

AN BORD PLEANÁLA	
LDG- _____	
ABP- _____	
09 MAR 2020	
Fee: € _____	Type: _____
Time: _____	Market Street, Listowel, Co. Kerry, V31 DK38, Ireland Tel: 068 50900 Fax: 068 21692 DX No: 85-001 Listowel info@pierse.ie www.pierse.ie

Reg. Post

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1
DO1 V902
REGISTERED POST

Our Ref: RP/MDC/P75 /0001

Your Ref: ABP-306614-20

6 March 2020

Re: Whether the two gates which have been erected to provide access to an agricultural field from the end of two private cul-de-sac service roads in an unfinished residential estate is or is not development or is or is not exempted development

Application under Section 5 of the Planning and Development Act 2000

Dear Sir,

We refer to the above application and your letter of the 13 February 2020.

We refer to our original application dated the 28 January 2020 to Kerry County Council for a Declaration on behalf of Mrs Eilín Enright under s. 5(1) of the Planning and Development Act 2000 as amended ("the 2000 Act").

This request for a Declaration to Kerry County Council as the relevant planning authority has to yet to be properly considered by the planning authority.

We refer to your letter dated the 13 February 2020 enclosing what is described as a referral from Kerry County Council under s. 5(4) of the Planning and Development Act 2000 as amended and requesting any submissions or observations.

Your letter dated the 13 February 2020 enclosed a copy of a letter dated the 5 February 2020 from Liam Brosnan, Administrative Officer, Kerry County Council to An Bord Pleanála referring to the question set forth in the title to this letter to the Board for a decision under section 5 (4) of the Planning and Development Act 2000 as amended.

The declaration sought by Kerry County Council in its correspondence dated the 5 February 2020 is not the declaration sought in the Application under section 5(1) of the 2000 Act by our client to Kerry County Council dated the 28 January 2020.

We write this letter on behalf of Mrs Eilín Enright, Dromin Upper, Listowel, Co Kerry, the owner of the farm and farm gates in issue at the above address.

With the greatest respect, we reply to your letter dated the 13 February 2020 as follows.

1. Preliminary observation

Our client made a lawful Application to Kerry County Council dated the 28 January 2020 under section 5(1) of the 2000 Act.

The Council may not decline jurisdiction and is required to fulfil its statutory obligation and duty.

There are two circumstances where a referral under section 5 may come before the Board. This applies:

- (a) Where the Council does not determine the Application within the period prescribed;
- (b) It also applies where the Council determines the Application under section 5(1) in a manner adverse to the applicant /referror and the application for a declaration referral comes before the Board for review by way of appeal under section 5(3) of the 2000 Act.

Otherwise, the Council is required to act in accordance with its statutory obligations and duty. The Council may not decline its statutory jurisdiction as the relevant Planning Authority and is required to issue its declaration within the period specified.

2. Further preliminary observation

It would appear from the Board's letter dated the 13 February 2020 that the Board has interpreted Kerry County Council's letter dated the 5 February 2020 as an entirely new referral under section 5(4) of the 2000 Act. There are a number of matters in the Planning Authority's question which appear to differ from the submission made by us on the 28 January 2020.

It is not clear from the declaration sought in the Council's letter dated the 5 February 2020 what is the relevance of the reference to "an unfinished residential estate" or what is the import of "from the end of two private cul de sac service roads" ? What are they intended to convey? The Council's letter does not explain the new wording of the declaration.

These matters require to be attended to by the Council and the record corrected and clarified in that regard. It is both inappropriate and improper that the Council should not address its mind to the Application made to it under section 5(1) of the 2000 Act. It is submitted that the Council cannot reformulate the question to the Board any more than it can treat the matter in the way it did in the submission to the Board dated the 5 February 2020.

3. Without prejudice to the above, further observations

If it should be necessary that the Council may make a referral to the Board of their own motion under section 5 of the 2000 Act, the Council is required to comply with the provisions of the above Act and

- i) set out what is development correctly;
- and
- ii) set out what is the exempted development

The Council cannot deflect these obligations to the Board.

If the Council acts in this manner, they must set out the grounds on which it asserts that the works are development; or the grounds that the works are exempted development.

This will then enable our client reply to the Council in the manner otherwise contemplated under the referral process under section 5 of the 2000 Act; and indeed to request the Board to review any declaration made by the Council if the applicant decides to refer the declaration to the Board under section 5(3) of the 2000 Act.

The Board is a review body and not a determining body at first instance in an Application to the relevant planning authority under section 5(1) of the 2000 Act.

4. The Council's obligations regarding Development and Exempted Development

In the previous referral under the Reference ABP - 08. RL.3516 dated the 5 April 2017 referred to in the Council's letter dated the 5 February 2020, the Council advanced an argument that the very use of the two entrances for the gates was development.

ere was no dispute we believe between the parties on the following: i) The only use of the entrances was for that of agriculture, to gain access to the field for the purposes of agriculture (which includes horticulture); ii) That the access was onto a private road over which the applicant has a right of way which terminated at a cul de sac; iii) There was no substantial evidence of traffic in the area where the small vehicles were moving inwards and outwards nor indeed were the vehicles accessed onto the private road.

Section 4(1)(a) of the 2000 Act provides: “4(1) The following shall be exempted development for the purposes of this Act- (a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with the land so used;”

In these circumstances, the Council is required to explain on what basis the use of the entrances amount to development, or amount to exempted development having regard to the provisions of section 4(1)(a) of the 2000 Act. The use of the land remains a use for agricultural purposes and the movement of any mechanically propelled vehicle is connected with and incidental to the use of land for agriculture. There is no other purpose.

The entrances are therefore entitled to a statutory exemption for their use under section 4(1)(a) and there is no issue arising of traffic hazard under Article 9(1)(a)(iii) of the Planning and Development Regulations 2001 (“the 2001 Regulations”).

Article 9 of the 2001 Regulations only disapplies exemptions under the Regulations. It does not and cannot disapply a statutory exemption under section 4(1)(a) of the 2000 Act.

Even if there was to be a consideration of a traffic hazard, the three to six movements on average of vehicles a week into an area where there is no traffic movement and, as a consequence, no traffic hazard capable arising, could never amount to a traffic hazard in reason or logic. Indeed, any such determination would offend the principle in *O’Keeffe v An Bord Pleanala* [1993] 1 IR 39. No reasonable planning authority could determine that this would amount to a traffic hazard.

5. Observations on Works

If the Council is to make an argument in respect of “works”, the following principles appear not disputable.

- i) The carrying out of works can never amount to a change of use: see definition of “use” in section 2(1) of the 2000 Act.
- ii) There is no limit on the width of an entrance that can be constructed for the purposes of section 4(1)(a) of the 2000 Act or Article 6(1) and CLASS 9 of the 2001 Regulations.

Section 2(1) of the 2000 Act states the “‘use,’ in relation to land, does not include the use of the land by the carrying out of any works thereon.”

In respect of the height of such a structure, there is no dispute that the gates do not exceed two metres in height as specified in Article 6(1) and CLASS 9. The height is required to be measured from the undisturbed ground prior to the carrying out of the works.

As a matter of law and fact in respect of Article 6(1) and CLASS 9, no traffic hazard under Article 9(1)(a)(iii) of the 2001 Regulations can be raised in respect of such works having regard to the judgment of Hogan J in *Cunningham v An Bord Pleanala and Sligo County Council* [2013] IEHC 234. This judgment expressly disapplied in identical circumstances any disapplication of the exemption arising from a traffic hazard relating to the carrying out of works.

6. Basic Fairness of Procures and the Referral Process

In the application for a declaration under section 5(1) of the 2000 Act made to the Council on the 28 January 2020, a determination was sought in respect of the following issues:

- i) Whether the gate, and use of Gate (A), for the purposes of agriculture otherwise from a public road falls within section 4(1)(a) of the 2000 Act?
- ii) Whether the gate, and use of Gate (B), for the purposes of agriculture otherwise from a public road falls within section 4(1)(a) of the 2000 Act?
- iii) Whether works for the construction of Gate (A) falls within Article 6(1) and CLASS 9 of the 2001 Regulations it being otherwise than onto a public road and falls within its provisions and is not subject to any of the exceptions or limitations in Article 9(1)(a)(iii) of the 2001 Regulations?
- iv) Whether works for the construction of Gate (B) falls within Article 6(1) and CLASS 9 of the 2001 Regulations it being otherwise than onto a public road and falls within its provisions and is not subject to any of the exceptions or limitations in Article 9(1)(a)(iii) of the 2001 Regulations?

The Council having received a request for a declaration under section 5(1) of the 2000 Act, has a duty to determine the application made to it. The provisions of section 5 require the Council to determine the matter. At the very least, section 5 does not entitle the Council to refuse to determine the matter by transferring its statutory duty as the determining body of first instance to the Board. The maxim *delegatus non potest delegare* applies to the Council. If necessary, the converse of the maxim applies to the Board.

It is submitted that the Board should not facilitate the Council in avoiding its statutory obligation and duty as the Board is an appellate body. Where a request for a referral is made to the Local Authority under section 5(1)(a), the Board may review that decision by way of appeal under s. 5(3) of the 2000 Act. The Council's letter dated the 5 February 2020 purports to reduce the status of the Board to that of a local authority at first instance.

The referral and request for a declaration as set out above raises four issues in respect of the two sites, Gate (A) and Gate (B), none of which have been determined by the Council previously. Prior to the Board accepting jurisdiction the Council can determine the application and leave it to the applicant, if required, to refer the declaration to the Board for review under section 5(3) of the 2000 Act.

It is submitted that the Council cannot act in the manner it has purported to do here.

We respectfully request the Board to direct the local authority to properly engage with the declaration sought made to it under section 5 of the 2000 Act in a transparent manner and respond to the four specific issues raised above. This will enable our client to reply in the fair procedures manner provided for under the said section.

On receipt of an appropriate response from the Council, we will engage and respond to the position the Council adopts. Hitherto, the Council has declined to adopt any position on the issues raised in the request made under section 5(1) for a referral by letter dated the 28 January 2020.

A section 5 referral has now acquired a status and importance in law: *Grianan An Aileacht Interpretive Centre Ltd v Donegal County Council (No 2)* [2004] 2 IR 625. This necessitates appropriate engagement in a manner consistent with the applicant's property rights under Article 40.3.1° and 2° and Article 43 of the Constitution as any determination under section 5 of the 2000 Act may form part of the planning history of the site. Fair procedures and natural and constitutional justice under the same provisions of Article 40 have equal application: *East Donegal Cooperative Live Stock Mart Ltd v The Attorney General* [1970] IR 317 and *Re Haughey* [1971] IR 217.

7. Without prejudice to the above, further observations

As above submitted, the Council has failed to engage with our client's request for a declaration under section 5(1) of the 2000 Act notwithstanding compliance with all its pre-conditions and requirements. The procedure adopted by the Council, if confirmed by the Board, has reversed the process that should apply in an application for a direction under section 5(1) of the 2000 Act.

the normal course, the Council is required to state what it regards as “development” and what it regards as “exempted development.” Fair procedures under the section 5 process so requires. The Council’s letter dated the 5 February 2020 purports to reverse that process.

The applicant for a declaration under section 5(1) is now required to set forth her submissions on “development” and “exempted development” to which the Council will respond in a manner that should have been clarified to the applicant by way of reply to her request. This reverses an onus of proof in a manner that breaches the principles of basic fairness of procedures and natural and constitutional justice with reference to the authorities cited above.

What is submitted hereunder is made under protest at the manner in which the Council has sought to obtain an unfair advantage over the applicant in subverting the entire premise on which the referral process under section 5 of the 2000 Act is intended to apply.

8. Whether the two gates which have been erected to provide access to an agricultural field from the end of two private cul-de sac service roads in an unfinished residential estate is development?

The erection of the two farm gates to provide access to an agricultural field comes with the definition of “development” in s. 3 of the 2000 Act.

Development is defined to *mean* any works on, in or over land. “Works” is defined in section 2(1) of the 2000 Act to *include* any act or operation of construction, excavation, demolition, extension, alternation, repair or renewal. It would include the two farm gates in issue marked Gate (A) and Gate (B) in the topographical survey prepared in May 2017 by J M Surveys Ltd, Kanturk, Co Cork included with your letter dated the 13 February 2020.

The development and works carried out in early 2010 was the construction of two farm gates for agricultural use in the boundary hedge and ditch of what is now Mrs Enright’s field and the private roads in the Cahirdown Wood Estate. The precise location is described in a Topographical Survey prepared in May 2017 by J M Surveys Ltd, Kanturk, Co Cork included in the List of Plans, Reports and Photos, etc submitted with the application to the Council dated the 28 January 2020. The Topographical Survey serves as a Site Location Map for the purposes of the application. Mrs Piere’s Field (now Mrs Enright’s) is outlined in red as required by the Council’s Section 5 Application Form. This is the main area to be used for the foliage farm together with 2 acres immediately to the north of that field. Foliage comprises forest produce such as eucalyptus for foliage and decorative conifers/fir trees. The 2 acres to the north of Gate (D) on the Topographical Survey is often a very wet area.

The field in issue is described as “Ms Piere’s Field” on the Survey. The two gates are marked Gate (A) and Gate (B) on the survey. These two farm gates are now less than 2 metres high and were constructed into the boundary hedge in a manner similar to farm gates throughout the countryside. They are kept locked, except when in use which has been infrequent

9. Whether the two gates which have been erected to provide access to an agricultural field from the end of two private cul-de sac service roads in an unfinished residential estate is exempted development? Section 4(1)(a) of the 2000 Act

It is submitted that the two farm gates are exempted development for the purposes of the Planning and Development Acts and the Planning and Development Regulations.

Reliance is placed on the following provisions of the primary and secondary legislation in the application for a declaration under section 5(1) presently arbitrarily to be dealt with by way of response to a section 5(4) application by the Council where its interpretation on “development” and “exempted development” is unknown:

Section 4 provides as follows:

1) The following shall be exempted development for the purpose of this Act – (a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with the land so used;”

The user of the Mrs Enright’s farm at Dromin Upper, Listowel together with the two farm gates for agricultural purposes is therefore exempted development under the Planning and Developments Act 2000, section 4(1)(a).

The farm gates are buildings occupied with the land so used, that is for agricultural use and are contemplated by the above statutory exemption. The user of the land for the proposed agriculture use in conjunction with the two farm gates is central to the statutory exemption set forth.

The agriculture user in contemplation is also the low-density user of land for foliage and cognate decorative tree planting encouraged by the Department of Agriculture, Food and the Marine and the Department of Communications, Climate Action and the Environment. It complies with all EU requirements in the context of concerns on carbon emissions nationally.

The agricultural user of the farm gates is comparable to the manner in which farm gates have been used and constructed in hedgerows and boundary fences throughout the countryside for the purposes of agriculture.

Section 4(1)(a) of the 2000 Act remains in its original language unamended.

This submission is supported by the judgment of the High Court in *Cunningham v An Bord Pleanala and Sligo County Council* [2013] IEHC 234. In issue was whether the construction of a tractor shed was constituted exempted development. The judgment noted in its opening paragraph 1 that the scope of the exemption for agricultural purposes in section 4(1) (a) of the 2000 Act “...has heretofore remained stubbornly unexplored”. The judgment of Hogan J is of assistance in explaining the meaning to be attached to this exemption. The High Court interpreted the general exemption for agricultural purposes to apply to development in the limited sense of that term.

“17. It follows, therefore, for these reasons that the general exemption for agricultural purposes contained in s. 4(1)(a) of the 2000 Act does not apply, because that exemption only applies in the case of development (in the more limited sense of that term) which consisted of the *use* of a structure for agricultural purposes. It does not apply in the case of the *construction* of such a structure. (emphasis added by the Court)”

What could be more limited by way of agricultural development than two farm gates which abound in the countryside. The two farm gates are to be used for the agricultural purposes described in the application for the section 5 referral made to Kerry County Council

Mrs Enright holds a B.Sc Degree and a M.Sc. Degree in Agricultural Science from University College Dublin. The lands are presently placed in an EU scheme to encourage low density user of the farmland. This is a Glas Scheme (Green Low Carbon Agricultural Scheme).

The agricultural use proposed in conjunction with the two farm gates is the growing of a foliage crop for use in the horticulture and flower arrangements in horticulture. This requires maintenance of the farmer’s field in issue in the early season and harvesting in late autumn. This takes place by hand in November and early December. Thereafter, rapid transport of the foliage to cold storage by small van and trailer is required to preserve the crop. The farm gates facilitate this agricultural use and purpose. The crop is consistent with reducing carbon emissions from farmland. Such user of land is actively encouraged by the Department of Agriculture, Food and the Marine and by the Department of Communications, Climate Action and Environment.

Mrs Enright proposes to develop the 4.5 acres of this field together with approximately 2 acres of the field to the north of Gate (D) as shown on the topographical survey for foliage horticulture. Foliage is the growing of plants such as eucalyptus to a height of 1 to 2 metres in rows about 1 metre apart. Small decorative conifers and decorative fir trees are also planted. The planting, harvesting and maintenance of the foliage crop is manual by workers using handheld clippers, sprayers on their back and small lawnmowers. The maintenance of decorative conifers or other small decorative trees is by way of ride on lawnmowers in the dry season. When harvested, it is necessary to transport the foliage rapidly for cold storage and eventual user in the horticultural industry both locally and for export.

liage is similar to flowers and requires prompt transfer for safe cold storage. Similar concerns apply to the decorative trees. The two farm gates will enable the harvesting of the crop and early transport to cold storage. The planting of the foliage crop requires the field to have been ploughed initially in rows or beds made in advance in the dry season when the field may be entered from the northern end through Gate (D).

The harvesting by hand is with hand clippers and is hard work and mainly done during the pre-Christmas season when access through area north of Gate (D) is not possible.

The proposed horticulture crop is further described in a report of Tony O'Keeffe, consulting engineer, dated the 11 May 2017 enclosed with the application to Kerry Council and include with your letter of the 13 February 2020. Photographs of similar foliage crops are included. These photos relate to foliage at the townland of Bunagarha nearby where Mrs Enright has an interest in a larger (40 acres) foliage farm to the one envisaged in this application.

10. Whether the two gates which have been erected to provide access to an agricultural field from the end of two private cul-de sac service roads in an unfinished residential estate is exempted development? Planning and Development Regulations 2001, Article 6(1) and CLASS 9, Sundry Works

The two farm gates come within the definition of "Exempted Development" within Article 6 being development of a class specified in Column 1 of Part 1 of Schedule 2 and comply with the conditions and limitations in column 2 opposite the mention of that class in column 1.

CLASS 9 describes *Sundry Works* as follows: "The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway."

The conditions and limitations in column 2 states: "The height of any such structure shall not exceed 2 metres."

Gates (A) and (B) on the Topographical Survey come within the definition "of any gate or gateway."

Neither of the two farm gates exceed 2 metres.

An Bord Pleanala did not consider heretofore the exemption for gates under Article 6(1) and CLASS 9 of the Planning and Development Regulations 2001 as amended in its Declaration dated the 5 April 2017 under section 5(4) of the Planning and Development Act 2000 in the earlier application under ABP Reference 08.RL.3516.

As noted above, there is no restriction on the width of a gate.

11. Whether the two gates which have been erected to provide access to an agricultural field from the end of two private cul-de sac service roads in an unfinished residential estate is exempted development? Distinguish Planning and Development Regulations 2001, Article 9(1)(a)(iii)

In the application under ABP Reference 08.RL.3516, dated the 5 April 2017, An Bord Pleanala "...concluded that the forming of two entrances to a field at the end of two cul-de-sac is development and is not exempted development as it would endanger public safety by reason of a traffic hazard or obstruction of road users." While an exemption under Article 6(1) of the Planning and Development Regulations 2001 are subject to restrictions on exemption described in Article 9, Article 9(1)(a)(iii) does not apply.

Article 9(1)(a)(iii) provides that 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 endanger public safety by reason of traffic hazard or obstruction of road users. Article 9(1)(a)(iii) of the 2001 Regulations should have no application to the two farm gates in issue as they are to be used for the purposes of agriculture in the manner provided for in section 4(1)(a) of the Planning and Development Act 2000.

There is no limiting factor on the use of land for the purposes of agriculture in section 4(1)(a). The Board used the test of traffic hazard or obstruction of road users to a statutory exemption which has no limiting factors.

Further Article 9 of the 2001 Regulations only disappplies exemptions under the Regulations. It does not and cannot disapply a statutory exemption under section 4(1)(a) of the 2000 Act

Separate and apart from this, the exemption for gates in Article 6 and CLASS 9 of the 2001 Regulations considered below also assists.

The user of the two farm gates for the purposes of agriculture is of a nature and type contemplated by farm gates constructed in hedges and ditches throughout the countryside.

12. Traffic Survey on Cahirdown Wood Estate

Without prejudice to the submission at paragraph 11 above, a traffic survey has also been prepared by Abacus Transportation Surveys dated May 2017 and included in the documents submitted to Kerry County Council. This is referred to in the Report of Tony O'Keeffe consulting engineer 18 May 2017. This explains the minimum traffic movements within the estate contemplated throughout a calendar year. Harvesting of the foliage/forestry crop takes place in November and early December.

Estimate traffic movements of small vans and trailers during harvesting and maintenance of 150 to 300 in a calendar year would not amount to a traffic hazard or obstruction of road users in Cahirdown Wood Estate.

See Report of Tony O'Keeffe, consulting engineer, dated the 11 May 2017 and the Traffic Survey by Abacus Transportation Surveys dated May 2017 referred to in Mr O'Keeffe's report.

See also letter of Forest Produce Ltd dated the 13th December 2019 herewith on the likely vehicle movements. This company maintains and harvests the Bunagarha foliage farm above which can be visited. This letter confirms 150 traffic movements as the probable number of movements in a calendar year. These take place during the maintenance season and during the harvesting season.

This traffic survey on the Cahirdown Wood estate supports the submission that any traffic movement generated by the maintenance and harvesting of the crop would be minimal in the overall context of traffic movements with the estate. When not used for maintenance or harvesting, the gates are locked.

This traffic survey is submitted in circumstances where no traffic survey was made before by the County Council or An Board Pleanala prior to its declaration made on the 5 April 2017 and included in the documents enclosed.

The engineering report and traffic survey further supports the submission that no traffic hazard or obstruction of road users applies.

13. Whether the two gates which have been erected to provide access to an agricultural field from the end of two private cul-de sac service roads in an unfinished residential estate is exempted development? Planning and Development Regulations 2001, Article 6(1) and CLASS 11, Sundry Works

While primary reliance is placed on the use of land for the purposes of agriculture and the use of the two farm gates for that purpose under section 4(1) (a) and also CLASS 9 under the 2001 Regulations, CLASS 11 may have relevance. It is in the same *Sundry Works* CLASS as CLASS 9 on Gates considered above. CLASS 11 provides for the following exemption:

“The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –

- (a) any fence (not being a hoarding or sheet metal fence), or
- (b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.”

The conditions and limitations on CLASS 11 are similar to CLASS 6 above. They require that the height of any new structure shall not exceed 2 metres.

So far as may be necessary, reliance is also placed on CLASS 11 regarding the two farm gates in issue. This submission is supported by an internal Memo from Kerry County Council, dated the 21 October 2010 entitled “Alleged Unauthorised Development Site Report” prepared by Chris van Schoor, Executive Planner, Planning: These copy documents are included in the Annex to this letter. This Memo with accompanying photographs of what are Gate (A) and Gate (B) on the Topographical Survey.

Following a description of the gates and their location the Memo concluded that the gates and user were exempted development under CLASS 11. “From the perspective of the owner of the original field, work involving changes to the fence or ditch bounding the field is exempted under Class 11 (this would not apply to fences that are within or bounding the curtilage of the dwelling house, but this was not relevant here).”

Mrs Enright learnt of this Planning Department Memo following a Freedom of Information Acts request in 2018. This Memo was not disclosed to An Bord Pleanala. Mr Van Schoor in a subsequent Memo dated the 10 January 2012 on “Alleged Unauthorised Development Site Report” reported that the same gates were not exempted in reliance on Article 9(1)(a)(iii) of the 2001 Regulations. The memo concluded that the gates would endanger public safety by reason of traffic hazard or obstruction of road users. No traffic survey appeared to have been carried out by the County Council or by An Bord Pleanala.

A copy of this documentation is enclosed as an annex to these submissions.

This earlier Memo dated the 21 October 2010 was not brought to the notice of An Bord Pleanala in the application for a referral under section 5(4) of the 2000 Act determined by the Board under its reference ABP 08.RL.3516 dated the 5 April 2017. If it had been included in the documents submitted, it would have brought to the notice of the Board the relevance of the Gates exemption in Article 6(1) CLASSES 9 and 11 in the *Sundry Works* CLASSES described the 2001 Regulations.

14. Previous referral by Kerry County Council under section 5(4) of the Planning and Development Act 2000 as amended concerning the two farm gates in issue

An Bord Pleanala issued a declaration under section 5 on the 5 April 2017 under reference ABP 08.RL.3516 on a referral by Kerry County Council under section 5(4) of the Planning and Development Act 2000 that the forming of two entrances at a field at the end of two cul de sacs is development and is not exempted development at Cahirdown Wood Estate, Listowel, Co Kerry, as it would endanger public safety by reason of a traffic hazard or obstruction of road users.

This follows an earlier finding by Kerry County Council on the 21st October 2010 that the gates were exempted, and a later finding dated the 10th January 2012 that they were not so. See the Memos of Mr Chris van Schoor, executive planner, Planning, Kerry County Council: These documents are included in the Annexe to this letter.

15. Documents relied upon in this application for a Declaration were not before An Bord Pleanala in ABP Reference 08.RL.3516 dated the 5 April 2017

The documents relied upon in this application were not before An Bord Pleanala when it made its declaration on the 5 April 2017.

These were not admitted by the High Court for that reason because they were not before An Bord Pleanala. This includes the Report of Tony O'Keeffe, consulting engineer and the Traffic Survey on Cahirdown Wood estate conducted by Abacus Transportation Services.

This application for a Declaration by Kerry County Council now under section 5(4) of the Planning and Development Act 2000 by Kerry County Council is an application based on the facts and documents not brought to the notice of the Planning Authority in the earlier application.

16. Summary

This letter replies to your letter dated the 13 February 2020 enclosing a copy of the letter dated the 5 February 2020 from Kerry County Council and accompanying documentation.

With respect, the Council has not engaged with the request made on the 28 January 2020 for a declaration under section 5(1) of the 2000 Act in which the relevant planning authority is the jurisdiction at first instance and the Board exercises an appellate and review jurisdiction under section 5(3).

The Council has also purported to alter the declaration sought in the referral request by seeking a different declaration in the Council's letter to the Board dated the 5 February 2020.

The further replies at paragraphs 7 to 15 are furnished under protest in circumstances where the Council has not responded to the request for a section 5(1) declaration as above explained.

We look forward to a considered response from the Board to the respectful request in our correspondence and, in due course, to the response of the Council to this letter.

If you require any further documents please let us know.

We look forward to your acknowledgment in due course.

Yours faithfully,

MICHAEL FITZPATRICK

Direct Dial 068 50939

FAX 068 21692

Email: law@pierse.ie

Annex

Internal report on Alleged Unauthorised Development Site Report
Kerry County Council. File closed after site inspection on 21 October 2010

21/10/10

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Alleged Unauthorised Development Site Report

MEMO

FROM: Chris van Schoor, E.P., Planning

TO: S. S. O. / A.S.O. Planning

Unauthorised Register No: U372-05 Planning Reg. No: 02/1311A; 03/3568

Name and Address of person carrying out development:

Beaucon Developments Ltd.

Unauthorised Development Address:

Cahirdown Woods
Dromin Upper
Listowel.



- NOT AT THE TIME
THIS REPORT WAS
COMPILED.

Complainant: internal: Michael Griffin + Kevin Burns

Site Inspection Date: 21/10/2010

Zoning: Rural general (outside of Listowel Local Area Plan)

Site Report:

When I inspected the above site on the date mentioned, I observed that the boundary hedgerow has been breached at two places where the internal estate roads lead up to the boundary of the field to the east of the estate (in the form of *culs-de-sac*). The field concerned is currently under pasture. There are currently temporary steel-and-wire fencing partition panels erected at these points.

There is also a breach in the tree line and ditch along the southern boundary of this field (this is the boundary along the N69). This breach involves the boundary line and hedgerow of the field only. It does not open all the way to the N69, is not negotiable by vehicles, so is not considered a new entrance from a public road.

I have carefully studied the above planning permission files for this Estate, and it is my opinion that these do not provide any details on the approved plans or the planning conditions that specify the treatment of the boundaries or fences where the breaches have occurred (i.e. with the field to the east).

From the prospective of the owner of the agricultural field, work involving changes to the fence or ditch bounding the field is exempt under Class 11 (this would not apply to fences that are within or bounding the curtilage of a dwelling house, but this is not relevant here).

RECOMMENDATION:

On the basis of the above, I recommend that this planning authority take no further action on this file until/unless further information comes to light.

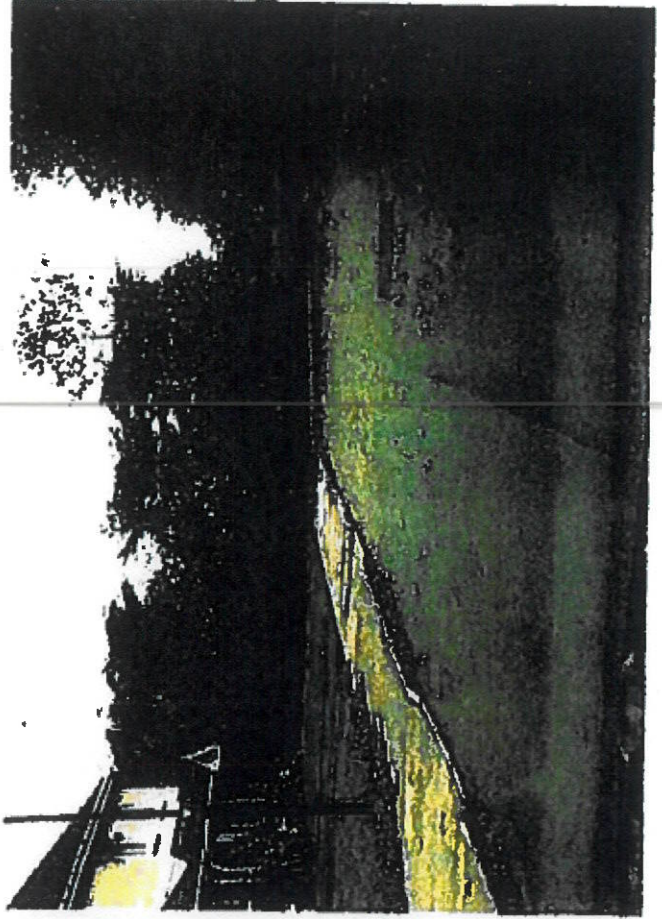
Please let the complainants have copies of this report.

21/10/2010.

V 372-05

02 ~~1311A~~ 1311A

03/3568



5

Lisa O'Carroll

From: Lisa O'Carroll
Sent: 08 November 2010 13:13
To: Michael Griffin; Kevin Burns
Subject: Cahirdown Woods- Listowel

Hi Mike and Kevin,

Please see attached report from Chris Van Schoor re the above development.

Thanks,

Lisa

From: chris vanschoor
Sent: 08 November 2010 13:11
To: Lisa O'Carroll
Subject:

*Chris van Schoor B Econ M(TRP)
Executive Planner
Planning Enforcement/Quarries
Kerry County Council
Ext. 3633*

4/4/11
close files)
A

08/11/2010

10

Date: 21 September 2011

~~U088-16~~

U372-05

To: Chris Van Schoor
E.P. Planning

From: Lisa O Carroll
Planning Enforcement

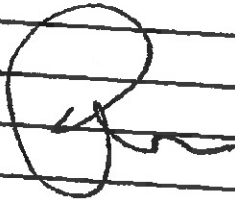
Chris,
Can you review this file and revert back to me with your observations/recommendations with respect to

on the side boundary of a b

The erection of 2 gates have not considered
unauthorised development.

File should be closed.

Inform relevant parties.



23/09/11

Have we gone on site & prepared
a report on [redacted] complaint.

I would like to get a VHI picture
of photos before I consider closure.

↑

See my report on U372-05 dated
2 November 2010, and your recommendation
to close that file. I also took some
new photos on 11/11/11 (attached).

Jan 14/11/11

11

va. 14/11/11

~~U 372-05~~

To

Joan McCarthy
SEO Planning

U 372-05

From

Slobhan O Mahony
Planning Enforcement Admin.

Please see new note & photograph
from Chris V Schaar.

Slobhan.

Slobhan

I have considered Chris V Schaar's
report again, (Dated 2/11/10). (U37205)
The gates in question seem wide
enough to take agricultural machinery,
passing through the housing estate.
Surely the safety issue in this
scenario, would be exempt this report
from the election of pieces.
Please place copy of said report
on this file.
Chris to consider the above. ✓

See class 9 (page 158), but Art. 3(1)(a)(iii) could...

~~4065-10~~

4372-05



11/11/2011

ALA

09 MAR 2020



11/11/2011