

AN BORD PLEANALA  
LDG- 038675-21  
ABP-  
14 APR 2021  
Fee: € 220 Type: Cheque  
By: Roy Post

The Secretary  
An Bord Pleanála  
64 Marlborough Street  
Dublin 1

13th April 2021

Re: **Referral of Declaration issued by Kerry County Council under Section 5 of the Planning and Development Act, 2000 in regard to the construction of a hard surface area at Derreen House Lauragh, Kenmare, Co. Kerry. Planning Register Reference Number. EX 891**

Dear Sir/Madam,

We act for Charles Bigham of Derreen House, Derreen, Lauragh, Kenmare, Co. Kerry and refer on his behalf the Declaration issued by Kerry County Council on 22<sup>nd</sup> March 2021 under Section 5 of the Planning and Development Act, 2000 (as amended)<sup>1</sup>. We enclose the required fee of €220.00 and attach as Appendix 1 a copy of the Declaration.

The Planning Authority has concluded that the works carried out in creating a hard surface area within the grounds of Derreen House are development and are not exempted development because:

- (i) The hard surface area would not come within the scope of exemption provided at Class 6(b)(i) of Part 1 of Schedule 2 of the Planning and Development Regulations<sup>2</sup> as the development is not located to the rear of Derreen House; and
- (ii) The hard surface area would not come within the scope of exemption provided at Class 8 of Part 3 of Schedule 2 of the Planning Regulations as the floorspace exceeds 200 square metres.

We ask the Board to review the Planning Authority's Declaration for the following reasons and considerations:

### Class 6(b)(i) of Part 1 of Schedule 2

Prior to the request for a Declaration under Section 5, the Planning Authority had taken the view (in the enforcement letter dated 5<sup>th</sup> February 2020) that:

*"The Development is not within the curtilage of the house as originally defined by the developer. The developer applied for permission to carry out works to the house as per PRN 06/1051. In this application the full extent of the gardens was shown. The area did not include the field where the current development is being carried out. As such Class 6 does not apply to this development."*

<sup>1</sup> Hereafter referred to as 'the Planning Act'

<sup>2</sup> Hereafter referred to as 'the Planning Regulations'

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The Planner's Report of 22<sup>nd</sup> March 2021 (see Appendix 2) acknowledges that the extent of curtilage is debateable and was not necessarily determined by the terms of the permission granted under Planning Reg No. 06/1051. However, the report then concludes that the exemption under Class 6(b)(i) does not apply on the grounds that:

- (a) the works in question were not carried out to the "rear" of Derreen House as defined by the terms of the permission granted under Planning Reg No. 06/1051; and
- (b) even if the southern elevation of Derreen House was deemed to be the rear elevation, the hard surface area is not located entirely to the rear of the southern elevation.

#### Definition of the "rear" of Derreen House

Classes 1, 2, 3, 6 and 57 of Part 1 of Schedule 2 of the Planning Regulations are implicitly based on a definition of 'the area to the rear of a premises' as the area which is behind the premises when viewed by a person standing on the adjoining public road. This is self-evident in the case of terraced, semi-detached and detached dwellings in a built-up area where there is an established building line. This definition is consistent with the general purpose of the Planning Regulations which is to allow more flexibility in regard to exempted development within the private open space which is not visible to persons travelling along the public road.

This principle could not be consistently applied if a property owner was free to redesignate the area behind the dwelling as the front garden by simply describing a rear door to the dwelling as the main entrance. If this was the case, extensions, garden sheds and solar panels could be exempt under Classes 1, 2 and 3 between the dwelling and the public road.

The convention should therefore be that, where there is no clearly established front building line, the area on the far side of the dwelling from the public road should be deemed to be "the area to the rear of the dwelling".

#### Whether the entirety of the hard surface area is to the rear of the southern elevation

The key issue to be determined in regard to exemptions for hard surface areas under Class 6(b) is whether the site falls within subclass 6(b)(i) "*to the rear of the house*" or subclass 6(b)(ii) "*forward of the front building line of the house, or in the area of the garden to the side of the side building line of the house*". The distinction is important as there are conditions and limitations to the front or side which do not apply to the rear of a dwelling.

We attach as Appendix 3 a site location map for Derreen House on which we have drawn the building lines which define the areas to which Class 6(b) applies. Subclass 6(b)(ii) applies to the areas shown as "front" and "side". The hard surface area at Derreen is entirely within the area to the rear of the main house and is therefore exempt under Class 6(b)(i).

#### Class 8 of Part 3 of Schedule 2

The Planner's Report of 22<sup>nd</sup> March 2021 appears to accept that Derreen House and Garden has the planning status of a residential farm and is entitled to avail of the exemptions in Part 3 of Schedule 2 of the Regulations.

Class 8 includes a mix of **structures** such roofless cubicles, milking parlours or structures for the making or storage of silage or any other structures of a similar character or description, and **paved areas** such as open loose yards, self-feed silo or silage areas, feeding aprons, assembly yards. Class 8 is subject to the general

restriction that the aggregate gross floor space of any structures provided under Class 8 shall not exceed 200 square metres. Gross floor space is defined as follows by Article 3 of the Regulations:

*"gross floor space" means the area ascertained by the internal measurement of the floor space on each floor of a building (including internal walls and partitions), disregarding any floor space provided for the parking of vehicles by persons occupying or using the building or buildings where such floor space is incidental to the primary purpose of the building".*

As gross floor space is defined as an internal measurement it can only be ascertained for structures which are bounded by perimeter walls. This referral refers to a hard-standing area which is not enclosed by walls. It therefore has a measurable site area but does not contain any floor space. As a result, the extent of the hard surface area is not constrained by the floor space limit which applies to **structures** provided under Class 8.

## Summary and Conclusion

We request the Board to issue the following Declaration under Section 5(3) of the Planning Act:

*Whereas a question has arisen as to whether the construction of a hard surface within the grounds of Derreen House, Lauragh, Killarney, Co. Kerry is or is not development or is or is not exempted development:*

*And whereas a request in regard to the said question was submitted by Charles Bigham in accordance with Section 5(1) of the Planning and Development Act, 2000, as amended;*

*And whereas the Board, in considering this request, had regard particularly to -*

- (a) sections 2, 3 and 4 of the said Act,*
- (b) the definition of "agriculture" contained in section 2 of the said Act;*
- (c) articles 6 and 9 of the Planning and Development Regulations, 2001, as amended;*
- (d) Class 6 of Part 1 of Schedule 2 to the said Regulations;*
- (e) Class 8 of Part 3 of Schedule 2 to the said Regulations;*
- (f) Chapter 13 of the Guidelines for Planning Authorities on Architectural Heritage Protection, 2011;*
- (g) the definitions of "curtilage" and "attendant grounds" contained in the said Guidelines;*
- (h) the status of Derreen House on the National Inventory of Architectural Heritage and the record of Protected Structures in the Kerry County Development Plan 2015;*
- (i) the history of Derreen House and Garden as shown on the Ordnance Surveys;*
- (j) the established use of the property for residential and horticultural purposes;*
- (k) the nature and scope of the works carried out for the creation of the hard surface;*
- (l) the horticultural nature of the proposed use of the hard surface;*
- (m) the fact that the hard surface area is not enclosed by perimeter wall and is not therefore a structure for which gross floor space can be defined;*
- (n) the location of the hard surface within the curtilage of Derreen House and to the rear of the main house; and*
- (o) the beneficial effect of the proposed horticultural use on the residential amenity of Derreen House.*

*And whereas the Planning Authority has concluded that -*

- (a) the construction of the hard surface constitutes 'works' as referred to in section 2 of the Planning and Development Act, 2000, as amended;*

- (b) *the nature, scope of intended use of the works carried out in the creation the hard surface come within the meaning of Class 6(b) of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001,*
- (a) *the nature, scope and intended use of the works carried out in the creation the hard surface also come within the meaning of Class 8 of Part 3 of Schedule 2 to the Planning and Development Regulations, 2001,*

*Now therefore the Planning Authority, in exercise of the powers conferred on it by section 5(2) of the Planning and Development Act, 2000 (as amended) hereby declares that the said works, being the creation of a hard surface within the curtilage of Derreen House for the purpose of horticulture are development and are exempted development.*

Yours sincerely,

*Brian McCutcheon*

Brian McCutcheon  
McCutcheon Halley

#### Appendices

Appendix 1: Declaration issued by Kerry County Council on 22<sup>nd</sup> March 2021

Appendix 2: Planner's Report dated 22<sup>nd</sup> March 2021;

Appendix 3: Site Location Map;



## Appendix 1: Declaration

### An Roinn Pleanála

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



### COMHAIRLE CONTAE CHIARRAÍ KERRY COUNTY COUNCIL

### Planning Department

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

Guthán | Tel 066 7163582 Faxes | Fax 066 7123328 Ríphost | Email [plan@kerryco.ie](mailto:plan@kerryco.ie) Suíomh | Web [www.kerryco.ie](http://www.kerryco.ie)

**Application No:** EX891  
**Decision Date:** 22<sup>nd</sup> March 2021 **Registration Date:** 25<sup>th</sup> February 2021  
**Applicant:** Charles Bigham, Derreen House, Derreen, Lauragh, Killarney, Co. Kerry  
**Agent:** Brian McCutcheon, 6 Joyce House, Ballincollig, Cork  
**Development Location:** Derreen House, Derreen, Lauragh, Killarney, Co Kerry

**Development Description:** A hard surface area constructed on the lands of Derreen House. From the drawings submitted, the area of the hardstanding is about 1000 square metres. The hardstanding is located about 150 metres south-west of Derreen House

#### DECLARATION ISSUED UNDER AND IN ACCORDANCE WITH SECTION 5 OF THE PLANNING AND DEVELOPMENT ACTS, 2000 – 2020

In pursuance of its functions under the Planning & Development Acts 2000 to 2020, Kerry County Council, being the Planning Authority for the County Health District of the County of Kerry, has by order dated 22<sup>nd</sup> March 2021 authorised the issue of a declaration under the provisions of Section 5 of the Planning & Development Acts, 2000 -2020 in accordance with plans and particulars submitted on 25<sup>th</sup> February 2021.

I hereby certify that, the Planning Authority considers that the works, the subject of the referral under the said Section 5 namely a hard surface area constructed on the lands of Derreen House. From the drawings submitted, the area of the hardstanding is about 1000 square metres. The hardstanding is located about 150 metres south-west of Derreen House at Derreen House, Derreen, Lauragh, Killarney, Co Kerry does not constitute exempted development under the Planning & Development Acts 2000-2020 having regard to the considerations inserted hereunder:-

#### Schedule 1

- The hard surface area constructed at Derreen House constitutes works that would come within the scope of Section 2(1) of the Planning and Development Act 2000 – 2020.
- The said works constitute development that comes within the scope of Section 3(1) of the Planning and Development Act 2000 – 2020,
- The hard surface area would not come within the scope of exemption provided at Class 6(b)(i) of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 – 2020 as the development is not located to the rear of Derreen House,
- The hard surface area would not come within the scope of exemption provided at Class 8 of Part 3 of Schedule 2 of the Planning and Development Regulations 2001 - 2020 as the floor space exceeds 200 square metres.

The proposed development would constitute development which is not exempted development.

An Appeal against the decision of the Planning Authority under Section 5 of the Planning & Development Act 2000 may be made to An Bord Pleanála within four weeks beginning on the date of the issuing of the declaration by the Planning Authority. An Appeal should be addressed to: An Bord Pleanála, 64 Marlborough Street, Dublin and should be accompanied by the appropriate fee.

Signed on behalf of Kerry County Council

Date: 22<sup>nd</sup> March 2021

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## Appendix 2: Planner's Report

To: ... Planning  
From: SEF Planning  
Date: 19/03/2021

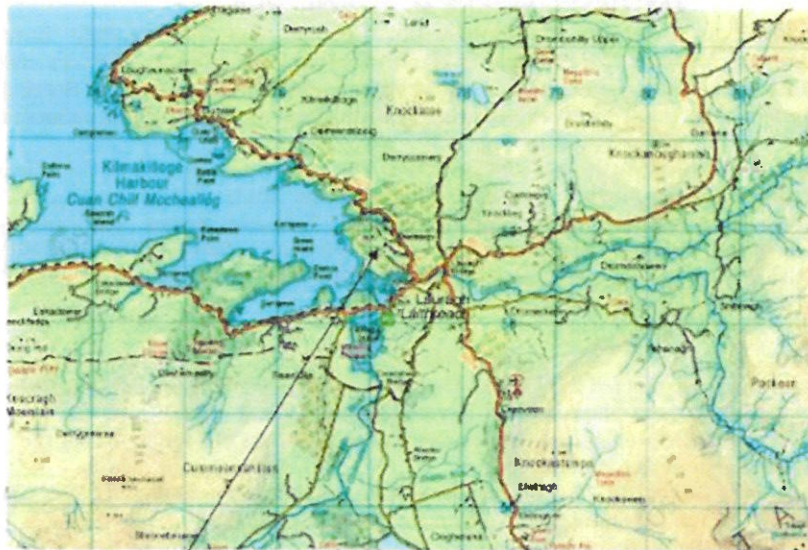
Re: Section 5 Reference EX891 – Charles Bigham, Derreen House, Derreen, Lauragh, Killarney

### Subject Works

This referral relates to a hard surface area constructed on the lands of Derreen House. From the drawings submitted, the area of the hardstanding is about 1000 square metres. The hardstanding is located about 150 metres south-west of Derreen House.

### Location of site

Derreen House and Garden is located in a rural location adjoining the R573 Regional Road west of Lauragh Church. Derreen House is a Protected Structure set on extensive grounds between the public road and Kilmakilloge Harbour. The garden and woodlands at Derreen House are open to the public on an occasional basis.



Location of site





Location of hardstand area

Derreen House



Location of hardstand area

Derreen House

**Recent planning History on the lands**

Planning Register No: 06/1051

Applicant: Charles Bigham

Permitted Development. CONSISTING OF MODIFICATIONS AND EXTENSION TO THE BASEMENT LEVEL KITCHEN, BELOW THE GROUND FLOOR BAY WINDOW AT SIDE OF HOUSE, WITH NEW STRUCTURAL HEAD IN EXISTING MASS CONCRETE WALL, NEW BAY WINDOW TO MATCH EXISTING, EXTENDED STONE PAVED PATIO AREA INCLUDING REMOVAL OF EXISTING IRON STEPS ACCESSING GARDEN. THIS DEVELOPMENT INVOLVES CARRYING OUT OF WORK TO A PROTECTED STRUCTURE APPLICATION

Planning Register No: 20/80

Applicant: Charles Bigham

Permitted Development: Retention permission granted by An Bord Pleanála (Ref 307265-20) to (A) RETAIN AS CONSTRUCTED A DWELLING HOUSE AND ALL ASSOCIATED SITE WORKS (B) PERMISSION TO CONSTRUCT A NEW WASTEWATER TREATMENT SYSTEM CONSISTING OF A MECHANICAL AERATION UNIT, INTERMITTENT FILTER AND POLISHING FILTER TO SERVE THE DWELLING HOUSE BEING RETAINED

#### Assessment

The hardstanding area subject of this Section 5 Referral is the subject of Planning Enforcement File Ref 8022. A difference of opinion in relation to exempted development has arisen between the developer and Planning Enforcement.

In the referral submission, the agent for the developer argues that the hard surface area would be exempt under two separate classes provided in the Planning and Development Regulations, 2001 (as amended) as follows:

Class 6(b)(i), Part 1, Schedule 2 which provides exemption for hard surfaces within the curtilage of a dwelling house and

Class 8, Part 3, Schedule 2 which provides exemption for yards for agricultural purposes in rural areas.

- (1) Class 6(b)(i), Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended) provides exemption for:

*Any works within the curtilage of a house for the provision to the rear of the house of a hard surface for use for any purpose incidental to the use of the house as such.*

The submission argues that the garden and woodlands around Derreen House comprise the historic curtilage of the house and, despite the hardstanding area being located about 150m from the house with the area screened from the house by the intervening woodlands, the hardstanding is within the curtilage. It is further argued that the use of the hardstanding will be in connection with the maintenance of the gardens and woodlands and, therefore, the use will be for a purpose incidental to the use of the house as such.

Exemption at Class 6(b)(i), Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended) was provided to enable paving or hard surfaces to be constructed in the rear garden space behind a dwelling house. It is unlikely that the exemption envisaged providing for the construction of hard surfaces in the rural landscape of up to 1000sqm in area and located 150 metres from the house. In this particular case, while the point in relation to whether the hard surface in question is within the curtilage of Derreen House may be debated, it is not accepted that the works were constructed to the rear of Derreen House. Firstly, the drawings submitted with Planning Reg No 06/1051 refer to the southern elevation of Derreen House as the 'Entrance Elevation'. On that basis, the hard surface area is to the front of the house. Secondly, even if the southern elevation of Derreen House were to be considered as the rear elevation, the hard surface area subject of this referral is not located entirely to the rear of the southern elevation. Therefore, as the hard surface is not to the rear of Derreen House, the development does not constitute exempted development under Class 6(b)(i), Part 1, Schedule 2.

- (2) Class 8, Part 3, Schedule 2 of the Planning and Development Regulations, 2001 (as amended) provides exemption for:

*Works consisting of the provision of roofless cubicles, open loose yards, self-feed silo or silage areas, feeding aprons, assembly yards, milking parlours or structures for the making or storage of silage or any other structures of a similar character or description, having an aggregate floor space not exceeding 200 square metres, and any ancillary provision for effluent storage.*





In this case, the stated use of the hardstanding area is for horticultural purposes in connection with the maintenance of the gardens and woodlands around Derreen House. On that basis, it is accepted that the hard surface area constructed for agricultural use in the rural area and would consist of an 'open loose yard' included under Class 8 above. However, as the area of the hard surface greatly exceeds 200 square metres, the development does not constitute exempted development under Class 8, Part 3, Schedule 2.

#### Recommendation

- (i) The hard surface area constructed at Derreen House constitutes works that would come within the scope of Section 2(1) of the Planning and Development Act 2000 (as amended),
- (ii) The said works constitute development that comes within the scope of Section 3(1) of the said Act and
- (iii) The hard surface area would not come within the scope of exemption provided at Class 6(b)(i) of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended) as the development is not located to the rear of Derreen House,
- (iv) The hard surface area would not come within the scope of exemption provided at Class 8 of Part 3 of Schedule 2 of the Planning and Development Regulations 2001 (as amended) as the floor space exceeds 200 square metres.

The proposed development would constitute development which is not exempted development.



Signed: Michael Lynch SEI

Date: 22/03/2021

### Appendix 3: Site Location Map

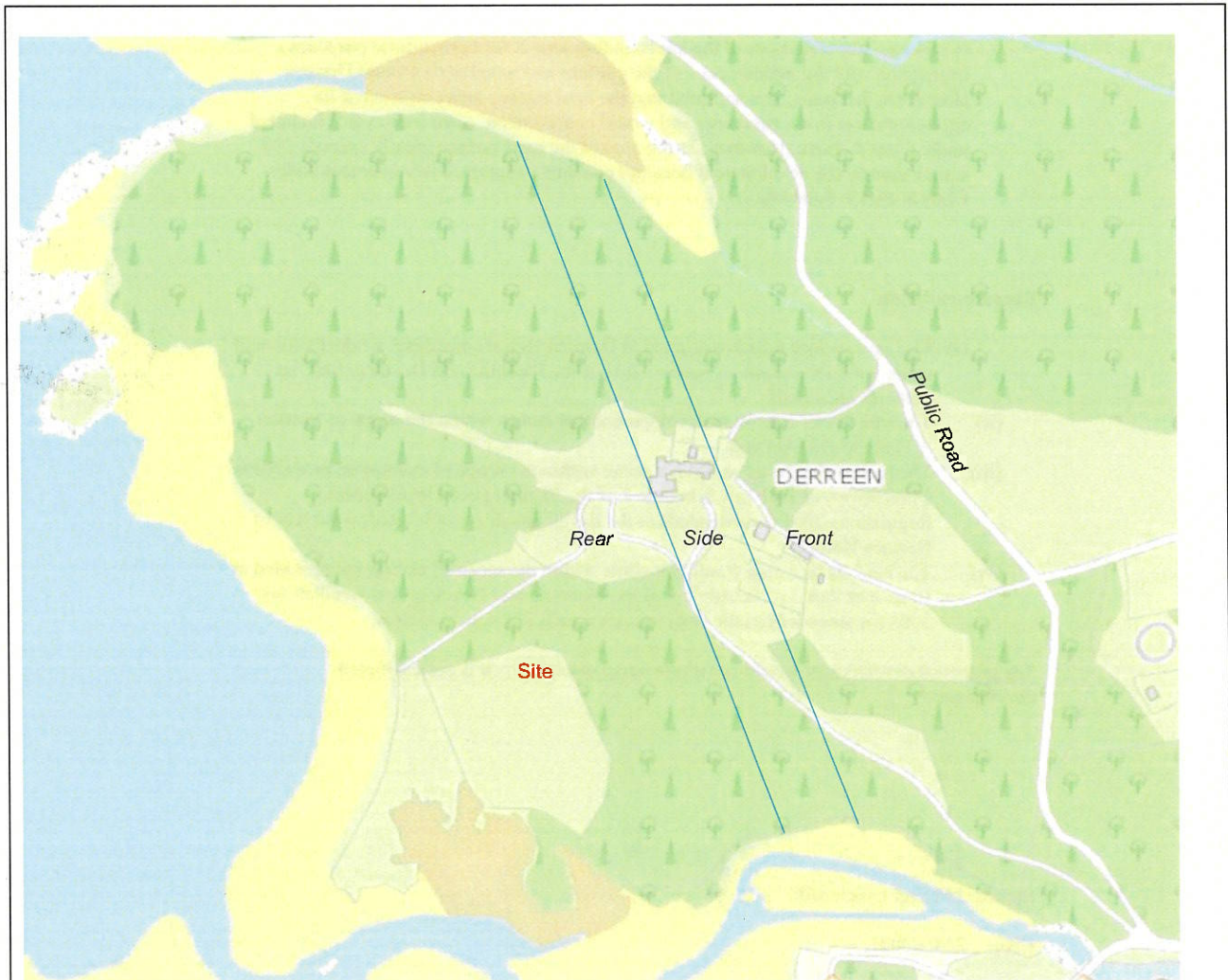


Fig 1: Definition of front, side and rear gardens of Derreen House for the purpose of Class 6(b) of the Planning Regulations

Front = "the area of the garden forward of the front building line of the house"  
Side = "the area of the garden to the side of the side building line of the house"  
.....Rear = the remaining gardens to the rear of the rear building line which fall outside the definition of "front" or "side"