

Note on origin of enforcement map re fencing at Fenit Island

1. The enforcement map produced by Kerry County Council (KCC) is based on a survey of the fencing carried out by Mr. Michael Slattery, civil engineer, which he conducted on 11 September 2011. Mr. Slattery avers in his affidavit dated 28 May 2019 that he was employed by Mr. William Parker, another landowner on Fenit Island, to survey the fencing in situ around the perimeter of the island and produce a map of same. Mr. Slattery states that the purpose of making the map was to “*mark the coastal access route*”. The fact that Mr. Slattery went on to the applicants lands as a trespasser means that his map is tainted with illegality and has no evidential value. It should also be noted that there is no coastal access route around Fenit Island.

Mr. Parker and a number of his co-agitators acknowledged in both the Circuit and High Courts following proceedings instituted by Mr. Seamas T. O’Sullivan that there was no public right of way over the lands of the applicants who are now applying for substituted consent. The Court also granted a general injunction against these agitators from entering the applicant’s lands post 12 February 2012.

2. Mr. Slattery’s map was submitted to An Bord Pleanala as part of the Section 5 application by Keep Ireland Open on 6 May 2014. It is the only map of the fencing included in this application. It should not have been considered by An Bord Pleanala because it is tainted with illegality.
3. Mr. Slattery’s map was later exhibited by Mr. Jim Fox, council engineer, at Exhibit JF1D in his affidavit dated 13 July 2018 on behalf of KCC. Mr. Fox notes that the fencing referred to in the enforcement proceedings is the same shown on the map submitted to An Bord Pleanala by Keep Ireland Open.

KCC have purported to rely on this map in the enforcement proceedings.

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4. The enforcement proceedings brought by KCC were listed for hearing on 24 January 2022. At the outset Judge Colin Daly was advised that it had been agreed between the parties that if Section 9(1)(a)(x) of the 2001 Regulations did not apply to the case the enforcement proceedings would not be sustainable. It was also agreed by the parties that 9(1)(a)(x) was the sole basis for these proceedings. On those grounds Judge Daly agreed to hear submissions on this point by way of a preliminary issue.

Having considered the parties submissions Judge Daly decided as follows:

- (i) The decision in *Dennehy & Anor. v An Bord Pleanala & Ors. [2020] IEHC 473* which completely undermined Article 9(1)(a)(x) post-dated the enforcement proceedings and he decided that he would not apply it retrospectively.

- (ii) Neither was he prepared to exercise his equitable discretion in favour of the defendants notwithstanding the fact that if KCC had brought the same proceedings after the decision in *Dennehy v An Bord Pleanala* there would have been no basis in law or in fact for doing so.

While there was a very compelling case for appealing Judge Daly's decision the applicants were advised by counsel that it was open to them to apply for a substituted consent and they decided to take this course rather than appeal.

The facts surrounding the manner in which the enforcement map was drawn and the fact that it was tainted with illegality and/or that there was no rational basis for the manner in which KCC had sought to have certain sections of the fencing declared as unauthorised development while not challenging other sections of the same fencing, were not brought before the Court because of the circumstances outlined above.

It should also be noted that Kerry County Council inspected all of the fencing in the enforcement map in April 2014 and declared it to be exempted development (see letter attached dated 15.04.14).

Conclusion

The map produced by KCC in the enforcement proceedings is entirely arbitrary, is tainted with illegality and amounts to an absurdity when viewed as a whole.