

Hillside House  
Twomilehouse  
Naas  
Co. Kildare

Secretary  
An Bord Pleanála  
64 Marlborough Street  
Dublin 1

25<sup>th</sup> March 2019

Re **An Bord Pleanála referral reference ABP 303326-18**  
**Applicant Ulric Barry**  
**Planning Authority Kildare County Council**

Dear Sir,

We refer to the above matter and your letter of the 1<sup>st</sup> day of March 2019 enclosing the submission on behalf of Ulric Barry.

### 1. Introduction

Martin Kennelly avers in his affidavit dated the 11<sup>th</sup> day of December 2018 that he owned the said lands since in or about 1950. He always used this entrance to gain access with his farm machinery and animals. Critically, he does not say that this “entrance” is the one used since the 1980s but that the “existing gate” is the one used since the 1980s. Mr Kennelley sold this plot to lands to Susan Bates in or about 1990.

Mr Kennelly’s version of events 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 myself.

Ms Bates purchased these lands from Martin Kennelly in or about 1990. In her affidavit, she avers 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 planning application ref. 99/2105, do not show the gate in situ. In point of fact, no gates appear at all on those drawings, and the value of this observation is therefore questionable.

The lands were purchased by Ulric Barry and Miriam Barry in or about 2006. It is not alleged by the Referrers that they removed the gate during the course of their ownership, merely they accessed the lands by means of another entrance closer to their house.

We purchased the lands from Mr and Mrs Barry by way of a receiver sale in or about 2016. The gate in question was present when I first attended to inspect the lands and I accessed same by use thereof. At "Appendix A" hereof, I attach a photograph of the gate as I found it. The hedgerow was somewhat overgrown, but the gate was demonstrably in place at that time. Following our successful purchase of the lands, I moved the gate further back into the field by three metres for reasons of traffic safety. At "Appendix B" hereof, we attach two photographs of the gate in its present condition and position. One of the original gate posts upon which the gate was hanging when we purchased the lands have been marked for ease of reference. It was in this context that the gate was "rehung", as noted by Mr O'Toole. At no time was the gate removed or the entrance otherwise physically changed prior to my ownership.

## **2. The Gate**

The gate itself is 2.8 metres wide and not, as alleged on behalf of Mr and Mrs Barry, in excess of 4 metres width. At "Appendix C" hereof, I attach a photograph of the gate which was measured by our engineers Maguire and Associates Chartered Engineers. It is a blacksmiths gate made in a forge and riveted. This variety of gate has not been made in Ireland for about a century. This is the only access to these lands from the highway and it is not otherwise accessible except by entering private lands, which we do not have permission to do.

For the avoidance of any doubt, the reference made in the submission of Mr and Mrs Barry dated the 1<sup>st</sup> day of November 2018 that condition 16 of their planning permission, ref. 06/41, requires the entrance to the existing dwelling be closed up, does not refer to this entrance and is immaterial hereto.

### **3. Submission**

There has been an entrance to this field at this location since at least 1950 and, as such, it predates planning control. The assertions on behalf of Mr and Mrs Barry that this entrance only existed since the 1980s are not substantiated by any reasonable reading of the affidavits furnished on my behalf from people with first hand and intimate knowledge of the gate.

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. Indeed, the evidence is that the gate is of some antiquity and was in regular use up to that time.

There is no evidence 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. Abandonment is predicated on an intention to so abandon. The submission made on behalf of Mr and Mrs Barry is to the effect that they preferred to use an entrance closer to their house to access the field. What is expressly not said in any of their submissions is that they intended to abandon this entrance. Certainly, there is no physical evidence that they expressly intended to affect an abandonment, for example, by the removal of the gate. Had they genuinely intended to abandon this entrance, the matter could have been put beyond all doubt by the removal of the gate. As matters stand, the actions of the Referrers are at best equivocal and may just as easily be interpreted as a mere preference for one means of access over another, as opposed to a deliberate intention to abandon one entrance altogether.

It cannot go unobserved, that had the Referrers actually intended to abandon the entrance during their tenure as owners, it was open to them to say so explicitly in their submissions. Instead, they are asking the Bord to infer such an intention from their conduct alone. While intentions may be inferred from actions, this is more appropriately done where the people whose actions are being considered are no longer available to comment on their own intentions. This critically undermines the Referrers' argument: They are asking the Bord to interpret their

conduct as being consistent with an intention to abandon without their ever actually having held that intention. If they did not hold that intention, there cannot have been any abandonment.

#### 4. Conclusion

Contrary to the allegations made, we did not form this access point. It was present when we first attended the lands to walk same in connection with our eventual purchase of same.

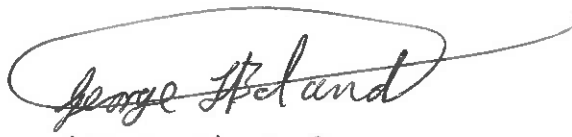
The available evidence from the pre-2006 owners is that there has been an entrance here since at least 1950. The existing gate is that which has been there since the 1980s. I moved the gate back 3 metres into the field for the purposes of traffic safety. The gate is 2.8 metres wide and not "over 4 metres in width".

The Referrers' actions in preferring to use another gate much more convenient to their house is at best open to interpretation but nowhere is it expressly submitted that they intended to affect an abandonment. In the absence of that expressed intention, which in their submission they could have said they held, there cannot have been any abandonment. The Referrers make no allegation that they themselves or anyone acting on their behalf removed the gate during their ownership.

Yours faithfully

George Boland

Elizabeth Boland.



George Boland  
Elizabeth Boland

Appendix A



Photograph of gate in original position (No 3)

---

Appendix B



original gate post

2.8m

3m



Appendix B

⑥



one of the original gate posts

# PHOTOGRAPH OF EXISTING GATE

Appendix C

← GATE WIDTH = 2.8 METRES →

