

**An  
Bord  
Pleanála**

**Board Order  
ABP-303326-18**

---

**Planning and Development Acts 2000 to 2018**

**Planning Authority: Kildare County Council.**

**Planning Register Reference Number: ED00692.**

**WHEREAS** a question has arisen as to whether the formation of a vehicular entrance from an agricultural tract of land onto Local Road L2023, and the installation of a gate structure on or near the front boundary of this land within the townland of Mylerstown, Two Mile House, Naas, County Kildare is or is not development or is or is not exempted development:

**AND WHEREAS** Ulric (Ollie) Barry care of Vincent JP Farry and Company Limited of Suite 180, 28 South Frederick Street, Dublin requested a declaration on the question from Kildare County Council and no declaration issued by the planning authority:

**AND WHEREAS** the said Ulric (Ollie) Barry referred the question for decision to An Bord Pleanála on the 28<sup>th</sup> day of December, 2018:

**AND WHEREAS**, having regard to the nature of the question and the documentation submitted as part of the referral, An Bord Pleanála decided to reformulate the question as follows -

Whether the relocation of an existing gate and gate posts to an existing agricultural entrance is or is not development or is or is not exempted development within the townland of Mylerstown, Two Mile House. Naas, County Kildare:

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

- (a) sections 2(1), 3(1), 4(2)(a)(i) of the Planning and Development Act, 2000, as amended,
- (b) Articles 6(1) and 9(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Class 9 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended,
- (d) section 2(1) of the Roads Act, 1993, as amended,
- (e) the planning history of the site,
- (f) the pattern of development in the area, and
- (g) the report of the planning inspector:

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


- (a) the development comes within the scope of sections 2(1) and 3(1), of the Planning and Development Act 2000, as amended, and constitutes development,
- (b) the development comes within the scope of Article 6(1), of the Planning and Development Regulations 2001, as amended, and also Class 9 of Part 1 of Schedule 2 to those Regulations, and

- (c) development does not come within the scope of the restrictions on exemption as set out under Article 9(1)(a)(i), (ii), (iii), and (viiB) 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 (3) (b) of the 2000 Act, hereby decides that the relocation of an existing gate and gate posts to an existing agricultural entrance within the townland of Mylerstown, Two Mile House, Naas, County Kildare is development and is exempted development.

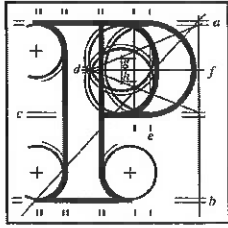
### **Matters Considered**

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

  
\_\_\_\_\_

**Stephen Bohan**  
**Member of An Bord Pleanála**  
**duly authorised to authenticate**  
**the seal of the Board.**

Dated this 17<sup>th</sup> day of June 2019.



An  
Bord  
Pleanála

## Inspector's Report ABP-303326-18

### Question

Whether the formation of a vehicular entrance from an agricultural tract of land onto Local Road L2023, within the townland of Mylerstown, Two Mile House, Naas County Kildare and the installation of a gate structure on or near the front boundary of this land, is or is not development or is or is not exempted development.

### Location

Mylerstown, Two Mile House, Naas County Kildare

### Declaration

Planning Authority

Kildare County Council.

Planning Authority Reg. Ref.

ED00692

Applicant for Declaration

Ulric (Ollie) Barry.

Planning Authority Decision

None.

### Referral

Referred by

Ulric (Ollie) Barry.

Owner/ Occupier

George and Elizabeth Boland.

**Observer(s)**

None.

**Date of Site Inspection**

25<sup>th</sup> March 2019.

**Inspector**

Susan McHugh

## Contents

1.0 Site Location and Description.....	5
2.0 The Question.....	5
3.0 Planning Authority Declaration.....	6
3.1. Declaration.....	6
3.2. Planning Authority Reports.....	6
4.0 Planning History.....	6
5.0 Policy Context.....	7
5.1. Development Plan.....	7
5.2. Natural Heritage Designations.....	7
6.0 The Referral.....	7
6.1. Referrer's Case.....	7
6.2. Planning Authority Response.....	9
6.3. Owner/ occupier's response.....	10
6.4. Referrer's Response.....	11
6.5. Owner/ occupier's further response.....	12
7.0 Statutory Provisions.....	13
7.1. Planning and Development Act, 2000 (as amended).....	13
7.2. Planning and Development Regulations, 2001, as amended.....	14
7.3. Roads Act, 1993.....	15
8.0 Assessment.....	16
8.2. Is or is not development.....	17
8.3. Is or is not exempted development.....	18
8.4. If Exempted Development, are there any restrictions to this exemption? ....	18
8.5. EIA Assessment.....	20

8.6. Precedent Cases .....20

9.0 Recommendation .....20

## **1.0 Site Location and Description**

- 1.1. The site is located in the rural area of Mylerstown, c.1.5km east of the village of Two Mile House, Naas, Co. Kildare.
- 1.2. It is c.300 m east of Mylerstown Crossroads along the old Naas-Kilcullen Road which is now Regional Road R448. It is on the southern side of the Local Road L2023 where a speed limit of 60km/h applies.
- 1.3. The entrance subject to the referral consists of an agricultural gate, located directly opposite a residential dwelling and vehicular entrance. To the west lies a gated entrance and driveway serving two residential properties the larger of which is home to the Referrer.
- 1.4. A number of residential dwellings are located to the north of the L2023 with commercial developments located at the junction with the R448.
- 1.5. The metal entrance gate to the field, is approx. 2.8m in width and is attached to two wooden posts approx. 1.35m in height. It is set back from the edge of the public road by approx. 6.4m with a grass verge between the road and the gate. The unmarked road carriageway along this section of the L2023 is approx. 5.7m in width.

## **2.0 The Question**

- 2.1. Under section 5(3)(b) of the Planning and Development Act 2000, Vincent JP Farry, (Agent on behalf of Ulric (Ollie) Barry), has sought a decision from the Board as to whether the formation of a vehicular entrance from an agricultural tract of land onto the Local Road L2023, within the townland of Mylerstown, Two Mile House, Naas County Kildare and the installation of a gate structure on or near the front boundary of this land, is or is not development or is or is not exempted development.



### 3.0 Planning Authority Declaration

#### 3.1. Declaration

On 1<sup>st</sup> November 2018, a Section 5 declaration application was submitted to Kildare County Council on behalf of the Referrer Ulric (Ollie) Barry by Vincent JP Farry and Co. Ltd. Planning and Development Consultants, requesting whether certain matters are or are not exempted development. The Council failed to issue a declaration within the appropriate period set out in Section 5 of the Act. No declaration, therefore, was made.

#### 3.2. Planning Authority Reports

None.

##### 3.2.1. Other Technical Reports

None.

### 4.0 Planning History

4.1. There is no relevant planning history pertaining to the subject site.

4.2. *Adjoining Site to the West and Referrer's Home (Mr. Barry)*

**P.A. Reg. Ref. 06/41:** Permission granted February 2007 for (a) 5 bedroom 2 storey house, (b) double garage with sheds, (c) EPS Bison effluent treatment plant system and percolation area, (d) all associated site development works to include site entrance, roads, services to Miriam and Ulric Barry.

Condition No. 16 states '*Within 3 months from the date of completion the entrance to the existing dwelling on the landholding shall be closed up and replaced with a continuous deciduous hedge interspersed with broad-leaved deciduous trees, at 4 metre centres along the road boundary inside the line of sight identified on the site layout plan.*

*Reason: In the interests of residential amenity.*

**P.A. Reg. Ref. 99/2105:** Permission **granted** July 2000 for (a) two storey extension to rear of existing bungalow and (b) replacement septic tank with effluent treatment system to Susan Bates (former owner).

#### 4.3. *Enforcement*

**UD7028:** Enforcement notice issued May 2018. (No details on file)

### 5.0 **Policy Context**

#### 5.1. **Development Plan**

The relevant Development Plan is the Kildare County Development Plan 2017-2023.

#### 5.2. **Natural Heritage Designations**

None of relevance.

### 6.0 **The Referral**

#### 6.1. **Referrer's Case**

6.1.1. The referral to the Board has been submitted by Vincent JP Farry and Co. Ltd. Planning and Development Consultants, on behalf of Mr. Ulric (Ollie) Barry of 'Murraville House', Mylerstown, Two Mile House, Naas, Co. Kildare. It can be summarised as follows:

- The Referrer notes that the referral site was purchased by Mr. Barry at the same time that he bought the contiguous land on which the P.A. granted permission for his home under P.A. Reg. Ref. 06/41, and that he owned it up to the year 2016, when it was sold to the present landowner.
- The tract of land which is located to the immediate east of the driveway which serves his house was not served by an independent vehicular entrance between the years 2006-2016, and was accessed for the duration of this

period through an intra-allotment gate which is located in the agricultural fence which demarcates the western boundary of this tract of land.

- There was never any need for this land to have been served by an independent entrance, during his ownership of this property or indeed, prior to his acquisition of this land.
- A streetview image from 2010 recorded by google shows a continuous bank of dense natural vegetation along the roadside boundary of the referral site with Local Road L2023.
- It is noted how the Council's letter to Mr. Barry of 18<sup>th</sup> October 2018 states that '*..the entrance...has been in place at its current location since the 1980's*' and in this context, the Referrer highlights the fact that the present request seeks to establish, not whether this access and gateway is enforceable, but rather whether it requires consent.
- Invite the P.A. to conclude that there are three routes by which a structure or a use can be lawful (viz. being established, permitted or exempted), and the fact that his access may have been extant in the 1980' is not a consideration for the purpose of this referral.
- Contend that a development which does not pre-date planning control or which does not have the benefit of a consent or which is not covered by a statutory or regulatory entitlement is unlawful and requires permission. There is no legal provision which renders a development lawful merely because it was in existence in the 1980's.
- It is noted that in (Kildare County Council -v-Goode), as noted by Garrett Simons in Planning and Development Law that '*the concept of abandonment equally applies to development by way of a material change of use, as to the development by way of works*'.
- Contend that the Referrer's own conduct between 2006-2016, specifically in only using the intra-allotment gateway, that Mr. Barry never used any direct roadside access which may have pre-dated his ownership of the site. He therefore abandoned any lawful rights to use any entrance which may have existed in the 1980's.

- Article 9(1) of the Planning and Development Regulations, 2001 (as amended) envisages the creation of an entrance in certain circumstances, and notes how the Council correspondence does not seek to rely on such a provision when dealing with Mr. Barry's initial complaint. Importantly, this provision de-exempts works for the 'formation, laying out or material widening of a means of access to a public roads the surface carriageway of which exceeds 4 metres in width' and as Local Road L-2023 is wider than this stipulated measurement, the entrance is not exempt by reason of this clause.
- Asserts that the erection of a gate comprises works and constitutes development. The creation of an access from a public road of over 4 metres in width comprises a material change in the use of the land and that permission is thus required for this access and gate.

## 6.2. Planning Authority Response

The Planning Authority response can be summarised as follows;

- *Whether or not the proposed development, notwithstanding other factors such as compliance with conditions of planning permission, would constitute development which might be exempted development under the provisions of the relevant legislation* - It would not be appropriate for the P.A. to comment in the abstract, in circumstances where the referral clearly relates to a particular development where other matters are directly relevant to the question of the exemption.
- Neither party disputes the fact that, in accordance with the provisions of article 9(1)(a)(ii) of the Planning and Development Regulations 2001-2018, 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 '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'. At this point there is no significant benefit in the planning authority restating or confirming this general provision without having regard to the specifics of the case.
- *Whether the proposed development would contravene conditions attached to a grant of planning permissions* - The matter was previously considered by the P.A. in its assessment of a complaint regarding an alleged unauthorised development at this

location (UD7028). The owner of the subject property has been engaging with the P.A. to address matters raised in that Enforcement Notice.

- The P.A. has been engaged in correspondence with the Referrer in the current instance in relation to progress on the Enforcement Notice. Given that there is still an outstanding Enforcement Notice in relation to this entrance, it would be inappropriate for the P.A. to engage in any parallel assessment of the legitimacy of the subject entrance which might prejudice the successful resolution of that ongoing enforcement case.
- *Whether the development is or is not a pre-1964 development* – This would appear to be a matter which requires a ‘finding of fact’ in circumstances where competing assertions have been put forward by both parties. Parties on both sides have submitted contrary claims as to whether or not there was a pre-existing entrance at this location and it is suggested that the Board must now weigh these competing assertions and make a finding of fact in relation to this question.
- *Whether any pre-existing entrance had or had not been abandoned* – This question can only be fully addressed in light of a determination on the previous question. Furthermore, any consideration of a potential abandonment must take into consideration the intention of the owners/occupiers and this matter has not been comprehensively addressed by either party in their submissions.

### 6.3. Owner/ occupier’s response

6.3.1. A response to the Section 5 Declaration was submitted by Maguire and Associates on behalf of the owners George and Elizabeth Boland of Hillside House, Two Mile House, Naas, Co. Kildare. This can be summarised as follows;

- *History of site entrance* – Five no. sworn affidavits from people who have lived in the area and who previously owned and farmed the land prior to the purchase in 2006 by the applicant were submitted along with Folio Map KE66185F. These include the following;
  - Patrick O’Toole, Stephenstown, Two Mile House, Naas, Co. Kildare, is a landowner from the area.

- Susan Bates, Ballinard, Fethard, Clonmel, Co. Tipperary was the previous owner of the overall landholding which was purchased by her from Martin Kennelly in 1990. The lands subject of this referral was sold to Ulric Barry and Miriam Barry in 2006.
- Martin Kennelly, Mylerstown Stud, Two Mile House, Naas, Co. Kildare was the previous owner who sold to Susan Bates.
- Sean Kennelly, Mylerstown Stud, Two Mile House, Naas, Co. Kildare son of Martin Kennelly.
- Liam Dowling, Mullacash, Naas, Co. Kildare is an Agricultural Contractor from the immediate vicinity of the site.
- *Current ownership of lands in the area* – Copies of folios with maps of landholdings of Ulric Barry and Miriam Barry.
- *P.A. Reg. Ref. 06/41* – Copy of planning permission and commencement notice attached noting that a commencement notice was validated on 11<sup>th</sup> September 2008. Notes that certain conditions have not been complied with including condition no. 16.
- *Response to Vincent JP Farry and Co. Ltd report* – The site entrance with gate has been in existence since the 1950's and has been in continuous use over this period.

#### 6.4. Referrer's Response

6.4.1. Vincent JP Farry and Co. Ltd. Planning and Development Consultants, on behalf of Mr. Ulric (Ollie) Barry made a further response which can be summarised as follows:

- Notes that certain points raised are irrelevant to the case.
- Comments on the substance of the affidavits submitted, and submits that none of the documents show that this entrance predates 1963 and instead refer to the 1980's-2000's.
- Contends that the concept of abandonment equally applies to both works and material changes of use and suggest that given the Referrer abandoned the use of any entrance which may historically have existed before his occupation of this land

and given that Mr. Boland erected the gate which currently stands on the land, at some time in the past 1-3 years, it is submitted that the resumption of development which has been abandoned requires planning permission.

#### **6.5. Owner/ occupier's further response**

The owners George and Elizabeth Boland made a further submission which can be summarised as follows;

- Martin Kennelly in his affidavit dated 11<sup>th</sup> December 2018 states that he owned the said lands since in or about 1950, that he always used this entrance to gain access with his farm machinery and animals. He sold this plot of land to Susan Bates in or about 1990. This is corroborated by his son Sean Kennelly and by Liam Dowling. It is further corroborated by Patrick O'Toole who notes that this is the same gate that was 'rehung' by George Boland.
- Ms Bates purchased these lands from Martin Kennelly in or about 1990. In her affidavit it is stated that the entrance was used by her and others with her permission to gain access to the lands. It is alleged that Ms Bates' drawings attached to P.A. Reg. Ref. 99/2105, do not show the gate in situ, when in fact no gates appear at all on the drawings, and the value therefore of this observation is questionable.
- The lands were purchased by Ulric Barry and Miriam Barry in or about 2006. It is not alleged by the Referrer's that they removed the gate during the course of their ownership merely that they accessed the lands by means of another entrance closer to their house.
- George Boland purchased the lands from Mr. and Mrs. Barry by way of a receiver sale in or about 2016, at which time the gate in question was present although somewhat overgrown, photos attached. Following the purchase of the lands George Boland moved the gate further back into the field by 3 metres for reasons of traffic safety, photos attached.
- The gate is 2.8 metres wide and not, as alleged on behalf of Mr. and Mrs Barry, in excess of 4 metres in width. A photograph of the gate indicates a blacksmiths gate.

- The reference made in the submission of Mr. and Mrs. Barry dated 1<sup>st</sup> November 2018 that condition 16 of their planning permission Reg. Ref. 06/41 requires the entrance to the existing dwelling to be closed up, does not refer to this entrance and is immaterial.
- There has been an entrance to this field at this location since at least 1950 and, as such, it predates planning control. The assertion on behalf of Mr. and Mrs Barry that this entrance only existed since the 1980's is not substantiated.
- There is no evidence in any of the affidavits that the gate was ever physically removed during the tenure of any of the previous owners up to 2006, or that the gate was removed by Mr or Mrs Barry during their tenure as owners.
- It is contended on behalf of Mr. and Mrs Barry that they abandoned the entrance. However, they instead preferred to use an entrance closer to their house to access the field as opposed to a deliberate intention to abandon one entrance altogether.
- It is asserted that the Referrer's are asking the Board to interpret their conduct as being consistent with an intention to abandon without ever actually having held that intention. If they did not hold that intention, there cannot have been any abandonment.

## 7.0 Statutory Provisions

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

#### Section 2

*“structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any 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,”*

#### Road

*“road” has the same meaning as in the Roads Act, 1993;”*

#### Section 2(1)



“works” includes any act or operation of construction, excavation, demolition, extension, alterations, repair or renewal and ....”

### **Section 3(1)**

“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(2)(a)(i)**

“The Minister may by regulations provide any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that –

- (i) By reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or ....”

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

### **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.”

### **Schedule 2, Part 1- (Exempted Development General) Class 9**

The relevant section of the Regulations which is referred to herein is Class 9. Class 9 and its conditions and limitations are as follows:

Column 1 Description of Development	Column 2 Conditions and Limitations
Sundry Works CLASS 9 The construction, erection renewal or replacement, other than within or bounding	The height of any such structure shall not exceed 2 metres.

the curtilage of a house, of any gate or gateway.	
---	--

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

“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,*

*(vii B) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,*

### **7.3. Roads Act, 1993**

#### **Section 2(1)**

*““ public road” means a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority;”*

*““ road” includes-*

- (a) any street, lane, footpath, square, court, alley or passage,*
- (b) any bridge, viaduct, underpass, subway, tunnel, overpass, overbridge, flyover, carriageway (whether single or multiple), pavement or footway,*
- (c) any weighbridge or other facility for the weighing or inspection of vehicles, toll plaza or other facility for the collection of tolls, service area, emergency*

- telephone, first aid post, culvert, arch, gully, railing, fence, wall, barrier, guardrail, margin, kerb, lay-by, hard shoulder, island, pedestrian refuge, median, central reserve, channelliser, roundabout, gantry, pole, ramp, bollard, pipe, wire, cable, sign, signal or lighting forming part of the road, and*
- (d) any other structure or thing forming part of the road and-*
- (i) necessary for the safety, convenience or amenity of road users or for the construction, maintenance, operation or management of the road for the protection of the environment, or*
- (ii) prescribed by the Minister;”*

## **8.0 Assessment**

- 8.1.1. It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the development in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.
- 8.1.2. The main parties to this referral are as follows;
- Ulric (Ollie) Barry (Referrer)
  - Kildare County Council
  - George and Elizabeth Boland (Landowner)
- 8.1.3. Ulric (Ollie) Barry has sought declaration from An Bord Pleanála in respect of whether the formation of a vehicular entrance from an agricultural tract of land onto the Local Road L2023, within the townland of Mylerstown, Two Mile House, Naas County Kildare and the installation of a gate structure on or near the front boundary of this land, is or is not development or is or is not exempted development.
- 8.1.4. Many of the matters raised in correspondence to this referral such as inter alia land ownership, unauthorised development, and planning applications etc, do not in my view concern the specific question that is before the Board.

- 8.1.5. From my site inspection, and as indicated on the submissions on file and attached photographs, it is clear that no recent work has taken place at the entrance. I am also satisfied on the basis of the submissions that the works involved related to an existing and established entrance, and do not result in the creation of a new entrance. The owner confirms that there had previously been a gate at this entrance which was set back 3m from its original position.
- 8.1.6. The issue of abandonment of the use of the entrance in my opinion is not a material consideration in this case, as the land which the entrance serves has remained in agricultural use. I also accept the argument made by the owner that the land which had been previously accessed via a separate entrance was more by way of convenience, but does not change the fact that there was an original entrance which became overgrown.
- 8.1.7. From my assessment and for clarification, I consider that
- (a) An existing gate and gate posts have been relocated at an entrance serving agricultural fields,
- 8.1.8. I therefore consider that the question asked by the Referrer in relation to the creation of a new entrance to be misleading and should be rephrased. I propose to redefine the question as to 'whether the relocation of an existing gate and gate posts to an existing agricultural entrance is or is not development and is or is not exempted development'.

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

- 8.2.1. The first question before the Board relates to whether or not the works comprises development. Having regard to sections 2 and 3 of the Planning and Development Act 2000, as amended I consider the works to the vehicular entrance constitutes 'development' within the meaning of the Act, being the carrying out of an act of construction (i.e. 'works') on land. I note that this is not disputed by the parties.

### 8.3. Is or is not exempted development

- 8.3.1. Development can be exempted from the requirement for planning permission by either Section 4 of the Planning and Development Act, 2000 (the Act), or Article 6(1) and 9(1) of the planning and Development Regulations 2001 (as amended) (the Regulations).
- 8.3.2. Section 4(1) of the Act sets out provisions in relation to exempted development. There is no exemption under Section 4.
- 8.3.3. Article 6(1) Class 9 (Schedule 2, Part 1) refers to 'the construction, erection renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway'. The condition limitation in Column 2 is that 'the height of any such structure does not exceed 2 metres'.
- 8.3.4. I consider that the entrance gate and gate posts, are less than 2 metres in height, and fall within the terms of Class 9.

### 8.4. If Exempted Development, are there any restrictions to this exemption?

- 8.4.1. A further question arises as to whether or not if any of the provisions as set out in Article 9(1) of the Planning and Development Regulations 2001 (as amended) apply in this instance. Article 9 de-exempts various development that would otherwise be exempted under Article 6. Sections relevant to this referral are discussed below.
- 8.4.2. **Article 9(1)(a)(i)** de-exempts development where it would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

It is noted by the Referrer that condition no. 16 of P.A. Reg. Ref. 06/41 required the closure of an entrance to an existing dwelling. This is however not relevant in any way to the subject referral. The development does not, therefore, come within the scope of Article 9(1)(a)(i).

- 8.4.3. **Article 9(1)(a)(ii)** de-exempts development where it would result in the creation / widening of access to public road of more than 4 metres in width.

Both parties dispute whether there was a pre-existing entrance gate. The Referrer relies on a streetview image from 2010 recorded by google which shows a continuous bank of dense natural vegetation along the L2023. I have included this image in the photographs attached and can confirm the date and description of the site.

The owner however, has submitted photographic evidence of the same gate which it is claimed had become overgrown, and affidavits which testify that there has been a gate at this location for a considerable time. I am satisfied on the basis of the information submitted by the owner in this Referral and noting the style of the metal gate, that on balance an agricultural entrance gate is established at this site. I am also satisfied that the relocation of the gate (approx 2.8m in width) and gate posts 3m back from its original position, does not result in the creation of a new access or result in the widening of the access.

I am satisfied that the works in question as decided above relate only to the relocation of an existing gate and gate posts to an existing agricultural entrance. I also consider that there has been no material change of use of the land which has remained in agricultural use.

The development does not, therefore, come within the scope of Article 9(1)(a)(ii).

**8.4.4. Article 9(1)(a)(iii)** de-exempts development where it would endanger public safety by reason of a traffic hazard or obstruction of road users.

It is noted by the owner that there are adequate sightlines in both directions along the L2023. Having inspected the site, I would concur with the owner and note that, by virtue of the set back and traffic speed limits along this section of the L2023, that the entrance does not constitute a traffic hazard. The development does not, therefore, come within the scope of Article 9 (1)(a)(iii).

**8.4.5. Article 9(1)(a)(viiB)** de-exempts development where the development would require an appropriate assessment. Having regard to the nature and small scale of the development, and to the 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. It would, therefore, be reasonable to conclude that the provision of Article 9(1)(a)(viiB) would not apply in this instance.

## 8.5. EIA Assessment

Having regard to the nature and scale of the development there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

## 8.6. Precedent Cases

The following precedent referrals are also of relevance:

- **93.RL.3538** (January 2018) - The question here referred to whether 'the erection of a new gate and gate post, and the replacement of an existing gate to existing vehicular entrances is or is not development and is or is not exempted development along an agricultural lane in Coolbunia, Cheekpoint, Co. Waterford. The Board decided that under Classes 9 and 11 of Part 1 of Schedule 2 to Article 6 of the Planning and Development Regulations 2001 (as amended), the works were exempted development.
- **15.RL2640** (February 2010) – This referral related to the erection of a new gate, gate posts and planted earth bank at an agricultural site near Dundalk, Co. Louth. The Board decided that under Classes 9 and 11 of Part 1 of Schedule 2 to Article 6 of the Planning and Development Regulations 2001 (as amended), the works were exempted development.

## 9.0 Recommendation

- 9.1. Arising from my assessment above I consider that the relocation of an existing gate and gate posts to an existing agricultural entrance constitutes development that is exempted development.

I recommend that the Board should decide this referral in accordance with the following draft order (noting the re-formulated question as advised in section 8.1.8 above).

**WHEREAS** a question has arisen as to whether the relocation of an existing gate and gate posts to an existing agricultural entrance is or is not development or is or is not exempted development:

**AND WHEREAS** Ulric (Ollie) Barry requested a declaration on this question from Council and the Council failed to issue a declaration within the appropriate period:

**AND WHEREAS** Ulric (Ollie) Barry referred this declaration for review to An Bord Pleanála on the 28<sup>th</sup> day of December, 2018:

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

- (a) Sections 2(1), 3(1), 4(2)(a)(i) of the Planning and Development Act, 2000, as amended,
- (b) Articles 6(1) 9(1) of the Planning and Development of the Planning and Development Regulations, 2001, as amended,
- (c) Class 9 of Part 1 of Schedule 2 of the said Regulations,
- (d) Section 2(1) of the Roads Act, 1993,
- (d) the planning history of the site,
- (e) the pattern of development in the area,
- (f) the Report of the Planning Inspector.

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

- (a) The development comes within the scope of Sections 2(1) and 3(1), of the Planning and Development Act 2000, as amended, and constitutes development,



- (b) The development comes within the scope of Article 6(1), of the Planning and Development Regulations 2001, as amended, and also Class 9, Part 1, Schedule 2 to those Regulations, and
- (c) development does not come within the scope of Article 9(1)(a)(i), (ii), (iii), and (viiB) of the said Regulations 2001,

**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 relocation of an existing gate and gate posts to an existing agricultural entrance is development and is exempted development.



---

Susan McHugh  
Planning Inspectorate

13<sup>th</sup> May 2019