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BY HAND ON

21 October 2022

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1

AN BORD PLEANALA	
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ABP-	
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By:	hand

**LAND AT RIVERVIEW HOUSE THOMASTOWN CARAGH NAAS CO. KILDARE.
KILDARE COUNTY COUNCIL PLANNING REGISTER REFERENCE ED / 00978**

Dear Sir

We refer to the above, which comprises a reference to the Planning Authority and we confirm that we act for John Curry and Catriona Howley, Riverview House Thomastown, Caragh Naas. Co. Kildare.

We hereby request An Bord Pleanála to review a decision of Kildare County Council to the effect that certain works and or activities which have been undertaken on land beside Riverview House does not constitute exempted development under the planning code and thus requires planning permission.

1. Background

The referrers built Riverview House about a decade or so ago and have been living in this home ever since. They recently carried out a development on their land, which included the erection of a small stable and the provision of a sand arena, on which their daughter's horses could be exercised, in the honest and genuine belief that such works were exempt from the need to secure permission. Prior to starting construction, they perused the Council's website and identified ref. EDQ12 (in the section headed 'Exempted Development - Frequently Asked Questions') as being relevant to their proposal:

EDQ12 Do I need planning permission to build or extend a shed to keep cattle (or horses, donkeys, deer, sheep, goats or rabbits)?

EDA12 Provided the gross floor area is not greater than 200 sq. metres and meets the following conditions, you do not need planning permission if you live in a rural area as defined in the Planning and Development Regulations 2001 as amended. This definition is set out earlier in the section "Exempted Development – Background Information – What does it mean".

- 1. No such structure shall be used for any purpose other than the purpose of agriculture.*
- 2. The gross floor space of such structure together with any other such structures within the same farmyard complex or within 100 metres of that complex shall not exceed 300 square metres gross floor space in aggregate.*
- 3. Effluent storage facilities adequate to serve the structure having regard to its size, use and location, shall be constructed in line with Department of Agriculture, Food and Rural Development and Department of the Environment and Local Government requirements and shall have regard to the need to avoid water pollution.*

4. *No such structure shall be situated, and no effluent from such structure shall be stored, within 10 metres of any public road.*
5. *No such structure within 100 metres of any public road shall exceed 8 metres in height.*
6. *No such structure shall be situated, and no effluent from such structure shall be stored, within 100 metres of any house (other than the house of the person providing the structure) or other residential building or school, hospital, church or building used for public assembly, save with the consent in writing of the owner and, as may be appropriate, the occupier or person in charge thereof.*
7. *No unpainted metal sheeting shall be used for roofing or on the external finish of the structure’.*

This is an important provision, which draws no distinction between urban and rural areas and which does not suggest that a householder cannot have a stable or sand arena for domestic horses and ponies.

We ask the Board to accept the householder’s *bona fides* and we note how, in ref. 07.LS.0031¹, the Board accepted our submission that a member of the general public could not have been expected to be aware of detailed elements of planning law, with the Report of the Inspector in this case stating:

‘Whether the applicant has or could reasonably have had a belief that the development was not unauthorised.

Given the agricultural nature of the works within a rural area, I am satisfied that the applicant could reasonably have had the belief that the development was not unauthorised’.

By Letter dated 31 August 2022, we lodged a referral with Kildare County Council pursuant to section 5 of the Planning and Development Act, 2000 (as amended) in respect of a development on the above land. This originating submission, which was prompted by a Warning Letter which is set out at Appendix A thereto, sought a formal declaration from the Local Authority on the following question:

‘Whether the construction of a stable building and sand arena for use by the Referror’s family alone, along with the removal of short stretches of hedgerow and two dying / diseased trees which were located on or close by the front boundary of the site and the planting and / or replanting of the removed shrubbery in the same location is development and / or is exempted development, at Riverview House, Thomastown, Caragh Naas Co. Kildare’

This referral to the Council was supported by a set of architectural drawings and by a planning report which explains why we consider that the items identified in this italicised passage do not need consent.

This initial submission to the Planning Authority identifies the subject site and its environs, traces the history of this tract of land, describes the structures and features which have been carried out on property beside Riverview House and highlights the relevant regulatory provisions which govern the exemptions which apply to proposals of this type. We respectfully invite the Board to peruse this document and to carry its contents forward into the assessment and determination of this present referral review request, under section 5(3) of the Planning and Development Act, 2000 (as amended).

2. Council Determination

By Declaration dated 27 September 2022, Kildare County Council issued the following determination:

- The construction of a stable building and sand arena constitutes Development as defined in Section 3(1) of the Planning and Development Act, 2000 (as amended) and is Not Exempted development as defined by the Planning and Development Act, 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended).

¹ This was a request for Leave to apply for Substitute Consent.

- The removal of short stretches of hedgerow, where it creates a vehicular access point onto a public road which does not have the benefit of Planning Permission constitutes development as defined in section 3(1) of the Planning and Development Act, 2000 (as amended) and is Not Exempted Development as defined by the Planning and Development Regulations, 2001 (as amended).
- The removal of short stretches of hedgerow, where it does not create a vehicular access point onto a public road which does not have the benefit of Planning Permission and the removal of two dying / diseased trees and planting and / or replanting of the removed shrubbery is not considered to constitute Development as defined in section 3(1) of the Planning and Development Act, 2000 (as amended)

3. Review of Council's Approach

The referral which was lodged with the Council contains three elements, viz, stable block, sand arena and changes to on-site planting and we address these items under the following select subheadings.

(i) Stable Block

(a) Council Analysis

The County Council's declaration does not actually identify the basis for the opinion that planning permission is needed for the stable, although this is covered in the Report of the Planning Officer.

Before turning to the salient issue in this case, the County Council's internal assessment accepts that a building of this type is capable of constituting exempted development (at p. 5) and acknowledges (at pp. 5-6) that the subject structure complies with all regulatory requirements relating to floorspace limitation, agricultural usage, effluent storage, maximum height and distance to sensitive receptors. It is common case between the parties that this block satisfies the exempted development stipulations in Class 6 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended).

(b) Planning History

Condition 10 of parent permission reg. ref. no. 11/807 is reproduced as follows, for ease of reference:

- '10. *The overall site shall be used for domestic-related purposes only and not for any commercial, workshop or other non-domestic use.*
 Reason: In the interest of the proper planning and development of the area'.

The Report of the Planning Officer candidly accepts, without question (p. 8), that *'The use of the stable building appears to be used for the applicant's own family...'* but considers that condition 10 is being breached on the basis that *'the applicant is relying on the exemptions under Class 6 for agricultural development. This conflicts with Condition 10 of planning permission as the development is not domestic in nature'*. This sentence appears to suggest that 'agricultural' activity must always be non-domestic in nature, a view which is not supported by the definition of 'agriculture' in s.4 of the Planning and Development Act, 2000 which describes the type of activities falling within this category, but which do not require such operations to be non-domestic in character.

The Board and the Council will be instantly aware of the principles governing the imposition of planning conditions, which are set out in *Development Management Guidelines* (DoEHLG, 2007). We draw specific attention to the requirement which is articulated in s.7.3.1 of this publication (headed *'Conditions should be necessary'*) and we take this opportunity to highlight part of this text as follows:

'One useful test of need is whether, without the condition, either permission for the proposed development would have to be refused...'

Given that planning permission would be needed for the use of this property for commercial purposes, on the basis that such activities would comprise 'development', it is impossible to conclude that consent would have had to have been denied for the referror's home in the absence of this condition.

(c) The Interpretation of Conditions

We ask the Board to note the manner in which stipulations, of a type found in condition 10 of permission reg. 11/807, are applied and indeed, to note the flexibility inherent in the interpretation of such restrictions. Before doing so, however, we respectfully ask the Board to acknowledge its decision in RL02.RL3472², in the context of the juxtaposition of a stable block with its host dwelling.

In ref. PL06D.RL.2616 (at 59A Kerry Mount Rise, Foxrock, Co. Dublin), An Bord Pleanála concluded that the use of a particular house for persons with a physical disability or mental illness, along with persons providing care, did not require planning permission, even though such a use would have breached a previous planning condition. The Report of the Inspector expressed the following view:

'Under Part 2, Section 9 of the Planning and Development Regulations, 2001 development to which article 6 relates shall not be exempted development for the purposes of the Act- (a) if the carrying out of such development would-(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act...)' (viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.

Condition no 6 of permission ref no. PL 06D.202190 notes that "the proposed house shall be used solely as a single dwelling unit" with the reason being "in the interest of residential amenity". This condition is designed to prevent subdivision of an existing dwelling and is not intended to prevent a change of use or de-exempt the dwelling from a change of use. I would therefore consider that this condition those not restrict or de-exempt the proposed development from a change use as detailed under with Class 14(f), Schedule 2, Part 1 of the Planning and Development Regulations, 2001'

(d) Overview

The key issue in this particular case does not relate to whether the use of this stable block falls within the definition of agriculture, which clearly includes *'the breeding and keeping of livestock...the training of horses and the rearing of bloodstock...'*, and we note how this has not been disputed by the Council. It is common case between the parties that stable accommodation lies within the ambit of Class 6 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended).

Instead, this referral should turn on whether the housing of the referror's horses in the subject structure breaches condition 10 of permission reg. 11/807 by reason of the commercial or non-domestic nature of such an activity. We do not believe that the provision of a building on unused land beside the householder's home which is used for two family ponies is commercial and we have already observed how the Report of the Planning Officer accepts that this structure is used by the referror's daughters. There is no suggestion whatsoever that the horses which are kept on this land generate an income.

² The Order, on that occasion, stated *'The Board decided, generally in accordance with the recommendation of the Inspector, that the existing detached stables building for the purpose of housing of horses within the curtilage of an existing house at Roebuck, Mountnugent, County Cavan is development and is not exempted development'* although we note how this conclusion was reached in the content of non-compliance with the effluent and distance stipulations in in Class 6 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2001 and not to the principle of equine accommodation beside a landowner's home.

In our view, developments involving animals and / or crops are not always commercial, with much depending on the motives of a particular landowner for carrying out activities of a type which fall within the definition of 'agriculture'. Whilst most individual who are engaged in breeding horses or cultivating barley do so for financial reasons, this is not always the case; we note how appeal ref. nos. ABP304734 and PL09.246754 involved the provision of an animal shelter by a registered charity and we do not believe that the mere keeping of animals on this land at Oldtown, Athgarvan Co, Kildare could reasonably be classed as being commercial, in terms of a wish to generate a profit or an income.

We suggest that this development is in the nature of domestic agriculture and we note how Kildare County Council has effectively fashioned this concept in the past, such as in its request for further information in ref. 13/236³ which drew a sharp distinction between domestic and commercial equine activities (*'Please submit details of the exact nature of the proposed development...in particular...if the proposed development is a commercial livery ...or primarily for the applicant's private use'*) and condition 4 of permission ref. 19/597⁴ which stated, *inter alia*, that *'The stables shall be used for domestic equine purposes'*. Whilst the Council now asserts that a stable building cannot be built on disused ground beside a dwelling, on the basis that it comprises commercial development, the Planning Authority has, itself, espoused the concept of domestic agriculture in previous applications

Moreover, applying the test in the second of the italicised paragraphs in subsection (c) above, is our view that condition 10 of permission reg. 11/807 was not germane to the decision to grant permission and is, indeed, somewhat superfluous in the content of the legal provisions which govern the planning code. We do not consider that this stipulation seeks to prevent the referrer from owning ponies for their two young daughters or from providing stable accommodation for these animals. In such circumstances we suggest that a determination, to the effect that this first element of the subject referral comprises exempted development, would accord with the approach in reg. PL06D.RL.2616.

(ii) Sand Arena

Although our referral to the Council expressly and explicitly queried whether the referrer's sand arena, which is used for exercising two family horses, requires permission no part of the Planning Authority's declaration addressed this issue. However, the commentary on this feature which is contained within the Report of the Planning Officer accepts that a facility of this nature is capable of complying with Class 10 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended) and that this exercise area complies with the rules for exempted development status within this Class.

The Council's internal assessment has concluded that the sand arena requires planning permission solely by reason of the fact that it runs counter to condition 10 of permission reg. no. 11/807 although we disagree with such an approach, on the basis of the arguments which have been articulated above.

(iii) Planting

The referrer's home, which occupies a smallholding, is served by an existing recessed entrance whose configuration and design can accommodate both private cars and vehicles towing horse-boxes. This permitted access leads, via a properly-formed and constructed driveway, to a central front yard area which abuts the householder's garage, the above stable building and, obliquely, the new sand arena.

³ For 'Two number stables / barn structures, Structure incorporating toilet, shower, office and kitchen facilities, foul water to septic tank and percolation area, dung stead and effluent holding tank. Alterations to existing recessed vehicular entrance, surface water to soakaways and all associated site works at Redhills, Kildare, Co. Kildare'.

⁴ For 'a (1) A two storey rear extension to an existing cottage, associated alterations to all elevations to replace existing septic tank with an on-site effluent treatment system and percolation area, surface water to soakaways, recessed vehicular entrance and all associated site works; (2) Stable block with 5 No. stables, associated concrete hard standing area, dung stead and effluent holding tank, machinery store, sand arena and all associated site works. Revised by significant further information consisting of; revised vehicular entrance details. Revised design of proposal to single storey. Retention of 42 sqm rear extension' at Rose Cottage, Turnings, Straffan Co. Kildare.

These features are not located on a land-locked site, to the degree that it was not necessary for the referrer to create a new entrance to this land (and indeed, there is no actual suggestion that an additional gateway was required for agricultural activities to be conducted beside Riverview House).

The front boundary of this holding is demarcated by existing vegetation which has been augmented by additional planting, which is now at an advanced stage of growth. However, some of the landscaping which was undertaken around a decade ago, when the house was built, did not establish successfully and the referrer removed existing shrubbery in order to create space for replacement planting (although two trees were also removed, the Council does not object to such felling works).

It is fairly obvious that the removal of a roadside feature, whether natural (in the form of a hedge) or man-made (such as a wall), would create an aperture in the form of a space within which nothing exists and that it would be possible for a motorists to drive over the cleared area, in order to access a site. It is on this basis that the Council remains somewhat undecided on whether the removal of existing shrubbery and the provision of new vegetation requires consent; the second the third bullet points in its declaration seem to fudge the key issue viz. whether the removal of shrubbery and the immediate provision of replenishment planting in the space created required planning permission.

Although the Report of the Planning Officer states, at p. 8, that *'I am satisfied that the extent of hedgerow / tree / shrub removal indicated...with replacement planting, is not of a net extent that would constitute development'*, this is subject to an additional clause which states *'in the absence of a new vehicular entrance'*. There is no new of additional entrance and we invite the Board to omit the second of the three bullet points which are contained within the Planning Authority's Declaration.


4. Concluding Comment

We consider, based on the above submission and on our original referral, that planning permission is not needed for this stable block, for the same arena, for the use of this land by the referrer's daughters exercising and caring for their horses and for the replacement planting on the property perimeter.

While we invite the Board to endorse our view on these points, we observe how the Council's Warning Letter contains several elements and it would be useful for the Board, should it disagree with any of our conclusions, to indicate which elements of this development actually require planning permission.

As the referral smallholding is private in nature and is protected by electric gates, we ask the Board to contact this author in the first instance, in order to make arrangements to gain access to this property.

Yours faithfully



Farry Town Planning Ltd.