

VINCENT JP FARRY AND CO LTD

Planning and Development Consultants

Suite 180
28 South Frederick Street
Dublin 2

Phone 01 677 8180
Mobile 087 288 7311
vincentfarry@gmail.com

22 February 2019

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1

DEVELOPMENT AT MYLERSTOWN TWO MILE HOUSE CO. KILDARE AN BORD PLEANALA REFERRAL REFERENCE NUMBER 303326-18

Dear Sir

We refer to the above and we confirm that we continue to act for Mr. Ulric (Ollie) Barry in this case.

We acknowledge receipt of the Board's letter dated 5 February 2019, which was addressed to Mr. Barry directly and we hereby take this opportunity to respond to the attachment to that correspondence, comprising a submission by Maguire & Associates and a number of third party statutory declarations.

1. Introduction

The sole question which is before the Board in the context of this referral comprises whether the formation of a particular vehicular entrance and gate, as detailed in our original submission, comprises development or exempted development and at no stage does the rebuttal submission on behalf of Mr and Mrs Boland suggest that the creation of this access is not development. It is thus common case between the parties that the subject entrance is capable of falling within the scope of planning control.

Moreover, no part of this latest submission suggest that this feature satisfies the exempted development provisions in section 4 of the Planning and Development Act, 2000 (as amended) or in articles 6-9 of the Planning and Development Regulations, 2001 (as amended). Indeed, we highlight, in this particular regard, the *dicta* of Finlay CJ. in *Dillon v. Irish Cement Ltd.* in which he opined that:

'...the exemption Regulations....put certain users or proposed developers of land into a special and in a sense privileged category.....these Regulations should be strictly construed in the sense that for a developer to put himself within them he must be clearly and unambiguously within them'.

The kernel of the landowner's rebuttal report is that a vehicular entrance to the subject field, which is contiguous to our client's home, has been in existence for a material period and the defence which is now being presented is not that this feature does not constitute development, or that it is exempted development, but rather that no work or change of use have taken place thereon since 1 October 1964.

Before turning to address this issue, we note how certain points which have been marshalled by Maguire & Associates are wholly irrelevant to this case. For example, the cover letter of 29 January 2019 to the Board notes, under para. (b) that '*We have examined the Folio KE50964F in respect of 14 Jigginstown Green and note that the current owner of this property is Miriam Kehoe*'. Given that this referral falls to be decided against planning law, we cannot identify any circumstance in which this statement might be relevant, in any way, to the question of law which the Board must now decide.

2. The Formation of An Access

It is accepted that the field which abuts the referrer's home is served by an existing entrance and the key issue comprises the timing of its creation. Although Mr. Martin Kennelly indicates, in his statutory declaration, that he owned this particular property since the 1950's decade, he also swears that '*this existing gate*' has only served the '*holding of George and Elizabeth Boland since the 1980's*'. It was open to Mr. Kennelly to have testified as to the existence of this feature prior to 1 October 1964 and the fact that he expressly and explicitly refrained from doing so is somewhat relevant to this case.

This opinion accords with the affidavit which was sworn by Sean Kennelly who states that he '*farmed part of the lands...in the 1980's...I always used this entrance gate to gain access to the lands*'. Importantly, however, this particular deponent only became aware of the subject feature in the 1980's decade and cannot offer first-hand testimony as to the time when this feature was originally provided.

Equally, to the degree that Mr. Liam Dowling's familiarity with this site was connected to the ownership of this property by Martin Kennelly ('*...have worked for the previous owner Martin Kennelly...*'), the opinion which is expressed in this affidavit, to the effect that '*this has been the existing gate to this holding of George and Elizabeth Boland since the 1980's*' is accepted herein.

The testimony of Susan Bates relates wholly and exclusively to the post 1990 period (when, referring to this field, she avers '*...I purchased same from Martin Kennelly in or around 1990*') and no part of her affidavit suggests that the entrance was created in a particular year. Although she states '*I sold the lands...to Ulrick Barry and Miriam Barry in 2006 and the gate was existing at that point in time*', this view does not accord with our client's recollection of events and indeed, her testimony is wholly inconsistent with the drawings which she lodged with Kildare County Council under application reg. 99/2105 (which, as previously noted, did not indicate the presence of the subject gateway at that time).

While the above deponents discuss the access which is the subject of this referral, Mr. Patrick O'Toole's alludes vaguely to the fact that '*there was always an entrance to the land purchased by George and Elizabeth Boland by means of a gate...*' but his evidence does not indicate the year in which this feature was provided. Importantly, his affidavit notes '*this...gateway...has been re-hung by George Boland*' and this is wholly consistent with our submission, for the reason set out below.

3. Submission

Although the landowner has submitted a number of statutory declarations in support of his defence, none of these documents show that this entrance pre-dates planning control. Although we have not invited the Board to consider whether this feature is lawful or otherwise, we note how '*unauthorised structure*' means a structure other than '*...a structure which was in existence on 1 October 1964...*'.

The affidavits by Martin Kennelly, Sean Kennelly, Liam Dowling and Susan Bates all relate to the post 1964 period, focusing on the 1980's – 2000's decades and no part of the evidence offered in these submissions suggests that this entrance does not require permission by reason that it pre-dates planning control. Indeed, even if such a feature had existed prior to Mr. Barry's acquisition of the referral property, it was removed at some time prior to Mr. Boland's purchase of this land (given the candid confession in the affidavit by Mr. O'Toole to the effect that the current landowner re-hung the gate).

We have already indicated that, during the period of his ownership of the referral site, Mr. Barry accessed this field via a gateway which is located in the intra-allotment boundary fence which is depicted in imagery which forms part of our earlier submission and which still separates these adjacent, residential and agricultural sites. Especially given that it would have been highly illogical for our client to drive out onto the public road before turning into any separate field access which may have served this site, he clearly abandoned any such entrance which may previously have existed.

This approach wholly accords with street-view imagery which has already been tabled by the referrer and which has not been challenged by the owner of the referral site. Indeed, Mr. Barry's explanation is also consistent with Mr. O'Toole's evidence which admits that Mr. Boland hung the gate which now demarcates this access. As this land was sold to its present owner in the year 2016, that the gate which physically stands on the front boundary of this field clearly does not pre-date planning control.

Indeed, Mr. O'Toole's evidence would appear to contradict the conclusion which was expressed by the County Council in its letter to Mr. Barry of 18 October 2018 which states that '*...the entrance... has been in place at its current location since the 1980's*'. Given the timing of Mr. Boland's purchase of the referral property and given Mr. O'Toole's testimony, there are grounds to question this opinion.

We note how Maguire & Associates seem to suggest that the referrer did not own the subject site for the period claimed (2006 – 2016) and, when doing so, its submission relies on the timing of Mr. Barry's planning application under reg. 06/41. The form which accompanied this earlier submission, which was date stamped by Kildare County Council as having been received on 13 January 2006, indicated conclusively that Mr. and Mrs. Barry were '*owner*' of the site on which their home stands.

We have already observed how the concept of abandonment equally applies to both works and material changes of use and we now suggest that, given that 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, we submit that the resumption of development which has been abandoned requires planning permission.

4. Concluding Comments

We suggest that Maguire & Associates may have overstated the available information, especially the content of the accompanying affidavits, when opining '*The site entrance has obviously been in existence since the 1950's...*'. There is no evidence whatsoever to this effect and, to the degree that a vehicular access to this field may have originally pre-dated planning control, any such use was abandoned by Mr. Barry and was resumed in the past thirty months when Mr. Boland re-hung a gate.

We remain of the view that the formation of an access serving this land comprises works and that such operations constitute development; we also opine that the creation of an entrance from a public road of over 4 metres in width comprises a material change in the use of the land. As the landowner does not dispute these facts and as all parties acknowledge that this work and change of use is not exempted development, we conclude that planning permission is thus required for this access and gate feature.

Yours faithfully


Vincent JP Farry and Co Ltd

