure of land habitually open to and used by the public for access to the lake shore of Lough Leane during the 10 years prior to the erection. However due to the documented public use of this road, the erection of the gate cannot be considered exempted development under the wider provisions of Section 4 of the Planning & Development Act.
- Reference is made to two similar cases decided by An Bord Pleanála (1) RL08.RL3219 and (2) RL08.RL3154.
- It has been demonstrated that the gate erected by Cornelius Anthony Dennehy encloses land habitually open to and used by the public during the 10 years prior to the erection of the gate as a means of access to the lake shore of Lough Leane and that the erection of this gate obstructs this public access. The applicant seeks a declaration that
 - The erection of the gate on the road constitutes development under the meaning of the Planning and Development Act and
 - This development is not exempt from planning permission due to the restrictions on exemption set out in Article 9(1)(a)(x) of the Planning Regulations.

This interpretation will maintain consistency with previous An Bord Pleanála decisions (1) RL08.RL3219 and (2) RL08.RL3154 on similar developments where public access has been obstructed without the necessary planning permission being sought by the developer.

6.1.6. **Cornelius Anthony Dennehy** - Mannix & Co Solicitors on behalf of the land owner Cornelius Anthony Dennehy, Acorn Lodge, Fossa, Killarney, Co Kerry (date stamp 29th November 2016) submitted the following response to Kerry County Council:

- The issue of whether the gates are or are not exempted is already addressed by statute as set out in the Exempted Development provisions. The query cannot be adjudicated under Section 5 as the Planning Authority

has no power to come to an alternative viewpoint other than is set out in those Classes. The erection of a gate cannot be construed as the “carrying out of any works on, in, over or under land” and therefore no application in this regard can be made. The gate and lands are solely owned by Cornelius Anthony Dennehy. The referrer has no “interest” in these lands.

- Kerry County Council has neither power to adjudicate on the rights of private landowners, nor the restriction of those rights. A private road is not a public road. Any access to, or within Cornelius Anthony Dennehy property is a matter for them. This gate has been the subject matter of two Circuit Court proceedings. The dismissal of such claims is a matter of public record and the appeal against that finding of the Circuit Court (in respect of which no stay was granted) is *res judicata* and remains before the High Court. At no stage did or would the referrer accept that the land was private land, subject to no right of any person to pass over it and indeed any person claiming such a right can only be declared to have such a right, by a Court not pursuant to an application under Section 5.
- A section 5 application is not the manner by which private interests may be interfered with, nor the existence of public rights, nor the categorization of lands as a private “road” can be declared, neither may you address the “public interest” in such as application.

6.2. Planning Authority Response

- 6.2.1. Further correspondence from Kerry County Council (date stamp 22nd December 2016) set out the following:
- 6.2.2. A list of previous planning decisions affecting / adjacent to the site is provided.
- 6.2.3. Stated that the Planning Authority has not issued a declaration. A copy of all correspondence / documentation held by the Planning Authority has been forwarded to the Board.
- 6.2.4. The owner of the land in question is Cornelius Anthony Dennehy, Acorn Lodge, Fossa, Killarney, Co Kerry.
- 6.2.5. The following persons were notified by the Planning Authority:

- Cornelius Anthony Dennehy, Acorn Lodge, Fossa, Killarney, Co Kerry
- Brian Coffey, Lake Isle House, Fossa, Killarney, Co Kerry

6.3. Owner/ occupier's response

6.3.1. **Anthony Dennehy** (date stamp 13th January 2017) submitted the following as summarised:

6.3.2. The referrer cannot now force a claim for access through the owner's property which has never been open to the public as a right of way. The present owner's parents did facilitate Fossa Rowing Club access to O'Connell's boathouse. This was a private arrangement that was abused in recent years. The Circuit Court have adjudicated on and rejected claims for a private right of way and a local customary right of way.

6.3.3. The gate is within the curtilage of the owners dwelling and is exempted development. The Court decision made by Judge Terence O'Sullivan precludes the Board on making the declaration of a public right of way on the owner's property which the referrer seeks. Many of the letter submitted by the referrer from the "public" are in fact letters from members and associates of Fossa Rowing Club who do not constitute the general public. A private agreement cannot be construed as public access. Lastly Kerry County Council acknowledge that there is no public access though the owner's property when they removed the illegal signage and entered negotiations to procure and access to Lough Leane through a neighbouring property in order to develop a track around the lake.

6.3.4. The submission was accompanied by the following:

- Extract from the Criminal Law (Defence and the Dwelling) Act 2011
- Report by Ann Lucey Court for the Irish Times reporting that fossa Rowing Club on the shores of Lough Leane and established in 1893 were now closed and that the rowing clubs claim of right of way had been dismissed. "The Judge said it was with some regret he was dismissing the clubs claim for right of way and for the more unusual customary right of way".
- Fossa Local Area Plan

- Copy of Peter Colleen (plaintiff / appellant) Vs Yanny Peters, Niall Leonach, North Wicklow Times Ltd and the Attorney General (defendants / respondents) “Intention to dedicate land and acceptance of it by the public is essential requirement in creation of public right of way”
- Newspaper Article (24th October 2012) re Public walk

6.4. Further Responses

- 6.4.1. **Dr Donal Coffey** (date stamp 16th January 2016). Additional comments may be summarised as follows:
- 6.4.2. The gate remains in place and access to the lake shore of Lough Leane continues to be blocked. As such all details described in the original application to Kerry County Council are as explained in that document.
- 6.4.3. Since previous submissions the gates are still in place across the Coffey / Dennehy boreen and members of the public continue to be obstructed from accessing the lake shore in the manner they previously enjoyed.
- 6.4.4. The Dennehys have not offered any evidence or reasoning as to why the erection of the gate does not meet the meaning of development as defined in the Planning and Development Act. The Dennehys have avoided addressing whether this lands were habitually open to and used by the public during the 10 years prior to the erection of the gate as a means of access to the lake shore of Lough Leane.
- 6.4.5. The private road that connects the N72 with the lake shore of Lough Leane does not fall entirely within the Dennehys property as asserted in the letter to ~Kerry County Council. The road should be considered in its entirety as the purposes of this road is to link the N72 with the lake shore of Lough Leane.
- 6.4.6. Regardless of the whether the Coffey / Dennehy boreen is considered a road, lane, laneway or path, the restriction on exemption will apply to it if the gate has enclosed land used by the public to access the lake shore of Lough Leane for 10 years prior to the erection of the gate.
- 6.4.7. Based on the evidence presented declaration sought that:
- The erection of the gate on Road A constitutes “development” under the meaning in the P&D Act and

- This development is not exempt from planning permission due to the restrictions on exemption set out in Article 9 of the Planning and Development Regulation's, namely Article 9(1)(a)(x)

6.4.8. The submission was accompanied by supplementary information, statement from Maurice O'Connell, Dennehy letter to neighbours regarding the Coffey / Dennehy boren and Dennehy letter requesting that Dr Donal Coffey attend court as a witness.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1) of the Act defines "works" as

"Any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ..."

Section 3(1) of the Act defines "development" as follows:

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

'**Public Road**' is defined in Section 2 as having *the same meaning as the Roads Act, 1993.*

Roads Act, 1993

Section 2 (l) defined public road as *'a means over which a public right of way exists and the responsibility for the maintenance of which lies on a roads authority'.*

7.2. Planning and Development Regulations, 2001

Article 6(1) of the Planning and Development Regulations 2001, states:

"Subject to Article 9, development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted 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."

Schedule 2, Part 1 – (Exempted Development General) Class 5

“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.”

The conditions and limitations associated with Class 16 are as follows:

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, 1.2 metres.”*
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 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.”*
3. *“No such structure shall be a metal palisade or other security fence.”*

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 – inter alia

(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,

(x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility,

(xi) obstruct any public right of way

8.0 Assessment

- 8.1. Section 5 of the Planning and Development Act (as amended) provides a mechanism by which questions as to whether something is or is not development and/or is or is not exempted development can be asked. The default position per Section 32 of the Planning and Development Act is that there is a general obligation to obtain permission for development that is not exempted development. The Act defines “development”, and, along with the Regulations set out provisions for exempted development. If a development is not among these provisions, then it is not exempted development. Essentially there are three key steps, set out below, in determining whether the erection of a gate across a lane is or is not development or is or is not exempt development. Before addressing these three question and in the interest of clarity I have set out the main parties involved together with summary of the background and context of the referral.
- 8.2. The main parties in this referral are as follows:
- Kerry County Council (Referrer)
 - Anthony Dennehy (Landowner)
 - Dr Donal Coffey (Complainant to Kerry County Council)
- 8.3. Kerry County Council has sought declaration from An Bord Pleanála in respect of whether the erection of a gate across a lane is or is not development or is or is not exempt development. The complainant in this case puts forward the view that there is public, personal and commercial interest in the road access as it serves a number of houses, a hotel and agricultural lands and that the road is owned by three parties. It is further stated that the gate encloses land habitually open to and used by the public during the 10 years prior to the erection of the gate as a means of access to the lake shore of Lough Leane and that the erection of this gate obstructs this public access. The landowner in their response to the Board states that the gate and lands are in their sole ownership and that the Circuit Court have adjudicated on and rejected claims for a private right of way and a local customary right of way.

8.4. Is or is not development

- 8.4.1. The first question before the Board relates to whether or not the works carried out constitute development in accordance with the provisions of the 2000 Act. ‘Works’ as defined in the Act include any act or operation including construction and alterations. In this regard there can be little doubt that the construction of a gate across a roadway would constitute works in accordance with the definitions set out in Article 2 of the Act. The proposal therefore constitutes development in accordance with the provisions of the Act.

8.5. Is or is not exempted development

- 8.5.1. Having regard to the information available on the file and in particular the decision of the Circuit Court I accept that the lane is private property. However, a question now arises as to whether or not the development constitutes exempted development under the broader provisions of Section 4 of the Planning and Development Act 2000.

- 8.6. Schedule 2, Part 1 – (Exempted Development General) Class 5 of the Regulations 2001 (as amended) deals specifically with exempted development within the curtilage of a dwelling house and states as follows:

“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.”

- 8.7. The term curtilage is not defined under the Planning and Development Act 2000 (as amended). However, the Oxford English Dictionary defines it as ‘*an area attached to a dwelling-house and forming one enclosure with it*’. The government’s Guidelines on Architectural Heritage Protection (in the context of Protected Structures) state that curtilage can be taken to be *the parcel of land immediately associated with that structure*. In any event it is not the case that the curtilage can extend out indefinitely from a dwelling and that regard is to be had to existing boundaries, natural or man-made, in determining the curtilage.
- 8.8. It was observed on day of site inspection that the area attached to the dwelling house to the south and adjoining the private road is clearly defined by a boundary wall with a roadside grass / gravel verge between the boundary wall and the tarmac

of the road. The gate as constructed is perpendicular to the house and lies beyond the roadside boundary. While a portion of the gate crosses the grass / gravel verge to adjoin the roadside boundary wall I am inclined towards the view that the gate is out with the curtilage of the owners dwelling house in this case and therefore cannot be afforded exemption under Schedule 2, Part 1 – (Exempted Development General) Class 5 of the Regulations 2001 (as amended).

8.9. **Appropriate Assessment**

8.10. Having regard to the nature and scale of the development, the nature of the receiving environment and proximity to the nearest European site (Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC (Site No 000365) and the Killarney National Park SAC (Site No 004038)) no appropriate assessment issues arise and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

9.0 **Recommendation**

9.1. Arising from my assessment above I consider that the gate in question constitutes development that is not exempted development having regard to the restrictions set out in Article 6(1) of the Planning and Development regulations, 2001, as amended.

9.2. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether or not the erection of a gate across a laneway in Fossa, Killarney is or is not development or is or is not exempted development:

AND WHEREAS Kerry County Council requested a declaration on this question from An Bord Pleanála on the 9th December 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, as amended,
- (c) article 6(1) of the Planning and Development Regulations, 2001, as amended,
- (d) Class 5 of Schedule 2, Parts 1 of the Planning and Development Regulations, 2001, as amended

AND WHEREAS An Bord Pleanála has concluded that the erection of a gate is development and is not exempted development as it is not within or bounding the curtilage of a house,

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 erection of a gate is not development and is not exempted development.

Mary Crowley

Senior Planning Inspector

20th April 2017