

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

29/9/2022

Your Reference: ABP – 313930 – 22: Whether the construction of a fence, a pedestrian gate and a vehicular gate on the road is or is not development and is or is not exempted development. Former Angler's Rest, Doonass Demesne, Clonlara, Co. Clare V94 K735

Dear Sir/Madam,

I refer to your letter dated 13/9/2022 with respect to the above-mentioned reference, inviting me to make a submission.

I note that the original referral (308442) was lodged with An Bord Pleanála on 19/10/2020 with the decision on same being made on 26/2/2021. The order of the High Court remitted the matter back to An Bord Pleanála with the remittal to take effect from the point in time immediately following receipt of the submission by the first named notice party received 2/12/2020.

I do not have access to the Bord file with respect to dates so I assume that this was the landowner's response to the initial referral to the Board and that all the material supplied by the Council and myself prior to the inspector's report remains on file for this new consideration.

Your letter dated 13/9/2022 invites submission in relation to the order of the High Court. The order in turn makes reference to the notice of motion submitted to the Court on which the order was based. I have not been supplied with this by the Board. I am therefore unclear with respect to the breadth of submission that is permitted. I was of course supplied with the notice of motion during the court action as I was a notice party. For this reason and having regard to the non-specific nature of your letter I am taking it that I can comment on some aspects of the notice of motion and some matters of planning relevance that were brought to the court's attention and which will now be relevant to the Board's adjudication.

If I am incorrect in my interpretation, I request that the Board give me an opportunity to make a further submission based on clearer terms of reference.

Planning history: The notice of motion did not itemise the planning history, despite a report being lodged by a planning consultant. The Council submission on file 308442 stated that there was no planning history. This is not correct.

I have recently discovered at least 4 planning file references that appear to be of relevance to the site. I have not had an opportunity to review the files as they are not available on line and the lateness of discovery made it impossible to order them out of Council archives for inspection.

The Council files in question are –

P8/16	Construction of annex to Angler's Rest – granted 11/11/1964
P8/2719	James Phelan – Alterations to Angler's Rest and additional accommodation granted 23/6/1969
24854	Osborne Promotions Ltd - Retain development and further additions to Angler's Rest – granted 2/10/1987
00/30	Michael Mason – retain buildings – granted 1/7/2001

There may be other relevant files and I consider that the Board should request a full report from the Council on this planning history together with remittance of all relevant files.

Planning Issues:

The applicant in the notice of motion to the Court took issue with not being given a right to reply with respect to certain aspects and also referred to certain planning matters that were claimed were improperly taken into account or in some cases ignored in the original inspector's report where they would have been to the advantage of the first party case. Other matters of a constitutional nature were also raised. The issue of right to reply and constitutional issues are not of relevance at this stage. I only intend to comment on certain planning matters that are relevance to the new assessment of the case, brought up in the notice of motion.

a. *The relevance of whether the property is a business premises or a house site.* While it is of course relevant to the classes of exempted development that have to be examined by the Board (class 5, 9 and 11 of schedule 2, part 1 exemption categories), I think that ultimately the works carried out would not have been exempted development under any of the classes reviewed by the Board having regard to the provisions of article 9 (1) (a) (x) relating to fencing/enclosing of land habitually open to the public. The use of the site for residential use is, therefore, ultimately not the kernel of the issue.

b. *Use of any structure/land within the curtilage of a house:* The first party to the court case makes reference to the planning act section 4 (1) (j) where it is set out that the following is exempted development under the Planning & Development Act 2000, as amended -

(j) development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;

The landowner indicates that this provision covers the development such that what is involved is exempt under the Act. This is important in that the provisions under section 4 of the act are not subject to the restrictions on exemption covered by Article 9 of the 2001 Planning & Development Regulations, as amended.

I would draw the board's attention, however, to the interpretation section of the same Act (Section 2) wherein it is stated that -

"use", in relation to land, does not include the use of the land by the carrying out of any works thereon;

In this case what is involved is not 'use' but 'works'. 'Works', is defined in the Act under section 2 -

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

The carrying out of these 'works' is not, therefore, covered by the provisions of section 4 (I) (j) above which only refers to 'use'.

The case revolves back, therefore, to the issue of whether the 'works' could be classed as exempted development under the Planning & Development Regulations, 2001, as amended which in turn leads back to the provisions of article 9 which sets out matters which restrict claims of any such exemption, including the following under 9 (1) (a) (x) -

- (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,

- c. *Article 9 (1) (a) (x) of 2001 planning regulations:* I have contended and submitted evidence on file that the land was 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 the riverbank. This access has been used from time immemorial. The land owner has submitted no evidence to the contrary except a statement that people used the property as customers of the pub.

The access to the river at this point was used long before any pub use.

It is interesting to note that the article states that the land should be '*habitually open to or used by the public during the 10 years preceding*' giving the 2 as separate issues such that the '*open*' nature and '*use*' can be looked at independently by the Board if required.

The fact that there were no findings of rights of way/public rights of way registered in the checks and certificates relating to the property sale as stated by the landowner to the Court is to my mind irrelevant. Rights of this nature which stretch back to time immemorial are not by their nature registered. In fact I also note that article 9 (1) (a) (xi) states that any development should not '*obstruct any right of way*' using the word '*any*' instead of '*a*' recognising the multifaceted nature of such rights.

