



AISLING MEEHAN

AGRICULTURAL SOLICITORS

Aisling Meehan BA Law & Acc, CTA, FETAC (Agri) Solicitor & Tax Consultant

Pauline Kearns BA ES, Dip Prop Tax, Dip Family Law Solicitor

Catherine Brennan BCL, Dip Prop Tax, Dip Trust & Est Plan Solicitor

By Swiftpost

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1
D01 V902

AN BORD PLEANÁLA	
LDG- <u>036140-21</u>	
ABP	
19 FEB 2021	
Fee € <u>220</u>	Type: <u>Cheque</u>
Time: _____	By: <u>Post Express</u>

18 February 2021

Our Clients – James Brennan

Matter – Application for Review of the Declaration by Kerry County Council dated 26th January 2021 under file reference EX877

Dear Sir/Madam

We act for James Brennan (the Applicant) of Skehenerin, Listowel, County Kerry. We enclose the following:-

1. Planning Appeal Form duly completed
2. Submission of the Applicant James Brennan for a review of the Declaration by Kerry County Council dated 26th January 2021
 - a. Conveyance 1 referred to in the submission
 - b. Letters 2 referred to in the submission
 - c. Articles 3 referred to in the submission
 - d. Enforcement Notice 4 referred to in the submission
3. Independent Property Review
4. A3 Map entitled Map 'A'
5. Cheque in the amount of €220 made payable to An Bord Pleanála

We would be obliged if you would acknowledge safe receipt of same.

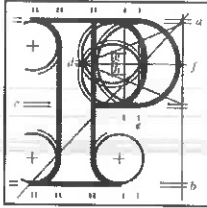
Yours faithfully

Aisling Meehan

Aisling Meehan Agricultural Solicitors







An
Bord
Pleanála

Planning Appeal Form

Your details

1. Appellant's details (person making the appeal)

Your full details:

(a) Name

James Brennan

(b) Address

Skehenerin, Listowel, Co Kerry V31 NX59

Agent's details

2. Agent's details (if applicable)

If an agent is acting for you, please **also** provide their details below. If you are not using an agent, please write "Not applicable" below.

(a) Agent's name

Aisling Meehan Agricultural Solicitors

(b) Agent's address

Springfield House
Sixmilebridge
County Clare
V95C795

Postal address for letters

3. During the appeal we will post information and items to you **or** to your agent. For this appeal, who should we write to? (Please tick ✓ one box only.)

You (the appellant) at the address in Part 1

☐

The agent at the address in Part 2

☒

Details about the proposed development

4. Please provide details about the planning authority decision you wish to appeal. If you want, you can include a copy of the planning authority's decision as the appeal details.

(a) Planning authority

(for example: Ballytown City Council)

Kerry County Council

(b) Planning authority register reference number

(for example: 18/0123)

Section 5 Application EX877

(c) Location of proposed development

(for example: 1 Main Street, Baile Fearainn, Co Ballytown)

Dromin Lower, Listowel, Co Kerry

Appeal details

5. Please describe the grounds of your appeal (planning reasons and arguments). You can type or write them in the space below or you can attach them separately.

Please see attached letter and reports

Supporting material

6. If you wish you can include supporting materials with your appeal.

Supporting materials include:

- photographs,
- plans,
- surveys,
- drawings,
- digital videos or DVDs,
- technical guidance, or
- other supporting materials.

Acknowledgement from planning authority (third party appeals)

7. If you are making a third party appeal, you **must** include the acknowledgment document that the planning authority gave to you to confirm you made a submission to it.

Fee

8. You **must** make sure that the correct [fee](#) is included with your appeal. You can find out the correct fee to include in our [Fees and Charges Guide](#) on our website.

Oral hearing request

9. If you wish to [request the Board to hold an oral hearing](#) on your appeal, please tick the “yes, I wish to request an oral hearing” box below.

Please note you will have to pay an **additional non-refundable fee** of €50. You can find information on how to make this request on [our website](#) or by contacting us.

If you do not wish to request an oral hearing, please tick the “No, I do not wish to request an oral hearing” box.

Yes, I wish to request an oral hearing

☐

No, I do not wish to request an oral hearing

☒

NALA has awarded this document its Plain English Mark

Last updated: April 2019.

Submission of the Applicant, James Brennan for a review (pursuant to section 5(3)(a) of the Planning and Development Act, 2000), of the Declaration by Kerry Council dated the 26th January, 2021 that completion of works consisting of the erection of a two metre high palisade fence does not constitute exempted development.

Name of Applicant:	James Brennan
Applicant's Address:	Skehenerin, Listowel, Co. Kerry
Date of Decision:	26 th January, 2021
Application No.:	EX877
Planning & Architectural Consultant for the Applicant:	Neil Gallagher, Engineers, Cork Road, Gouldshill, Mallow, Cork
Solicitor for the Applicant:	Aisling Meehan, Agricultural Solicitors, Springfield House, Sixmilebridge, County Clare

Introduction

This Submission should be viewed in concert with the *"Independent Property Review of Lands at Listowel, Co. Kerry"* by Neill Gallagher, Planning & Architectural Consultant and the photographs and maps appended to that document (hereinafter the "Property Review").

For ease of understanding, "Map A" is enclosed on an A3 sheet and while it is generated from an old map and while it does not show the recently developed housing estates, it does demonstrate the nature and extent of the Applicant's property and the adjoining lands.

This application intends first, to address the factual basis grounding this review. Secondly, to proceed to address what is required by the specific provisions in issue in this matter.

The Applicant contends that the decisions by the Local Planning Authority, Kerry County Council (hereinafter "KCC") to accept two further section 5 referrals (given reference numbers EX858 and EX877) after the works, confirmed to be exempted by EX624, had been carried out (and were accepted by KCC to be carried out by the time of EX858) was in error. Even should the Board decline to make a decision on that contention, it is this background which informs the third aspect of this Submission, namely that KCC erred in:

- (i) its assessment of the facts before it (and the information wrongly imported into EX877, from EX858);
- (ii) the manner of its interpretation of the provisions of Article 9(1)(a)(x) and
- (iii) the application of that interpretation to the 'facts' as found by KCC.

In this regard the Applicant maintains that it was unfortunate that KCC assigned Mr. Damien Ginty (hereinafter the "Planner") to assess EX877, when he had already determined EX858 in a manner adverse to the Applicant and expected this Planner to be in a position to look at the matter 'afresh'.

Planning Background

The fence, the subject matter of this Review has been the subject of three section 5 declaration procedures:

- EX624** Application by Vincent & James Brennan, resulting in a Declaration dated 19th December, 2017 that the construction of about 50 metres of stock-proof fencing at the western boundary of the Applicant's farm land at Dromin Lower, Listowel, Co. Kerry constitutes exempted development.
- EX858** Application by "*Bluebell Wood and River Walk Action Committee*", resulting in a Declaration dated 23rd October, 2020 that the works and construction of a 2 metre high palisade fence adjacent to a water course .. does not constitute exempted development.
- EX877** Application by James Brennan resulting in a Declaration dated the 26th January, 2021 that the completion of works consisting of a 2 metre high palisade fence adjacent to a water course at Dromin Lower, Listowel, Co. Kerry does NOT constitute exempted development.

Situation of and Benefits to the Lands

The Applicant is the owner of farmlands situate at Dromin Lower and Skehanierin Lower coloured in yellow upon Map A, (the "Farmlands"). As can be seen from Map A, the lands are bounded on the southern side by the River Feale (coloured in blue) and on the western side, by a tributary of the River Feale, referred to in the Report of the Planner as a "tributary watercourse". This tributary is shown aligned with the Townland Boundary on Map A, coloured faintly in blue and flowing perpendicular to the River Feale. The Townland Boundary reflects the division between the Townland of Dromin Lower and the Townland Ballygowloge to the west of the Farmlands. It also reflects the division of ownership of the lands in the distant past. The lands to the west (owned by Mr. Barratt) were formerly owned by Lord Listowel. The Applicant's Farmlands (represented on Map A in yellow) were owned by the Estate of the Knight of Kerry.

It is significant that there is no factual dispute between the Applicant and the Planning Authority but that the fence, the subject of the Application is "*adjacent to a water course which discharges to the River Feale*" (Planner, KCC, 25.01.21). Given this water course separates the Applicant from the neighbouring landowner and separates the townlands, it must be accepted (and Kerry County Council do not allege otherwise) that the fence in question is therefore, entirely situate on the Applicant's property and marked on Map A with a broken blue/purple line).

The northern and eastern boundaries of the Applicant's Farmlands are long established stock proof ditches and fences and physically distant and removed from the public road (N69, National Secondary Road, Listowel to Tarbert and running between "Red Cottages" and "Skehanlerin Bridge" on Map A) by lands owned by other landowners between the public road and the Applicant's lands. The Applicant, his mother and father, reside in a

house to the north of the Farmlands directly beside the N69 and with direct access on and off the N69 but physically separated from the Farmlands (the numbers 89 marking this area on Map A, east of "Skehanlerin Bridge").

Access North to South to the Applicant's Property

Access from the dwellinghouse (to the north) to the Farmlands, is facilitated over the lands of neighbouring landowners, pursuant to internal private rights of way, running approximately north to south, coloured in green on Map A and a photograph of the nature and extent of same which is shown in the Property Review. Repairs to and maintenance of the roadway is an entirely private matter arising from obligations arising under deed.

Access West to East by Landowners

Otherwise, access between the different plots of land are facilitated by internal rights of way running east to west and situate in the main to the north of the Farmlands, parallel to the old disused railway line (and marked "M.P" to the north of the Farmlands on Map A). This railway line is to become the "North Kerry Greenway" announced and currently under development by KCC. The lands which are not coloured yellow (as they are not owned by the Applicant) is subject to a right of access in favour of the Applicant illustrated with the letters "F.P." directly beside the River Feale. In reality, while the right is conferred, there is no track or metalled surface at this location.

Rights to the River

Unusually, the Applicant's riparian rights are intact. They were not retained (as is commonplace in many areas of the River Feale) by the Applicant's predecessor in title (the Knight of Kerry). As can be seen from Map A, the Applicant's ownership extends into the middle of the River Feale and he is solely entitled to them.

In this regard the Applicant encloses a copy of Conveyance executed in 1923 which explicitly states at items 27, 29, 30 and 30B (the relevant entries) that these lands (reflecting the Farmlands) enjoy (taking plot 27):

"Similar right of fishing and taking fish to that set forth at Nos. 2 and 2A, 3 and 3A in that part of the River Feale comprised in Plot No. [see map] with similar right of way and ancillary rights."

Use of the Lands

The Applicant is the fourth generation of farmers on the Farmlands. He has a mixed farm of dairy cows and stock and using the open fields for silage production and grazing of cattle, which is run with the assistance of his father, Vincent Brennan.

Background to the Necessity to Replace Boundary Fencing

The Applicant and his father, experienced incidents of minor trespass to their lands when neighbouring lands to the west, were developed as a golf course by their neighbour Michael Barrett. While the matter is ventilated in more detail below, it is accepted by KCC that the boundary between the Applicant and his neighbour to the west is the "adjacent .. water course which discharges to the River Feale" (Planner, 25.01.21). As will also be seen below, it is incontrovertible that at this time in 2005/2006, the Applicant's lands were still bounded by ditch and post and wire fence, to retain livestock.

Trespass to the Applicant's lands was rare and infrequent. Following the refencing of the respective boundaries, while the Applicant would not deny that young men may have occasionally entered the lands to swim and sunbathe on the 'lime lock' (a long flat protruding stone at a low point, into the river and photographed in the Property Review), because of the rough woodland nature of this area of the Farmlands: the undulating surface, number of trees and necessity to cross the tributary or watercourse to enter the Applicant's Farmlands; the lands were difficult to access and incursions infrequent.

However in concert with the development of housing estates on lands to the north west of the Farmlands (marked on Map A as "Kenny Heights Estate"), which had previously been used solely for farming, the Applicant became aware of increasing incidents, evidenced by the breaking down of the boundary fence and leaving behind of clothing, bottles and other detritus, which not only was unsanitary, but posed a danger to animals.

In addition, from time to time, the Applicant and his father would meet complete strangers ambling onto the open fields of the Farmlands, having crossed the tributary, the boundary fence and the wooded area, as if it were the most natural thing in the world. Similarly, people using Kayaks would pull into a low flat area of the river bank, as if it had been created for them.

While the Applicant and his father were not aggressive to these people, they believed that high fences make good neighbours and given that 'no trespassing' and 'private property' signs, were insufficient to deter these complete strangers, they applied to Kerry County Council in 2017 for confirmation that replacing the existing western boundary fence with a more robust and 'repellent' type of palisade fencing, did not require planning permission. This was confirmed on the 19th December, 2017 (EX 624).

The Applicant did not carry out the works immediately. However from the commencement of the first Covid-19 'lockdown' in March 2020, notwithstanding numerous 'no trespassing' and other signs (see photographs in the Property Review) the lands were subject to an unprecedented increase in the number of trespassers, rising almost to people coming onto the lands on a daily basis. At this stage the lands were protected only by a severely debilitated ditch, as the fencing had been essentially trampled and removed and this formed an impetus for the carrying out of the works in July 2020.

The works required the digging out of the existing ditch and removal of the post and wire fence on Applicant's lands on the boundary, so as to construct a foundation, which would allow the fencing to resist being broken if climbed, or unlawfully interfered with. The river side edge of the fencing was extended sufficiently towards the river that a trespasser, having negotiated the watercourse, could not simply walk around the edge of the fence and photographs of the palisade fencing and its position towards the river, are shown in the Property Review.

Immediately following the completion of the erection of the palisade fencing between the 6th and 10th July 2020, on the 13th July, 2020 a Facebook page was opened by an "Antóin O'Cathasaigh" entitled "*The Bluebells Woods & River Walk Group*" and which posted:

"Meeting at the handball alley on Saturday evening at 7 about right of way barrier fence. Tell anyone you think is interested".

This page now has over fourteen hundred (1,400) followers including an offer of support from the 'Keep Ireland Open' campaign and it publishes diverse and aggressive commentary expressed against the Applicant and the Local Planning Authority (KCC).

The opening of this Facebook page, has coincided with the intensification of a public campaign, which sought and obtained funding from donors and which resulted in the second section 5 referral (EX858) by the *"Bluebell Wood and River Walk Action Committee"* and a number of articles appearing in the local newspapers (see Articles 3).

Extent of the claimed 'Bluebell Wood' and "River Walk"

Before addressing the works carried out by the Applicant permitted as exempted development pursuant to Declaration EX 624, it is important to realise that the designation *"Bluebell Woods"* is a construct. It is a fabrication. An epithet without historical or geographical basis. For the avoidance of doubt, the pictures appearing on the Facebook page of *"The Bluebells Woods & River Walk Group"* are not of the Applicant's Farmlands. They are photographs of a location which is undisclosed.

Further, there is no 'river walk' on the Farmlands. Save and except one man-made break in the bank, at the boundary of the fields with the river (created historically by the Applicant's predecessors in title, for the purpose of drawing gravel from the River and not located in the "wood") and the lower portion of wooded area inside the western boundary fence, it is not possible to walk along the river bank, as the south of the fields coloured in yellow on Map A are bounded by a high natural ditch, comprised of natural hedge and brambles and low bushes. Further, the river bank (depending on the flow of the river) immediately beside those fields, presents as a sheer vertical face, several metres in height, as shown on the right hand side of the photograph of the river, contained in the Property Review.

Secondly, the length of the area of the Farmlands said to comprise the forest "Walk" (by KCC's own admission) is no longer than 150 metres, leading to the Applicant's (and his neighbours) flat fields. There is no path, no track, no defined surface of any kind on these fields. Such a defined surface would constitute damage, in fields used for silage production and dairy cows.

What is contended for in this matter, is that the public have had habitual access over the wooded portion of the Farmlands (150 metres) for the purpose of obtaining access to the Applicant's agricultural fields. This is not logical. It does not fall within Article 9(1)(a)(x). In this regard it should be recalled, that the internal access of these lands is to the north, where is situate the abandoned railway line. No person other than the Applicant, has a right of access to the Farmlands, nevermind these fields, which are entirely privately owned, nor do fields in private ownership constitute *"a .. seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility"*. Merely because is it possible to walk on land, does not confer it with 'recreational utility'.

Finally, having trespassed upon the Applicant's fields, such persons cannot get to any public road, without also trespassing over the Applicant's neighbours' lands to get to the N69. There is no alternative but to turn around and go back the same way. There is no 'loop', no connection to lands dedicated to the public. The contention of the 'public' and also KCC, appears to be, that unlawfully entering onto the Applicant's lands for 150 metres, coming to a field and turning around again, results in the removal, by operation of Article 9(1)(a)(x) of the Applicant's entitlement to fence his own property, without being obliged to make an application for planning permission, to which the 1,400 followers of the "*The Bluebells Woods & River Walk Group*" will no doubt object.

Works previously carried out by the Applicant

KCC's previous planner, in the course of EX624 (leading to Declaration dated 19th December, 2017) confirmed that the Applicant's boundary fence was in place in December, 2017.

This was some ten years after a previous re-fencing, evidence of which is clearly provided. Indeed the Planner himself records that KCC was provided with documents including "*a letter from a Michael Moore to Maurice & Co. Solicitors dated 13th July 2006. This letter states that a fence on Mr. Barrett's property was removed when the golf club opened and that an undertaken (sic.) was given to repair this fence. ..*" (see Letters 2).

It is submitted by the Applicant, that the correspondence shows somewhat more than a claim that "*a fence on Mr. Barrett's property was removed when the golf club opened and that an undertaken (sic.) was given to repair this fence. ..*".

Not only does the correspondence demonstrate that there was an agreement between the Applicant's father and his neighbour to the west, Michael Barrett (who met on site in 2006, after a letter sent on behalf of the Applicant's father dated the 15th July, 2005), the correspondence also demonstrates that back in 2006 as a result of the development of the golf course, fences which had been in place, had deteriorated or been broken and had to be repaired to deter trespass and prevent the escape of cattle, across the wire, onto the bank of the tributary and on to the golf course next door.

In the words of Michael Moore Solicitor (letter 13th July 2006) acting for the Applicant's father:

"[Michael Barrett] had a fence along the line 'A-B' before he built the golf course. He cleared away the fence and opened up the space surrounding it with the result that walkers began trespassing on my client's lands. My client has repaired his fence at the entrance to the wood on his property several times in recent years but it has been torn down by trespassers. He will endeavour to keep it repaired. However if your client repaired the gap in the fence at the point 'B', this would prevent cattle from trespassing on his lands from the river. Your client might please arrange to do so."

Further, the line and location of the fence which the Applicant's father sought Mr. Barratt to repair is also explicitly recorded by the map appended to the letter of the 15th July 2005.

This letter stated:

"My client is concerned that arising out of your recent planning application for a hotel and leisure centre at Gurinard, Listowel, his property will be trespassed upon. I enclose

copy map showing my client's property, the boundary of which with your property, I am instructed, is along the line 'A-B'.

My client requires to hear from you within the next seven days with your proposals to make your property secure and prevent any such trespass and in particular he requires that you erect a permanent fence along the boundary line 'A-B' and that you set out the type of fence to be erected for his approval."

Accompanying this letter is an extract from a map (see Letters 3), clearly showing that the area in question is the same area of the section 5 referrals and that the Applicant's father knew that Mr. Barratt's boundary was along the line of the Townland boundary.

The Planner dismisses this information with the words *"The existence of any fence at this location historically is disputed by the evidence submitted by the applicants on the second Section 5 declaration issued in relation to this fence (Ex858)."*

In doing so, not only does the Planner contradict and come to the opposite of a factual finding KCC previously arrived at in the course of EX624, but he also appears to believe that if he merely 'elects' or 'prefers' one side of the argument, as opposed to the other and discounting one side, that in doing so, he fulfils his function. For the reasons set out below, we do not accept this is the case.

Public Walking Rights in Listowel

Setting aside the opening of the *"North Kerry Greenway"*, the town of Listowel is also served by the Listowel Memorial Park .

In addition, there appears to be evidence of a walk along the bank of the River Feale in the Townland of Ballygowloge to the west of the Applicant's Farmlands. This walk is marked on Map A in pink, going east to west beside the river and marked "F.P." and then turning northwards and marked "F.P." and along the northern illustrated path entirely within the Townland of Ballygowloge to the public (N69) roadway. The northern portion of this walk no longer exists on the ground.

The Kenny Heights Estate, contain houses constructed on the northern path of the walk as recorded, in addition, that area at the intersection of the "red way" and the path marked pink has become, or has been rendered, impassable.

It appears that the suggestion that there is public access onto the Applicant's lands, arises simply because of its proximity to the 'walk' coloured in pink on Map A, notwithstanding there is no articulation between the lands on either sides of the water course and they are comprised within separate (historical) landholdings and separate Townlands.

The way marked in red on Map A, is a new development and is a way which is extremely rough and dangerous with significant drops in height, no defined path and the track which has been carved out is replete with tree roots, mud and detritus. It appears to have sprung up since 'lockdown' began.

Other Features

KCC's Planner makes specific reference (Report, 25.01.21) and photographs:

"A number of steps exist on the western bank of the tributary watercourse facilitating stepped access to the bed of the water course."

The Planner appears to be unaware that these stone steps lead to and are for the purpose of accessing, a "Spa Well" and source of fresh water, within the Townland of Ballygowloge although a source of water which has long fell into disuse. This well is marked with a red square on Map A.

The only historical feature on the Applicant's lands is a canal, initially constructed in the late 1800's or early 1900's pursuant to venture which failed, well prior to the sale of the lands from the representatives of the Knight of Kerry in 1923. This canal is not marked on Map A but commences in the area to the west of the Applicant's lands running west to east and its abandonment by its creators (and not filled in) has resulted in a trap for the unwary. Its only use is for wildlife.

Appearance of Objectivity

The decision of KCC is based on the Planner's Report (25.01.21) which initially at least, is identical, word for word, to his previous report carried out in the context of EX858 and dated 22.10.20. The repetition between the two reports, raises questions about the degree to which the Planner came to this matter with an 'open mind' or whether he was just confirming what he previously decided in EX858 ?

In fairness, the issue of whether the Planner could be expected to look at the same factual situation 'afresh', in an impartial and objective manner, or whether he would naturally tend to confirm the decision he made under EX858, is one for KCC. While it is not alleged that any predetermination was deliberate or intentional, as can be seen from the discussion about the significance of the stone steps set out below and the significance of the reliance on information imported from EX858, it is submitted that the Planner could only have made his assessment from an already predetermined view, that a walking route / public access exists on the Applicant's land.

Evidence of 'paths'

In addition, the Planner uses words such as 'evidence', 'evidential' and 'historical' in concert with words such as "path" and "pathway" in a manner which clearly indicates that the Planner, upon finding a track or "path", considered such tracks to have an 'evidential' value. This is a logical fallacy.

The existence of tracks on lands are of no evidential assistance unless paved or manifestly artificially created. Such tracks tend to be created by larger mammals and landowners themselves, as both will automatically choose the pathway of 'least resistance' to inspect and survey the lands. Secondly, such tracks in undulating land with a proliferation of vegetation and tree cover, tend to develop in areas which have the least obstruction, to avoid tree roots etc.

In this case, it is clear that a portion of what is being described as a 'path', is the action of water from the River Feale flooding onto the lowest point of the lands. The existence of a track or path on lands, has no *evidential* weight in a case such as this, where the issue is not whether the public has had access to the lands, but rather whether such access has been *habitual*. With regard to the habitual nature of the access, the 'tracks' or 'paths' identified by the Planner, by virtue of their narrow width, unpaved nature and sheer roughness, are of no 'evidential' value at all. Yet it is clear that the existence, of what the Planner considers to be tracks, led him, without evidential support, to determine that these tracks were inexorably created by members of the public accessing the lands. This is merely an assumption, confirming a view already formed in EX858.

Further, the KCC report fails to draw a distinction between the Applicant's lands and those of his neighbour, but rather appears to view the lands of the Applicant and his neighbour, as a contiguous whole, thus entirely ignoring or setting aside the existing ownership of those parcels within their separate Townlands and their historical context. In particular, the KCC Planner states:

"The stone steps facilitating access to the tributary bed are evidentially historical in nature, consisting of well-placed stones and not modern materials such as concrete. This indicates that historically there was an intention to facilitate and maintain a walking route along this path."

This finding, is a very clear example of where the KCC assessment has been misdirected.

First, the stone steps (it is accepted by KCC) accesses "the tributary bed". A tributary bed which also represents the Townland Boundary and the delineation of ownership of the lands of the Applicant and the lands of his neighbour. In fact, these steps provide access to the "Spa Well" entirely contained in the Townland of Ballygowloge the Townland adjoining the Townland in which the Applicant's Farmlands are situate (and marked by a red square on Map A). This error with regard to the purpose of the steps and their historical usage to access the well, leads to a series of further specious assumptions.

The Planner having made an assumption that the steps relate to a "walking route" and not the well, renders his opinion entirely unsupportable.

Further, the Planner, having earlier in his report (see "Analysis") conclusively excluded the existence of a public right of way, with the words:

"I am satisfied that there was no evidence submitted on the current application or on the previous applications that indicate a public right of way running west – east at this location adjacent to the riverbank."

utilises the stone steps to justify a finding that there was dedication to the public, with the words "*.. historically there was an intention to facilitate and maintain a walking route along this path*". [underline added]

Thirdly, the Planner who inspects the lands in January, 2021 makes a *finding* that "*One of the paths outlined above east of the fence is in line with these steps*". Again, given the lands in question were subject to the groundworks necessary to give the palisade fencing a proper foundation in July 2020 (thus altering the topography of the land where those works were

carried out), any such finding of 'alignment', can only be the exercise of speculation, not fact finding.

In making these purported findings, the Planner has entirely departed from and allowed himself to be distracted from, those matters which he is required to find, in order to deprive the Applicant's works of their exempted status – access by the public for “10 years preceding such fencing”. In confusing the issue of public access and the existence of ‘paths’, the Planner departs from the strictures of the statutory requirements and imports a criteria which simply does not exist, cannot be demonstrated on the facts and which expressly contradicts (following a full assessment) his own finding that there is no “public right of way”.

The Planning Context

It is accepted by all parties that the lands in issue here, comprise a wooded area and are agricultural lands. Many agricultural activities are explicitly conferred with the benefit of ‘exempted development’ status, as indeed are certain woodland activities, by section 4 of the Planning and Development Act, 2000 and in particular 4(1)(a) which provides that exempted status extends to:

“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 land so used”.

Again, this is not an unlimited right. In this case, the restriction on the exemption arises if the development, in accordance with Article 9(1)(a) of the Regulations:

- (x) *consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility,*
- (xi) *obstruct any public right of way*

Even KCC accepts no public right of way exists on the Applicant's lands per Article 9(1)(a)(xi) and so this aspect of the restriction will not be addressed further (although as set out above, this restriction effected the Report).

With regard to Article 9(1)(a)(x) there are a number of factors which must be satisfied in order to denude the Applicant of his right to fence his lands. The lands in question must be:

- (a) habitually open to or used by the public;
- (b) during the 10 years preceding such fencing or enclosure;
- (c) the said use being for recreational purposes, or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility.

Interpretation

Given the Applicant is the owner of private property and KCC and An Bord Pleanala constitute “The State”; Article 9(1)(a)(x), can only be interpreted in a manner which is consistent with the Applicant's right of ownership of private property.

Indeed, not only is KCC and the Board required to protect the Applicant's lands from unjust attack and vindicate his property rights, but the right to fence lands and protect them from access, by those who have no right to access them, is a fundamental incident of the right of ownership. As stated by Mr. Justice McKechnie:

"The right to own what is one's own is as ancient as the earliest form by which unit groups of society regulated the affairs of those within them. Intrinsic to such a right is an entitlement to undisturbed enjoyment of one's property and if necessary, the right to rebuff all unwelcome interferences with it. This right has always been recognised as a bedrock of the common law, with Blackstone describing it as the 'third absolute right inherent in every Englishman...' "

As a Means of Access To ...

In this case, it must be accepted that any person entering over the fence at the Applicant's eastern boundary into the wooded area of the Applicant's lands, emerges into a field from which the riverbank cannot physically be accessed by reason of the natural boundary to the south of brambles and natural hedging. A field which if crossed, does not lead to a public road, or public land, or anything other than private property.

Can a field constitute a place of natural beauty, or recreational utility ?

While beauty is always in the eye of the beholder, were every landholding which could afford recreational utility, or be considered a place of natural beauty be 'caught' by Article 9(1)(a)(x), there would be few farmlands in the country (and in particular along the western seaboard) which would not be deprived of the right to renew and replace boundary fencing, without having to apply for planning permission to do so. In such a case, this would not only entirely set at naught the exemption afforded in section 4 of the Act and constitute a restriction of the exempted development provisions which the 'parent' act does not allow, but it would also constitute a substantial interference with the most basic incident of land ownership – the right to keep out trespassers.

The Applicant's lands do not constitute a "*means of access*" to any "*seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility*" (by which we mean 'recorded' or 'recognised').

In this case KCC and indeed the "*Bluebell Wood and River Walk Action Committee*" suggests, that the Applicant's Farmlands themselves *should* be available for "*recreational purposes*", not necessarily because it claims the Applicant's lands are of particular natural beauty but rather, simply by virtue of the location of the Farmlands beside the River Feale to the south. This is not what Article 9(1)(a)(x) permits.

Not only are the Applicant's lands NOT a means of access to a recognised location, but merely because I want to walk on the property of another, because I consider that property to be of "*natural beauty or recreational activity*", does not afford a right to do so, nor can Article 9(1)(a)(x) be interpreted to permit of such an interpretation. The contrary is the case. The only land a person may enter is land owned by himself, unless invited to do so.

If a landowner indulges access to his land or does not repel incursions onto his land with zeal, this does not result in the creation of public right of any nature. As is often cited:

".. nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."

(per Lord Atkinson in *Folkestone Corporation v. Brockman* and approved by the Irish Supreme Court in *Walsh v. Cassidy*).

Further, while the Applicant has been forced to erect, palisade fencing, warning signs and CCTV because of the ongoing campaign by the "*Bluebell Wood and River Walk Action Committee*" in order to protect his property, as can be seen from the above, he is permitted to allow people to access his lands (such as for example, young men swimming off the flat rock, or indeed walkers) without adverse effect, if this is what he chooses. As the Supreme Court have held:

"User by permission of the owner is not user as of right. At the same time, user without express permission is not necessarily user as of right. .. Acts may be tolerated or indulged by a landowners vis-à-vis his neighbours without being considered to be the existence of a right. .. owners should not be constrained to be "churlish" in the insistence of their own property rights. It would be undesirable and inconsistent with a policy of good neighbourliness if the law were so readily to infer dedication of public rights of way from acts of openness and tolerance that landowners were induced to adopt a fortress mentality. .. " (*Walsh v. Sligo County Council*).

Such indulgence does not and therefore cannot, have a legal effect adverse to the Applicant's rights of ownership and privacy.

Habitually Open to or Used by the Public .. 10 years

The temporal requirement of 10 years is a factor which must be objectively found. A lesser period is insufficient and a longer period is irrelevant. The criteria is 10 years.

Further, the use must be 'habitual' and must be lawful. It is clear that unlawful use cannot be taken into account as *"If unlawful means were permissible for the establishment of a "use" or, for that matter, a right of way, such could be readily established by deliberate and persistent trespass, wanton destruction of private property and threats of personal violence. The law is there to protect people from such, not to benefit those who engage in or perpetrate such activity."* (per Meenan J. in *Dennehy v. An Bord Pleanala* (No. 2) 18.09.20).

In this case, in order to justify its finding, KCC has attempted to reach back to a period considerably in excess of 10 years in order to justify what is in effect, a finding of 'dedication' and in particular a 'historical' intention *"to facilitate and maintain a walking route along this path"*.

The Applicant would refer in particular to those documents referred to in the "Conclusion" of the Planners Report. These represent another attempt to use information to support a predetermined view. For example, see the reference to:

- The Stone Steps (clearly misinterpreted, see above)
- Use of the path by members of the public (evidencing nothing but ongoing trespass)
- Reference to the Irish Tourist Board in 1942. Setting aside that this is a document which is not referable to the Applicant's lands and is vague, lacks specificity and cannot support the interpretation being placed upon it, it is clear that the document only goes as far as making a general reference to a "*public right of way on the northern bank*". There is no map illustrating the path of this way. In circumstances where the 'northern bank' applies to the entire length of the river, even ascribing some weight to the document (and the Applicant does not), it is more likely that this document refers to the way marked in pink on Map A, acknowledged to exist in newspaper articles as far back as 1992. This document is certainly not authoritative with regard to the Applicant's lands.
- "witness statements" submitted not in this Application, but rather imported by KCC from EX858. Ignoring for a moment that in importing these statements, the Planner effectively incorporates both EX858 into EX877 and redecides both and setting aside these 'statements' are formulated in repetitive, unspecific and inane terms more akin to a petition; the description "*from Council pumphouse, Town Park to Shehenerin Lr. Listowel*" are incapable of supporting a case for a defined route from one point to another. The statements refer to a walk, claiming to have a starting point which is accepted to be public property and an end point, which is not only vague, but is submitted to be somewhere in the middle of a privately owned Townland (not all of which is owned by the Applicant). These statements should not have been relied upon by KCC, nevermind being 'reused' in EX877.
- Statement by the North Kerry Anglers Association of uninterrupted access. There is simply no evidence to support the text of this statement which is unspecific, clearly biased and self serving and cannot be correct, given the Applicant's retains his riparian rights
- A video of 2019 which can have no bearing on the 10 year requirement and which is clearly shot in a manner which misrepresents the position on the ground
- Photographs, the content of which are interpreted by KCC to support its own mistaken view about the 'evidential' value of the 'path' or 'track'

While KCC grounds its conclusion on these matters, none of this 'evidence' is demonstrative or even indicative of the Applicant's lands being "*habitually open to or used by the public during the 10 years preceding*" the fencing. In confusing what constitutes 'evidence' and the degree to which regard can be had to documents which claim to indicate what occurred in the 1940's and 1950's (during which decades the Applicant's grandfather was owner of the lands) to fulfil the 10 year criterion, KCC has entirely ignored and failed to implement the express terms of Article 9(1)(a)(x).

Further, in making a "Conclusion" on the basis of the above, KCC has entirely set aside, discounted and ignored all evidence submitted by the Applicant, the owner of the lands and the person in occupation throughout the entire period.

In this regard, the Board will have before it, the file relating to EX877, a copy of which could not be obtained by the Applicant in light of the restrictions currently in place, within the four week time limit which applies to this Review. However, the Board will no doubt observe the

frequency and piecemeal nature of KCC's communications with the Applicant and the paucity of time afforded to him, to reply. Indeed the difficulty for the Applicant in having sufficient time to address the plethora of issues raised, is to a degree replicated in this review and therefore, the Applicant would welcome, given the restrictions on his ability to access legal and engineering advice because of 'Covid-19', an opportunity to address such specific issues as the Board continues relevant to its decision, by way of further information or request pursuant to section 132.

Most disconcertingly, KCC has entirely discounted the Applicant's evidence and in particular, the contemporaneous documentary evidence accepted by KCC in EX624 and which resulted in KCC finding, in 2017, that the proposed construction of the "*stock-proof fencing at the western boundary of the applicant's farm land at Dromin Lower, Listowel, Co. Kerry does constitute exempted development*".

No justification for this *volte face* is set out in EX858 and EX877, even though the Planner made a unilateral decision, to go back and incorporate statements submitted EX858. Why this was done, is not explained.

Acceptance of EX858 and EX877

The Applicant would ask the Board to consider; KCC having confirmed the Applicant's intended replacement of fencing in 2017 was exempt from the requirement to obtain planning permission and those works having been carried out and manifestly in place at the time of EX858; whether KCC should have accepted EX858 (and by way of parallel, this application) at all ?

That KCC were aware the works had been carried out at the time of EX858, is clear from the express words of the decision of 23.10.20 "*The fence has been constructed...*". Given the fence was constructed on foot of EX624, a question arises as to whether KCC were entitled to embark again upon the same issue and indeed to make a contrary finding (a mere three years later) to determination EX624, in EX858 ?

Further, having confirmed the works were exempted, KCC appears to believe, not only may it reverse its original decision in EX624, by virtue of EX858, but that it is appropriate and just, to exercise its discretion in matters of criminal prosecution, in favour of subjecting the Applicant and his father, to risk of criminal penalty and prosecution, as a result of its 'change of mind' pursuant to the Enforcement Notices served on the Applicant and his father, dated 4th November 2020 (see Enforcement Notice 4).

The Applicant would further submit that KCC had no power to accept EX858 from the "*Bluebell Wood and River Walk Action Committee*", in circumstances where the decision in EX624 had already been made, the works carried out on foot of EX624 and the application EX858 was clearly an attempt to appeal against the decision in EX624, to the body who made the decision – KCC. That the Applicant has no choice, under threat of criminal prosecution, to adopt the same unfortunate course, is bizarre. The Applicant submits the Board should consider whether repetitive section 5 referrals, are permissible and hopes that your Decision in this review, will explicitly address this issue.

Conclusion

This review is a difficult one, in that it encompasses mixed issues of fact and law. The Applicant is aware that if the Board does not agree with his submissions with regard to how Article 9(1)(a)(x) should be interpreted, that it has available to it, the facility, pursuant to section 50 of the Planning Act 2000, to refer the question to the High Court.

However, it would be hoped that it is self evident, on the facts, that the Applicant's lands were not "*habitually open to or used by the public during the 10 years preceding such fencing*". Further, it would be hoped that the Board would agree that such factors and documents as were taken into account by KCC and upon which it based its Conclusion, lack credibility, specificity and provenance, sufficient to deprive the Applicant of his right to fence his lands on the basis the fencing is exempted development.

Given the level of aggression and public approbation to which the Applicant has been subject, by reason merely of being a landowner, it is our belief that to remove from him, the exemption to which he is entitled, would then expose him to a planning process which would allow the 'keyboard warriors' to involve themselves in a matter in which they are not invested and which holds no adverse consequences for them. We have not in this Submission, set out the entire panoply of the campaign mounted by the "*Bluebell Wood and River Walk Action Committee*" and like-minded individuals against the Applicant, as we trust that the Board can appreciate the level of anxiety and feelings of oppression which has led to the erection of palisade fencing, installation of CCTV and multiple signs.

Elizabeth Murphy BL

Documents to which we will refer

Conveyance 1

Copy of Conveyance, executed in 1923

Letters 2: Correspondence and map generated in 2005 and 2006, letters before
and after *13th July 2006*

Articles 3: Newspaper Articles

Enforcement Notice 4: 4th November, 2020

2

GET THE NEW EPAPER!

Your paper on any device. Visit kerryman.ie/subscribe



'SAVE OUR RIVER WALK'



ORDNANCE survey maps are being examined by both sides of a tense dispute over access to the banks of the River Feale in Listowel.

Up to 60 people attended a meeting in the Town Park on Saturday night as locals outlined their anger over recent fencing works erected

at the boundary of the 'Bluebell Woods' - impeding access to a popular walking trail along the riverbank as well as to prime fishing spots on the Listowel bank of the river.

The landowner behind the fencing told *The Kerryman* he did not wish to comment on the

matter. However, Sinn Féin County Councillor Tom Barry told the meeting the landowner informed him of a number of concerns he had about anti-social behaviour on his property during the lockdown.

The Kerryman understands both sides are

Sinn Féin County Councillor Tom Barry addresses the public meeting held in Listowel on Saturday over concerns about fencing works that have impeded access to part of the bank of the River Feale in the town. Photo: John Kelling

examining OS maps of the area in an attempt to establish if a right of way exists there.

Tony Casey, who convened the meeting, said he had received a substantial response to the matter from Listowel people far and wide.

SEE PAGE 4

WALKING ROUTE ON THE BANKS OF THE FEALE IS TAKING SHAPE IN LISTOWEL

BY DONAL NOLAN

ORDNANCE Survey maps of the River Feale are being scrutinised this week by both sides of a tense dispute that was sparked after fencing was erected down to the water's edge, blocking off a route used by townspeople.

The appearance of the fence cutting through the 'Bluebell Wood' prompted a public meeting in the Town Park on Saturday evening, where scores of anglers and townspeople vented their anger over the structure erected by a landowner.

Townspeople are now scrutinising the OS map to establish the veracity of a right of way it appears to show along the northern bank of the river from Listowel Bridge, through the Golf Club and the lands now blocked off by the fence.

The structure is meanwhile now under investigation by Kerry County Council officials, *The Kerryman* understands.

The Take Back the Bluebell Woods committee was formed as an outcome of the meeting with locals now calling on the landowner responsible for the fencing to take it back down immediately.

The landowner believed to be responsible for the fencing along the boundary of his land with Listowel Golf Club told *The Kerryman* that he wouldn't be commenting on the matter at this juncture.

However, Sinn Féin County Councillor Tom Barry has been in contact with the man and his family on the issue and expressed a number of concerns they told him they had recently experienced, during the lock-down, with the river bank route - including groups of people drinking in the woods, lighting fires and leaving broken bottles in their wake.

Take Back the Bluebell Woods committee member and angler Tony Casey - who convened the meeting - told *The Kerryman* that he didn't see any rubbish on the property.

"Before you get to those woods, there are other woods on the left, and I did see empty bottles, crisp packets and shopping bags strewn around all right, but in the Bluebell Woods I didn't."

Mr Casey said there has been a massive response to the dispute among a town that cherishes its use of the riverbank.

"There was an OS map produced at the meeting the last night showing what we say is the right of way in a yellow dotted line running from the handball alley under Listowel Bridge through the Golf Club, through the Bluebell Woods, into



the landowners' first field, in through a second field owned by another man, in through the landowners' second field, up over a bridge and along a boren out onto the Tarbert Road before looping back into town through Caherdunn."

Mr Casey claimed that the route was vital long ago in allowing the residents of Caherdunn access a well.

He also claimed that anglers are now impeded from accessing the best fishing spots beyond the woods by this route, by the fencing too.

"This is a hugely important issue for Listowel people as many of us have cherished memories of the Bluebell Woods and the river up there. I set up the Take Back the Bluebell Woods page online last night (Monday) and in the space of 12 hours over 200 people have joined it.

"I'm getting e-mails from far and wide. One Listowel lady now living in Canada was very upset with it, as well as cousins of mine in the States who grew up swimming there. I learned to swim myself."

Mr Casey said the fence is impeding many from getting to the best fishing spots by this route just as the pale salmon and white trout are running in numbers up the Feale.

It's understood the landowners are now ex-

amining the map.

Sinn Féin Cllr Tom Barry, who has spoken with both sides in the dispute, said he is hopeful of a resolution shortly that would be in the interests of all concerned.

view that he might meet for a chat to see if we could resolve it.

"He explained to me that he put the cameras up because initially gates were being left open up there and they had cattle.

"He gave me two examples and he said he had put padlocks on the gates to find the locks had been glued afterwards.

"He highlighted issues with anti-social behaviour and said that when he put the cameras up there it was only then he realised the volume of people going up in big groups, with fires being lit and bottles thrown around."

Cllr Barry said that he pointed out that people had been using the route for a long time:

"There is a lot of anger and frustration over it. People see that as a right of way for years, and there hadn't been an issue until recently.

"I used the route myself many times, and it's a beautiful place.

"All I can do now is offer my services to mediate on the matter. I have spoken with the family a number of times and I have to take their concerns on board.

"I would be hopeful that we can resolve this issue.

"Tensions are high at the moment, but the best thing we can do is to take a step back and see how we can resolve it now...the last thing we want is for this to go to court."



A section of the fencing erected in the Bluebell Woods last week, running all the way down to the bank of the Feale.

Opposition grows to Listowel fence

Campaigners claim access to traditional walkway now blocked

A SPIKED steel fence blocking access to a traditional path to Bluebell Woods along the River Feale is uniting the Listowel community worldwide.

BY MICHAEL AHERN

In recent months, walkers, swimmers and anglers have been unable to access an area known locally as 'The Falls' in Dromin Lower, following the erection of an industrial-grade fence in Bluebell Woods.

Locals claim the fence blocks a walkway that has been used by them for generations.

Listowel natives living as far away as New York, Australia and Canada are lending their financial support to a group opposing the fence, called 'The Bluebells Woods and River Walk Group'.

The group hopes their iDonate webpage 'Save Bluebell Walk' will bring about the removal of the metal fence.

Local man Tony Casey says that documents show an 'historic right of way for locals' granted by the Knights of Kerry in the 1770s.

Chairman of the group Joe O'Mahony says they're looking for a solution that suits both the local community and the landowner who erected the fence.

"Our purpose is to solve this amicably," he said. "This is part of the town, and people are very, very upset about it."

He said people "from all over the world" have been helping out, as this walkway is dear to many locals' hearts.

"It's unbelievable the amount of support we are getting," said Mr O'Mahony.

"Just about every young girl over the age of 30 learned to swim down there, and at one time the area used to be packed with people during the summer," he said.

He added that the area is still used by quite a number of swimmers, walkers and fishermen, and that locals are determined to come to a suitable arrangement with the landowner.

Local people claim that they first became aware of an issue in the area when security cameras were erected in the Bluebell Woods area, followed by warning signs, and then the fence.

Tony Casey says that OSI maps obtained by the group show a designated footpath along the river bank and up through three fields and onto the Tarbert Road.

"The OSI map was printed in 1837 and was updated in 1945, still showing the footpath," he commented.

"We were also onto the land registry for documents and deeds and we also have aerial footage and depositions from people who learned to fish and swim in the area," he said.

Chairman Joe O'Mahony added the group is 'making good progress' in a few different areas, and that they have been working with a number of different government bodies to help resolve the standoff.

Kerry's Eye contacted the landowner by phone but had not received a response before going to print on Wednesday evening.

Local Sinn Féin councillor Tom Barry says he's spoken to both parties and is hopeful that 'common sense can prevail'.

"The landowner will say that some anti-social behaviour was going on there," commented Councillor Barry, "and that's why the signs and cameras were erected."

"I respect everybody's right to protect their property from anti-social behaviour, but putting a fence up there takes it to another level."

"No doubt there was some anti-social behaviour going on there, but the vast majority of people going up there are not involved with that, and they are very upset about the fence."

"I've made myself available to mediate since last May, and I would hope that common sense can prevail," he added.



Tony Casey and Tony Stack from Listowel standing near the barrier erected on the path to Bluebell Woods in Listowel.

right price tiles
& wood flooring



UP TO
70% OFF
SALE

- ✓ ALL WALL & FLOOR TILES
- ✓ ALL WOOD FLOORING
- ✓ ALL BATHWARE
- ✓ ALL CLADDING

ENDS SOON!

OPEN 7 DAYS
MON - SAT 9am - 5.30pm
SUN 2pm - 5.30pm

DELIVERY SERVICE
& TILERS AVAILABLE

Manor Mile Height,
Killarney Road, Tralee
tralee@rightpricetiles.ie

066 7125522

Stores Nationwide
www.rightpricetiles.ie

DEPOSITS
TAKEN
CREDIT CARDS
ACCEPTED

FREE
MEASURING
SERVICE
AVAILABLE

There are two known barn owl nesting sites in the Listowel area, as well as a 'potential' nest site - all within what's termed the 'zone of influence' of the route.

Jacobs found that, ultimately, the Listowel Bypass could damage barn

owls. It is accepted that the proposed development will result in an increased risk of mortality from collisions, with road traffic for most of the local bird species," the report stated.

However, the EIS stated that there is no evidence to suggest the predict-

ed risk of collision while the bird is at its most active.

Lighting proposed for the route should also have the effect of deterring owls from feeding in the vicinity of the road.

"For most local breeding bird species, the presence of the proposed

impact significant at the local level in the immediate vicinity of the road edge but is expected to reduce to an imperceptible impact with increasing distance from the road," the report concluded in respect of its assessment of the likely risk on the bird population of the Listowel area.



over the erection of fencing on the bank of the River Feale. Photo by John Kelliher

Council on river walk: 'It is not a public right of way'

KERRY County Council is not involved in a dispute over a fence impeding access to the bank of the Feale as the Authority says it does not involve a 'public right of way', a spokesperson told *The Kerryman*.

The Council's line will come as a blow to townspeople angry over the appearance of fencing impeding the route of a walk along the Riverbank through the Bluebell Woods.

The route leads to prime fishing spots for anglers and through a much-loved wooded area.

The landowner behind the fencing told *The Kerryman* he did not wish to comment on the matter at this point. However, Sinn Féin County Councillor Tom Barry had spoken with

him at length and relayed the landowner's concerns about anti-social behaviour on his property during the lockdown.

Anglers and walkers attended a recent public meeting convened by Tony Casey, where they set out their dismay at the appearance of the fence which runs through the periphery of the Bluebell Woods down to the water's edge.

They pointed to an OS map they claim shows a route along the bank, supporting their belief that a right of way exists.

Not so, says Kerry County Council.

"This appears to be a civil matter and the Council is not involved insofar as there is not a public right of way," the spokesperson said.

Ballylongford looks to post pandemic

✓

1
Maurice O'Sullivan and Co
Solicitors
ACC Building
Main St
Listowel
Co. Kerry.

13th July 2006.

Your ref: OS/S/ck/B95.

Re: Your client, Michael Barrett.
My client, Vincent Brennan.

Dear Sirs,

I refer to your letter of the 5th inst.


I enclose copy letter of the 15th of July 2005 I sent to your client with copy map referred to therein.

I understand that following my letter of the 15th of July 2005 your client met with my client about two weeks afterwards and your client agreed to repair a gap at the point 'B' on the map on your client's property which had been made be walkers. Your client did not repair this gap which is also the point where the cattle went on to your clients lands from the river. My clients cattle get drinking water from the river.

Your client had a fence along the line 'A-B' before he built the golf course. He cleared away the fence and opened up the space surrounding it with the result that walkers began trespassing on my client's lands. My client has repaired his fence at the entrance to the wood on his property several times in recent years but it has been torn down by trespassers. He will endeavour to keep it repaired. However if your client repaired the gap in his fence at the point 'B', this would prevent cattle from trespassing on his lands from the river. Your client might please arrange to do so.

Yours faithfully

Michael Moore



Vincent Brennan
Skehenerin
Listowel
Co. Kerry.

6th July 2006

Re: You and Michael Barrett.
Alleged cattle trespass.

Dear Mr Brennan,

I enclose copy letter of the 5th of July 2006 from Maurice O'Sullivan and Co, Solicitors,
Listowel with copy letter of the 5th isn't to you for your attention.

Yours faithfully

Michael Moore



MAURICE O'SULLIVAN & CO
SOLICITORS

Maurice O'Sullivan, B.C.L.

My Ref:

Date:

Your Ref:

MO'S/ck/B95

A.C.G. BUILDING, CHURCH STREET,
LISTOWEL, CO. KERRY, IRELAND.

Phone: (068) 21760 (2 Lines)

Fax: (068) 21960

V.A.T. No. 35099591

Document Exchange No. DX 85 002

Listowel

E-Mail: kerrylaw@eircom.net

Website: www.houseinireland.com

5 July, 2006

Michael Moore
Solicitor
Convent Street
Listowel
Co. Kerry

Dear Michael,

I understand you act for Vincent Brennan and I enclose a copy of my letter of today's date to Mr. Brennan in respect of cattle trespassing last Sunday morning on my clients Golf Course.

Yours faithfully

Maurice O'Sullivan

MO'S/ck/B95/

5 July, 2006

Mr. Vincent Brennan
Cahirdown
Listowel
Co. Kerry

Re: My Client: Michael F Barrett

Dear Mr. Brennan,

I have received instructions from Michael F Barrett that on last Sunday morning on two occasions, cattle from your property came through the woods and trespassed on my clients Golf Course and did damage to two of the greens. My client has been reasonably successful in repairing the damage but my client is extremely worried if this incidence trespass occurs again and is not noticed immediately by my client that irreparable damage could be done, particularly to the green on his seventh hole.

If the green were to be severely damaged then it could cost quite a considerable amount of money to repair same and there would be a considerable amount of loss of revenue to my client by having the part of the course closed.

Would you please ensure that your cattle do not trespass on my clients' lands again and can you please advise me whether or not you have insurance on your farm covering cattle trespassing in the event that further trespass occurs.

Yours sincerely,

Maurice O'Sullivan

Mr Michael Barrett
Gurtinard
Listowel
Co. Kerry.

15th July 2005.

Re: My client, Vincent Brennan, Skehenerin, Listowel, Co. Kerry.
Proposed hotel and leisure centre at Gurtinard, Listowel.

Dear Mr Barrett,

As you know, my client's property adjoins your property at Dromin Lower, Listowel, Co. Kerry.

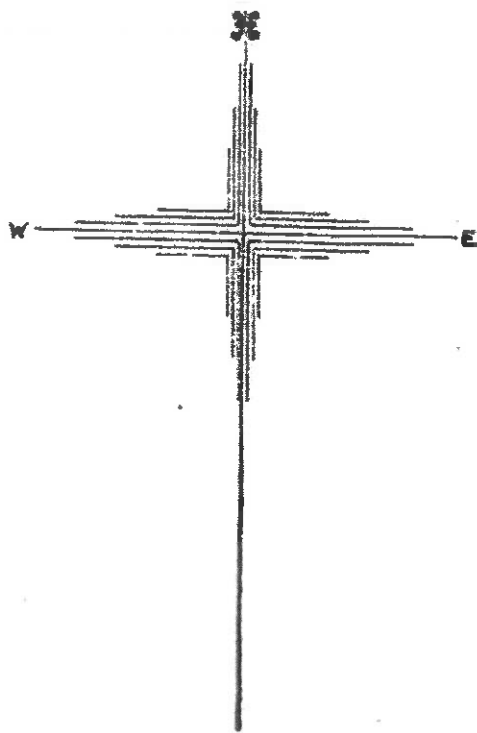
My client is concerned that arising out of your recent planning application for a hotel and leisure centre at Gurtinard, Listowel, his property will be trespassed upon. I enclose copy map showing my client's property, the boundary of which with your property, I am instructed, is along the line 'A-B'.

My client requires to hear from you within the next seven days with your proposals to make your property secure and prevent any such trespass and in particular he requires that you erect a permanent fence along the boundary line 'A-B' and that you set out the type of fence to be erected for his approval.

I await hearing from you in this regard within the next seven days.

Yours faithfully

Michael Moore



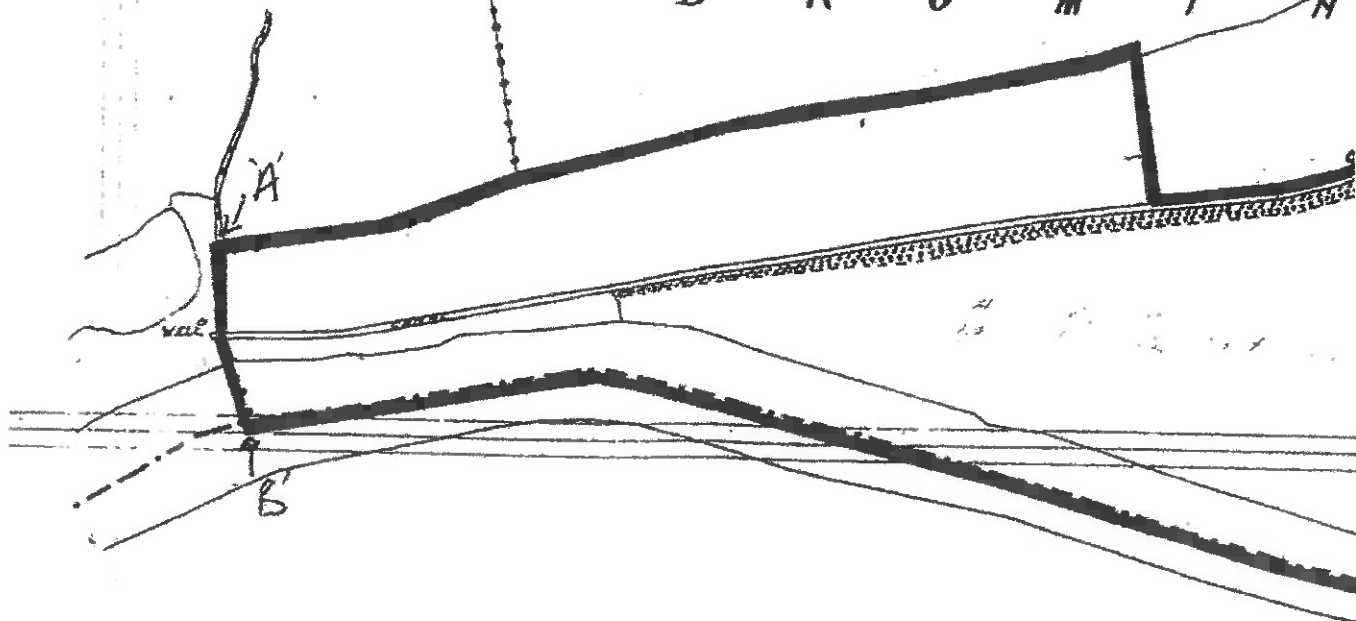
REFERRED

CO

Sec

G. S. RAILWAY

D R O M I N



An Rannóg Forfheidhmithe,
An Roinn Pleanála

Comhairle Contae Chiarraí,
Áras an Chontae,
Trá Lí, Co. Chiarraí.



COMHAIRLE CONTAE CHIARRAÍ
KERRY COUNTY COUNCIL

Enforcement Unit,
Planning Department

Kerry County Council,
County Buildings,
Tralee, Co. Kerry.

Guthán | Tel 066 7183774 Facs | Fax 066 7120328 Rphost | Email enforcement@kerrycoco.ie Suíomh | Web www.kerrycoco.ie

Our Ref: **8224**

6th November 2020

Vincent Brennan,
Skehenerin,
Listowel,
Co. Kerry

Re: Planning and Development Acts 2000 - 2020

A Chara,

I refer to our letter which accompanied the Enforcement Notice recently served on you (i.e. the Enforcement Notice which was correctly dated 04th November 2020).

It has since been noted that the **cover letter** which accompanied the Enforcement Notice was inadvertently dated 04th December 2020 instead of the **correct date of 04th November 2020**.

Please accept our apologies for any confusion caused by this typographical error.

Attached herewith is the amended cover letter (04th November 2020) together with a copy of the original Enforcement notice.

Mise le meas,

Staff Officer,
Enforcement Unit,
Planning and Sustainable Development – 066 718 3774



An Rannóg Forfheidhmithe,
An Roinn Pleanála

Comhairle Contae Chiarraí,
Áras an Chontae,
Trá Lí, Co. Chiarraí.



COMHAIRLE CONTAE CHIAIRRAÍ
KERRY COUNTY COUNCIL

Enforcement Unit,
Planning Department

Kerry County Council,
County Buildings,
Tralee, Co. Kerry.

Guthán | Tel 066 7183774 Facs | Fax 066 7120328 Rphost | Email enforcement@kerrycoco.ie Suíomh | Web www.kerrycoco.ie

Our Ref: 8224

Date: 4th November 2020

**Vincent Brennan,
Skehenerin,
Listowel,
Co. Kerry**

Planning and Development Acts 2000 to 2020.

A Chara,

I refer to previous correspondence regarding the above matter and to the submission from IC Engineers in relation to same. A decision has been made on the Section 5 referral submitted under Reference EX858. It has been determined on 23/10/2020 that the works outlined in the Section 5 referral would constitute development, which is not exempted development.

Please find attached an Enforcement Notice requiring the removal of the fence by 8th January 2021.

The Planning Authority wishes to inform you that in the event of the Enforcement Notice not being complied with, your file shall be forwarded to the Law Department to Institute Legal Proceedings against you, without any further notice or correspondence. You should note that you are liable for all costs and expenses incurred by Kerry County Council in relation to this matter.

Furthermore, you have incurred an Enforcement Fine of €250 being the costs incurred to date by Kerry County Council in dealing with this matter. The aforementioned fine is payable not later than 4 weeks from the date of this letter.

I trust your co-operation will be forthcoming in this matter.

Yours faithfully,

**S.O. Enforcement Unit
Planning and Sustainable Development - (066) 718 3774**



KERRY COUNTY COUNCIL
SECTION 154(5) PLANNING AND DEVELOPMENT ACTS 2000 to 2020.
ENFORCEMENT NOTICE

To: Vincent Brennan, Skehenerin, Listowel, Co. Kerry

Ref: 8224

WHEREAS Kerry County Council (hereinafter called "the Council") is the Planning Authority for the County of Kerry in which are situate lands at **Dromin Lower, Listowel, Co. Kerry.**

AND WHEREAS the following development has been carried out at the said lands namely:

- **The construction of a fence.**

AND WHEREAS the said development is not exempted and no permission for the said development has been applied for or granted by the Council in respect of the said development, the Council in exercise of the powers conferred on it by Section 154 of the Planning and Development Act 2000 as amended requires that the development **cease.**

Further you are required to carry out the following steps:-

- **Removal of the fence by 8th January 2021.**

AND TAKE NOTICE THAT if within the period specified above, or within such extended period (not being more than 6 months) as the Council may allow, the steps specified in this Notice to be taken by you have not been taken, the Council may enter on the lands and take such steps, including the removal, demolition or alteration of any structure, and may recover any expenses reasonably incurred by them in that behalf. If by the period specified above the steps specified in this Notice have not been undertaken you may be guilty of an offence.

A person who is guilty of an offence in relation to an unauthorised development under the provision of the Planning and Development Act 2000 (as amended) shall be liable to the following:-

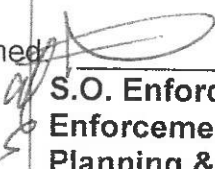
- (a) On conviction on indictment, to a fine not exceeding EUR 12,697,381, or to imprisonment for a term not exceeding 2 years, or to both, or

(2) On summary conviction, to a fine not exceeding EUR 5,000 or to imprisonment for a term not exceeding 6 months, or to both.

In addition you are required in accordance with section 154(5)(d) of the Planning and Development Act 2000 (as amended) to refund to the Council, the sum of EUR **250.00** being the costs and expenses reasonably incurred by the Council in relation to the investigation, detection and issue of the Enforcement Notice.

Dated this **4th November 2020**

Signed



**S.O. Enforcement Unit
Enforcement Unit
Planning & Sustainable Development**

~~An Rannóg Forfheidhmithe,~~
~~An Páinn Pleanála~~

Comhairle Contae Chiarraí,
Áras an Chontae,
Trá Lí, Co. Chiarraí.



COMHAIRLE CONTAE CHIARRAÍ
KERRY COUNTY COUNCIL

Enforcement Unit,
Planning Department

Kerry County Council,
County Buildings,
Tralee, Co. Kerry.

Guthán | Tel 066 7183774 Facs | Fax 066 7120328 Rphost | Email enforcement@kerrycoco.ie Suíomh | Web www.kerrycoco.ie

Our Ref: 8224

6th November 2020

James Brennan,
Skehenerin,
Listowel,
Co. Kerry

Re: Planning and Development Acts 2000 - 2020

A Chara,

I refer to our letter which accompanied the Enforcement Notice recently served on you (i.e. the Enforcement Notice which was correctly dated 04th November 2020).

It has since been noted that the **cover letter** which accompanied the Enforcement Notice was inadvertently dated 04th December 2020 instead of the **correct date of 04th November 2020**.

Please accept our apologies for any confusion caused by this typographical error.

Attached herewith is the amended cover letter (04th November 2020) together with a copy of the original Enforcement notice.

Mise le meas,

Staff Officer,
Enforcement Unit,
Planning and Sustainable Development – 066 718 3774



Manóóg Forfheidhmithe,
An Roinn Pleanála

Coml e Contae Chiarraí,
Áras an Chontae,
Trá Lí, Co. Chiarraí.



COMHAIRLE CONTAE CHIARRAÍ
KERRY COUNTY COUNCIL

Enforcement Unit,
Planning Department

Kerry County Council,
County Buildings,
Tralee, Co. Kerry.

Guthán | Tel 066 7183774 Facs | Fax 066 7120328 Rphost | Email enforcement@kerrycoco.ie Suíomh | Web www.kerrycoco.ie

Our Ref: 8224

Date: 4th November 2020

**James Brennan,
Skehenerin,
Listowel,
Co. Kerry**

Planning and Development Acts 2000 to 2020.

A Chara,

I refer to previous correspondence regarding the above matter and to the submission from IC Engineers in relation to same. A decision has been made on the Section 5 referral submitted under Reference EX858. It has been determined on 23/10/2020 that the works outlined in the Section 5 referral would constitute development, which is not exempted development.

Please find attached an Enforcement Notice requiring the removal of the fence by 8th January 2021.

The Planning Authority wishes to inform you that in the event of the Enforcement Notice not being complied with, your file shall be forwarded to the Law Department to Institute Legal Proceedings against you, without any further notice or correspondence. You should note that you are liable for all costs and expenses incurred by Kerry County Council in relation to this matter.

Furthermore, you have incurred an Enforcement Fine of €250 being the costs incurred to date by Kerry County Council in dealing with this matter. The aforementioned fine is payable not later than 4 weeks from the date of this letter.

I trust your co-operation will be forthcoming in this matter.

Yours faithfully,

S.O. Enforcement Unit

Planning and Sustainable Development - (066) 718 3774



KERRY COUNTY COUNCIL
SECTION 154(5) PLANNING AND DEVELOPMENT ACTS 2000 to 2020.
ENFORCEMENT NOTICE

To: James Brennan, Skehenerin, Listowel, Co. Kerry

Ref: 8224

WHEREAS Kerry County Council (hereinafter called "the Council") is the Planning Authority for the County of Kerry in which are situate lands at **Dromin Lower, Listowel, Co. Kerry.**

AND WHEREAS the following development has been carried out at the said lands namely:

- **The construction of a fence.**

AND WHEREAS the said development is not exempted and no permission for the said development has been applied for or granted by the Council in respect of the said development, the Council in exercise of the powers conferred on it by Section 154 of the Planning and Development Act 2000 as amended requires that the development **cease.**

Further you are required to carry out the following steps:-

- **Removal of the fence by 8th January 2021.**

AND TAKE NOTICE THAT if within the period specified above, or within such extended period (not being more than 6 months) as the Council may allow, the steps specified in this Notice to be taken by you have not been taken, the Council may enter on the lands and take such steps, including the removal, demolition or alteration of any structure, and may recover any expenses reasonably incurred by them in that behalf. If by the period specified above the steps specified in this Notice have not been undertaken you may be guilty of an offence.

A person who is guilty of an offence in relation to an unauthorised development under the provision of the Planning and Development Act 2000 (as amended) shall be liable to the following:-

- (a) On conviction on indictment, to a fine not exceeding EUR 12,697,381, or to imprisonment for a term not exceeding 2 years, or to both, or
- (b) On summary conviction, to a fine not exceeding EUR 5,000 or to imprisonment for a term not exceeding 6 months, or to both.

Dated this 4th November 2020

ned

Enforcement Unit

Planning & Sustainable Development

Independent Property Review of Lands at Listowel, Co. Kerry

Development: Independent Property Review

Lands: Dromin Lower, Listowel, Co. Kerry

Client: James Brennan

Date: 15th February 2021

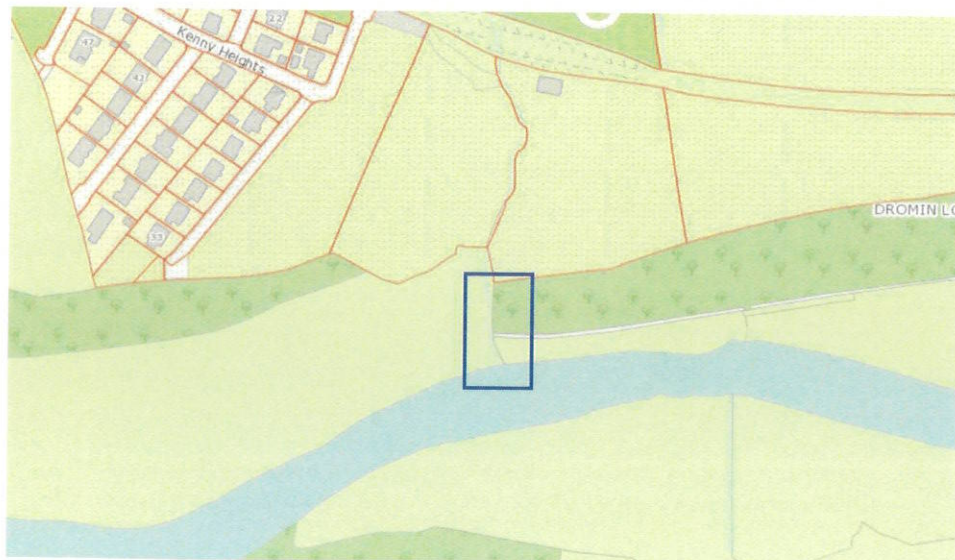
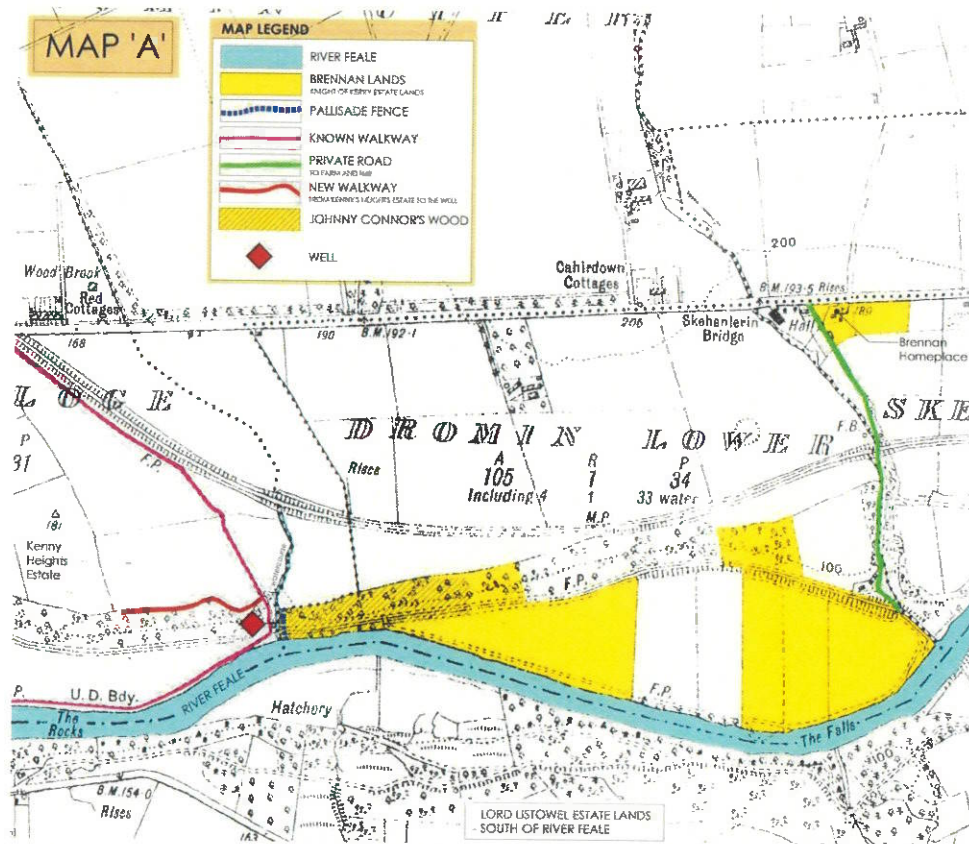


Table of Contents

Table of Contents	2
1.0 Introduction	3
2.0 Section 5 Declaration Procedure History	7
3.0 Palisade Fence Technical Details	8
4.0 Photographic References.....	12

1.0 Introduction

I have been engaged by Aisling Meehan Agricultural Solicitors, Springfield House, Sixmilebridge, Co. Clare V95 C795 to carry out an Independent Review of lands which have been the subject of three 'Section 5 Declaration Procedures' at Dromin Lower, Listowel, Co. Kerry. These lands are in the ownership of James Brennan.

This Independent Review of Lands intends to review the details of the now erected palisade fencing on the subject lands owned by James Brennan at Dromin Lower, Listowel, Co. Kerry and providing supplementary information on the surrounding lands and environs that are associated with all the Section 5 Declaration procedures

This review is provided to be used for reference purposes and essential technical information for this overall submission to An Bord Pleanála on behalf of James Brennan.

The subject lands are situated on the eastern side of Listowel Town, approx. 1.50km from the Town Square. These lands are situated on the northern banks of the River Feale. From the OPW Flooding Map database it is noted that these lands do not flood

The landowners James Brennan constructed a 1.80m high palisade fence of length 50m approx. on their own lands. This fence was constructed from the bank of the River Feale for a length of 50m to the east of a watercourse / stream. This stream is a tributary to the River Feale. The palisade fence was erected on Brennan lands to the east of the stream.

The stream forms the legal boundary between Brennan lands and the lands directly to the west. The lands to the west are in the ownership of Mr. Barrett.

The fence was erected on foot of a Section 5 Declaration procedure EX626 to Kerry County Council - Application by James Brennan, resulting in a Declaration dated 19th December, 2017 that the construction of about 50 metres of stock-proof fencing at the western boundary of the applicant's farm land at Dromin Lower, Listowel, Co. Kerry **does constitute exempted development**.

The palisade fence was erected on 6th -10th July 2020 following the above directive.

Independent Property Review – Dromin Lower, Listowel, Co. Kerry



Fig 1.1 – Site Location Map – Subject Lands in Red to the eastern side of Listowel Town



Fig 1.2 – Site Location Map – Subject Lands in Red

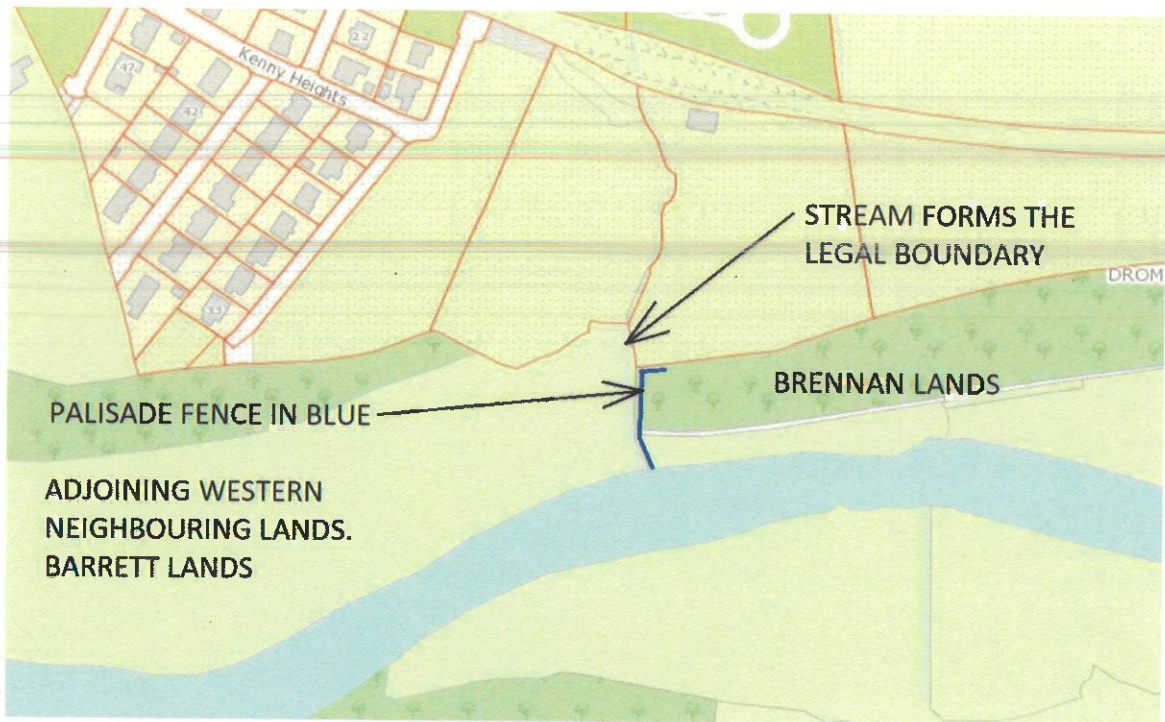


Fig 1.3 – Palisade Fence Location

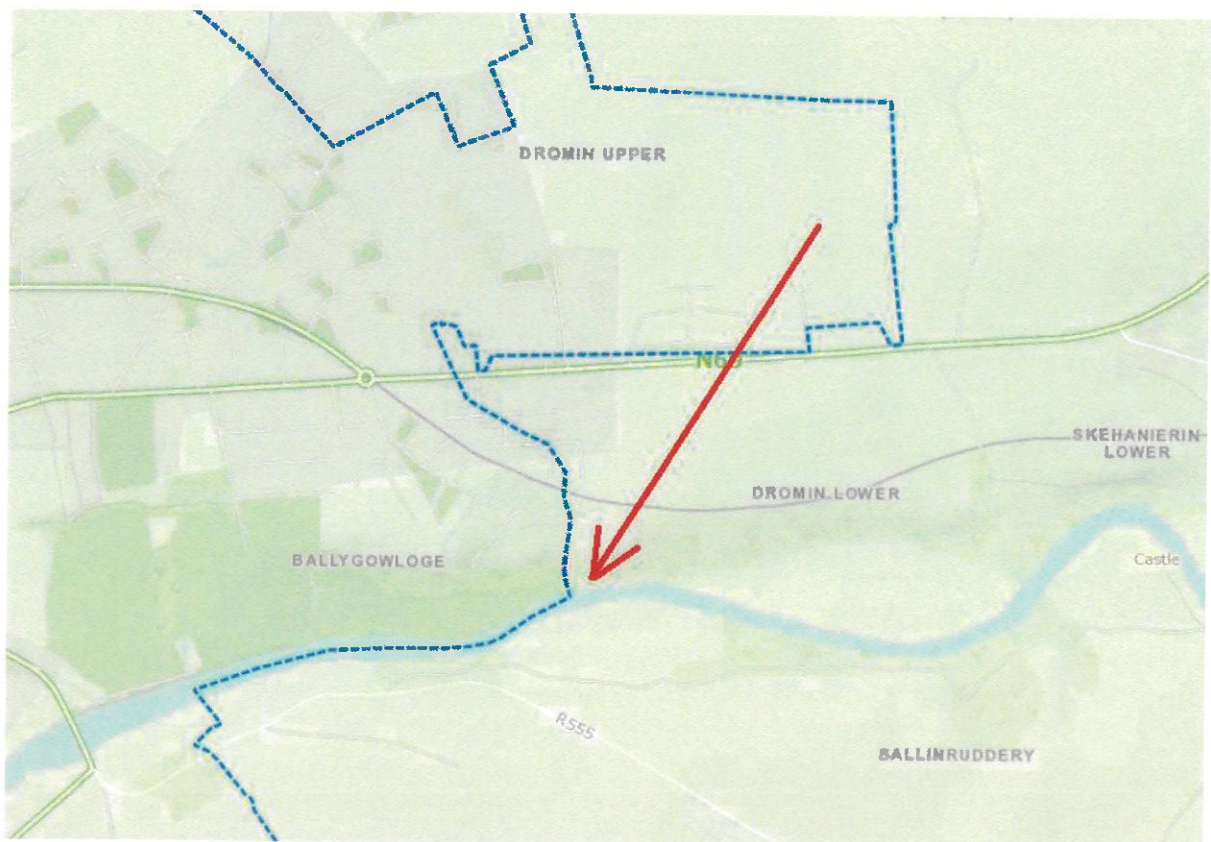


Fig 1.4 – Flood Zoning Map – Extract from the OPW Flood Mapping Database

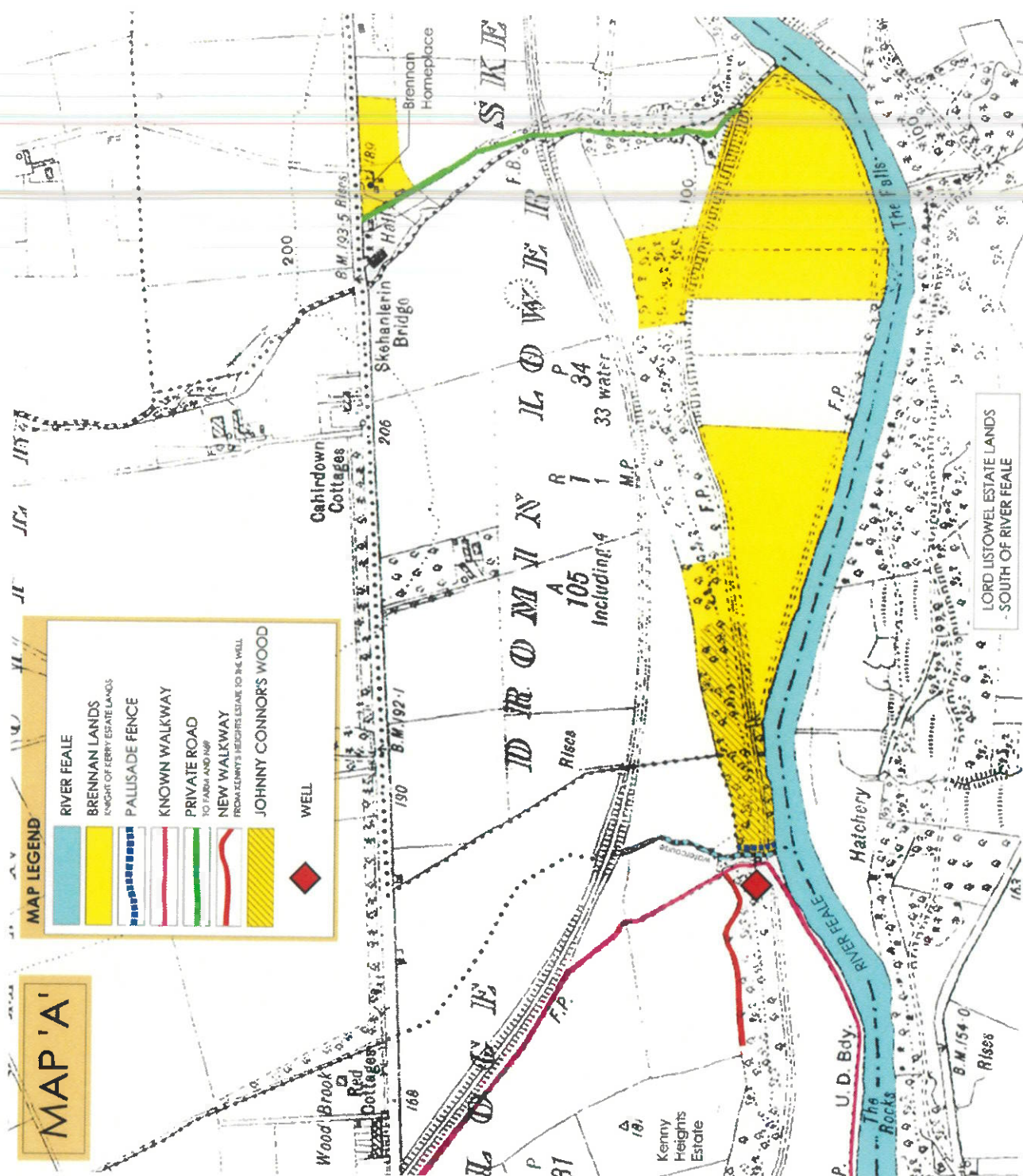


Fig 1.5 – Reference Map – A3 Version in Appendix

2.0 Section 5 Declaration Procedure History

The following is a history of the 'Section 5 Declaration Procedures' to & from Kerry County Council

- EX624** Application by Vincent & James Brennan, resulting in a Declaration dated 19th December, 2017 that the construction of about 50 metres of stock-proof fencing at the western boundary of the applicant's farm land at Dromin Lower, Listowel, Co. Kerry **does constitute exempted development.**

Palisade Fence erected on 6th – 10th July 2020 on the ruling of EX626

- EX858** Application by "Bluebell Wood and River Walk Action Committee", resulting in a Declaration dated 23rd October, 2020 that the works and construction of a 2 metre high palisade fence adjacent to a water course **does not constitute exempted development.**

- EX877** Application by James Brennan resulting in a Declaration dated the 20th December, 2020 that the completion of works consisting of a 2 metre high palisade fence adjacent to a water course at Dromin Lower, Listowel, Co. Kerry **does NOT constitute exempted development.**

3.0 Palisade Fence Technical Details

Fencing length: 50m

Height: 2000mm

Standard: To BS1722-12

Panel: 20 No 2.5mm thick pales with triad head bolted to angle rail with 87mm gaps •

Rails: 2 no 2730mm 45 x 45 x 5 Angle

Posts: 100 x 55 RSJ hot dipped galvanised post to BS EN9 ISO 1461:2009 after fabrication and subsequently electrostatically powder coated in a plant complying to EN 1722 Part 16 Post Centres: 2750mm

Fixings: Irfen® angle cleats and 10mm Irfen® anti vandal bolts and nuts

Method of setting posts: Erect posts plumb and level in 25n concrete bases minimum size 350 x 350 x 600mm set 100mm below ground level



Fig 3.1 – Palisade fence viewing west towards neighbouring lands

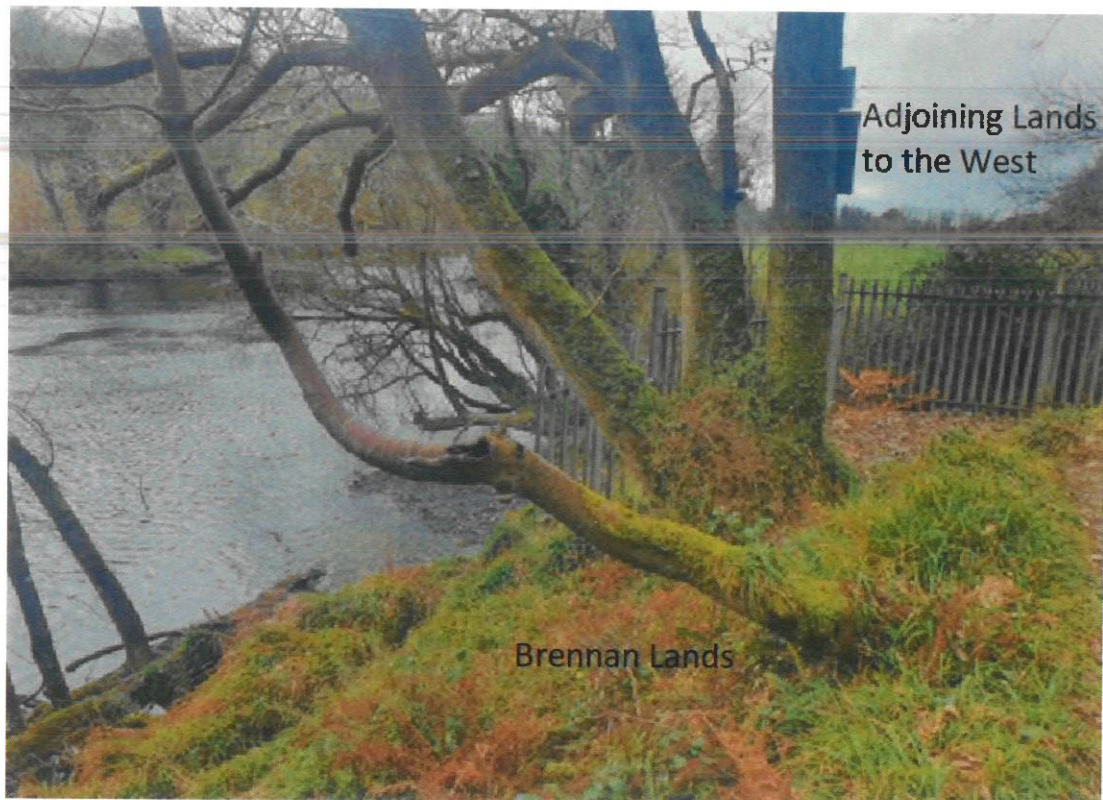


Fig 3.2 – Palisade fence viewing west towards neighbouring lands with River Feale to the South



Fig 3.3 – Palisade fence viewing west towards neighbouring lands with River Feale to the South

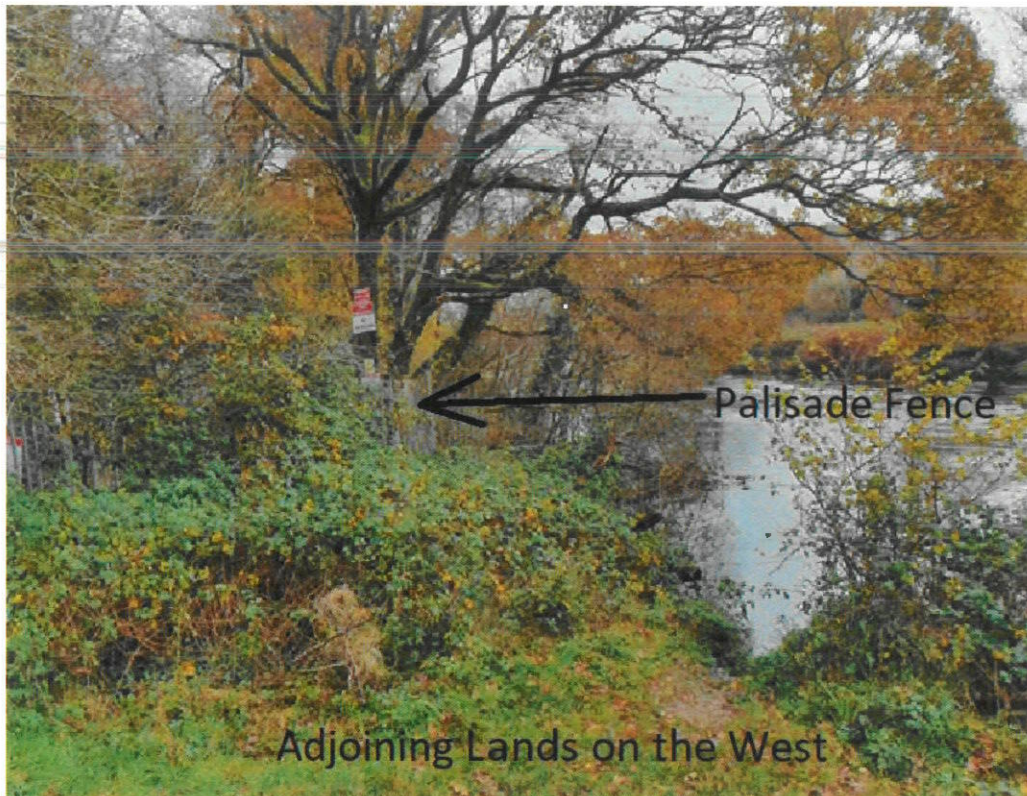


Fig 3.4 – Palisade fence viewing eastwards towards Brennan lands with River Feale to the South



Fig 3.5 – Palisade fence viewing eastwards towards Brennan lands, stream is the legal boundary



Fig 3.6 – Palisade fence junction with the River Feale Bank

4.0 Photographic References



Fig 4.1 – No Trespassing Signage erected by the Brennan's in Johnny Connor's Wood adjacent to the Palisade Fencing



Fig 4.2 – No Trespassing Signage erected by the Brennan's in Johnny Connor's Wood adjacent to the Palisade Fencing



Fig 4.3 – The Long Rock projecting into the River Feale from Johnny Connor's Wood



Fig 4.4 – Viewing eastwards from Johnny Connor's Wood, River Feale to the South



Fig 4.5 – CCTV camera in Johnny Connor's Wood



Fig 4.6 – Agricultural Brennan lands to the east of Johnny Connor's wood



Fig 4.7 – Agricultural Brennan lands to the east of Johnny Connor's wood – viewing west



Fig 4.8 – Agricultural Brennan lands to the east of Johnny Connor's wood – viewing west



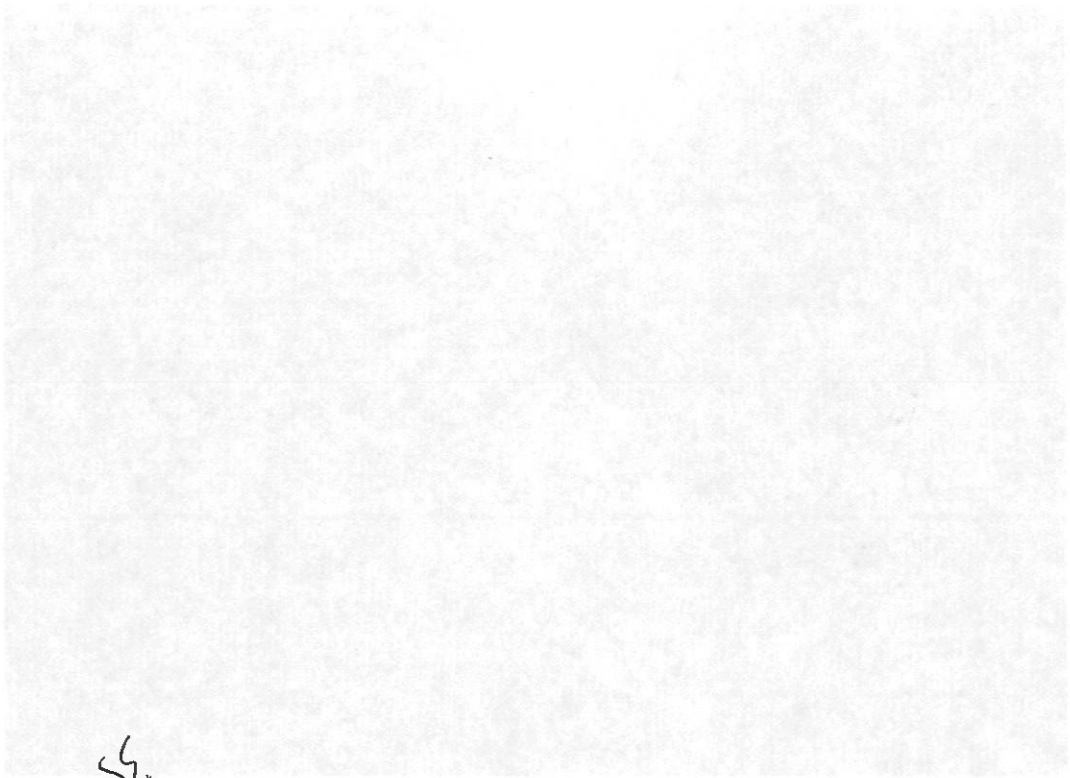
Fig 4.9 – River Feale running adjacent to the Brennan's agricultural lands



Fig 4.10 – Brennan's agricultural lands to the east



Fig 4.11 – Private Road – Brennan's have Right of Way over this road, indicated in green on the A3 Map



52