

An
Bord
Pleanála

Inspector's Report ABP-315791-23

Question	Whether the development of a well as a water source, is or is not development and is or is not exempted development
Location	Darrynane More, Caherdaniel, Co. Kerry
Declaration	
Planning Authority	Kerry County Council
Planning Authority Reg. Ref.	EX 1046
Applicant for Declaration	John Cox.
Planning Authority Decision	Is not exempted development
Referral	
Referred by	John Cox
Owner/ Occupier	John Cox.
Observer(s)	None.
Inspector	Daire McDevitt

1.0 Site Location and Description

The site which is the subject of this referral refer to lands in a wooded area that have been cleared, located at Derrynane More, c 1km west of Caherdaniel and Derrynane House is located to the southeast. The well, which is the subject of this referral is located on a section of the land holding where the woodland has been cleared.

There are also remnants of hard core and tracks.

There is a concurrent section 5 referral under 315789-23 for this land holding relating to the widening and alteration of a gateway. Access to the lands is via this gateway and pedestrian access/gate.

2.0 The Question

The Requester asks:

Is the development of a well exempted development?

In the interest of clarity I wish to highlight to the Board that I am considering the question as follows:

Whether the provision of a well as a water source is or is not development and is or is not exempted development?

3.0 Planning Authority Declaration

3.1. Declaration

The planning authority issue a Declaration under Section 5 of the Planning and Development Act 2000 as amended on the 16th January 2023 which set out:

- a) The sinking of the well in question would constitute works that would come within the scope of section 2(1) of the Planning and Development Act 2000 (as amended.
- b) The said works would constitute development that comes within the scope of section 3(1) of the said Act and

- c) The said works would not fall for consideration under exemption provided at Class 44, Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended) as the well is not for the purposes of providing a domestic water supply or a group water supply scheme.

3.2. Planning Authority Reports

3.2.1. Planning Reports (16/01/23)

Sets out location, context, planning history and assessment. Point of note include:

- The planning authority are of the view that the well was developed when mobile homes (now removed) were brought onto the lands.
- There is no planning permission on these lands for any development requiring a domestic water supply or a group water scheme.

3.2.2. Other Technical Reports

None.

4.0 Planning History

PA Ref. 21/1324 refers to 2021 application by Brisin Health & Leisure Ltd for the retention permission to retain 2 mobile homes, shipping container and the associated site services and all ancillary site works for a period of 3 years. KCC concluded that KCC was precluded from considering the application as a) the retention being sought required AA, conclusion reached by ABP under ABP 309122 (20/673), conclusion made by KCC in original AA screening in 2020 (20/673) and d) section 177U of the Act.

The Planning Authority in correspondence associated with PA Ref. 21/134 refer to PA Ref. 20/673 (ABP 309122-21), an application to retain and complete pasteurisation/pump room, offices, machinery shed, new entrance road onto public road and all associated ancillary site works. Construct two digestion tanks, a storage silo, an esb substation for the completion of an agricultural anaerobic digestion facility at Dromkeen, Co. Kerry.

PA Ref. 21/112 refers to an invalid application as per the 21/1324.

PA reference in Planning Report to Open Enforcement File to the lands served by the gateway the subject of this referral pertaining to mobile homes. (No mobile homes or shipping containers observed on site on the 14th February 2024).

Concurrent Section 5 Referral under ABP 315789-23 relating to whether or not the widening and alteration of a gateway is or is not development and is or is not exempted development.

5.0 Policy Context

5.1. Development Plan

The relevant plans are the West Iveagh Local Area Plan 2019-2025 and the Kerry County Development Plan 2022-2028.

5.2. Natural Heritage Designations

The site is located within Kenmare River SAC (site code 002158).

6.0 The Referral

6.1. Referrer's Case

The owner (John Cox) lodged a section 5 referral with An Bord Pleanála on the 13th February 2023 following a decision by Kerry County Council. The question: *Is the development of a well exempted development?*

The owner has submitted the following argument why they consider it is exempted development:

- The well was installed to replace the spring water supply previously used for the irrigation of the plant life due to the sloping nature of the property.

- The long term plan of the owner is to return the property to its original wild plant life space and create a glamping site and attraction for tourist to the area.
- It is their opinion that planning permission is not required to preplace a water source.

6.2. Planning Authority Response

Correspondence sets out the planning history and notes that the Council have ongoing and active enforcement file in relation to the matter. While there is correspondence between the applicant and the Council in relation to this matter on the enforcement file the Council wish to exert legal privilege over this file at this stage.

6.3 Further Responses.

None.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 (as amended)

In order to assess whether or not the activity constitutes development that is exempted development, regard must be had to the following items of legislation:

Under Section 2, the following is the interpretation of 'works': "...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..."

Section 3 (1) defines 'development' as follows:

"In this Act "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land."

Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act.

Section 4 (2) (a) states-

“The Minister may by regulations provide for any class of development to be exempted development for the purpose of the Act”

Section 4 (3) states-

A reference in this Act to exempted development shall be construed as a reference to development which is—

(a) any of the developments specified in subsection (1), or

(b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.

7.2. Planning and Development Regulations, 2001 (as amended)

Article 6 (1) states as follows:

“Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.”

Article 9(1) details development to which article 6 relates and shall not be exempted development for the purposes of the Act. In particular the following are relevant-

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site.

Schedule 2, Part 1 Exempted Development – General.

Column 1 Description of Development	Column 2 Conditions and Limitations
<p>Class 44</p> <p>The sinking of a well, drilling of a borehole, erection of a pump, or construction of a pumphouse, for the purpose of providing a domestic water supply, or a group water supply scheme in accordance with a plan or proposal approved by the Minister or a local authority for the purpose of making a grant towards the cost of such works.</p>	

8.0 Referrals database

None noted that resemble the current case.

9.0 Assessment

9.1. Is or is not development

The first part of the question to be examined is whether or not 'development' has taken place within the meaning of the Act. If no development has occurred, no further question arises but if on the other hand, the development of a well as a water source is considered to be development, the second part of the question arises as to whether or not the development is exempted development by reference to the Act and Regulations.

Section 2 (1) of the Planning and Development Act, 2000 (as amended) provides an interpretation of 'works' as including 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'. Clearly, the provision of a well as a water source, represents 'works' under the interpretation within the Act.

Section 3 (1) states that 'in this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.' Development has therefore taken place in the form of 'works' on land in this case.

9.2. Is or is not exempted development

The subject development comprises of provision of a well as a water source I am satisfied that due to the nature of the proposed works, that these would fall within the definition of 'works' under Section 2 of the Act and thus are considered to constitute 'development' for purposes of Section 3 of the Planning and Development Act.

From the site inspection it is clear the owner has carried out development by providing a well on the lands. This is not disputed by any of the parties involved. The owner however submits that the well in question replaced a spring water supply previously in place used for the irrigation of plant life. No evidence has been submitted to support this. I note the portion of the lands where the well is located has been the subject of woodland clearance and based on planning history was the location of 2 mobile homes, now removed. Having regard to the exempted development provisions contained in the Planning and Development Act v2000 (as amended) and the Planning and Development Regulations 2001 (as amended) and the nature of the question which is the subject of this appeal i.e *Whether the provision of a well as a water source is or is not development and is or is not exempted development*. Therefore in order for this development to be exempted development it must meet the criteria set out in the legislation.

'Class 44, Part 1 of Schedule 2 applies in this instance "The sinking of a well, drilling of a borehole, erection of a pump, or construction of a pumphouse, for the purpose of providing a domestic water supply, or a group water supply scheme in accordance with a plan or proposal approved by the Minister or a local authority for the purpose of making a grant towards the cost of such works."

I have inspected the site and am satisfied the development does not meet this criteria as its purpose is not for providing a domestic water supply or a group water supply scheme. Therefore is development and is not exempted development.

9.3. Restrictions on exempted development

Section 4(2) of the Planning and Development Act sets out that the 'Minister' may by regulations provide for any class of development to be exempted development. Article 6 of the Planning and Development Regulations details specific classes for

excepted development in column 1 of Part 1 of Schedule 2 subject to conditions and limitations specified in column 2 of the said Part 1.

As set out above as the I consider that the provision of a well as a water source is development and is not exempted development there is no need to consider restrictions on exempted development under Article 9 of the Regulations.

10.0 Conclusion:

Having regard to the forgoing I am of the opinion that that the matter subject to this referral is development and is not exempted development under Schedule 2, Part 1 Class 44 of the Planning and Development Regulations 2001 (as amended).

11.0 Appropriate Assessment

Please refer to Appendix 1 Screening the need for Appropriate Assessment
Screening Determination

Notwithstanding the location of the site which is subject of this referral within Kenmare River SAC (site code 002158), having regard to the nature and scale of the development no appropriate assessment issues arise and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

11.0 Recommendation

I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the provision of a well as a water source is or is not development and is or is not exempted development:

AND WHEREAS

John Cox requested a declaration on this question from Kerry County Council and the Council issued a declaration on the 16th day of January, 2023 stating that the matter was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 13th day of February 2023:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) Article 5, 6 and 9 of the Planning and Development Regulations, 2001, as amended,
- (c) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, including Class 44.
- (d) the planning history of the site,
- (e) the pattern of development in the area:

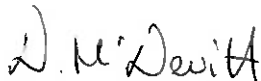
AND WHEREAS An Bord Pleanála has concluded that the provision of a well as a water source

- (a) Does constitute the carrying out of works which comes within the meaning of development in Section 3(1) of the Planning and Development Act, 2000 as amended,
- (b) Does come within the scope of Class 9, Part 1 of Schedule 2 to the Planning and Development Regulations, 2001 as amended, and

(c) The development would not be exempted development, having regard to Schedule 2, Part 1 class 44 as its purpose is not for providing a domestic water supply or a group water supply scheme.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the provision of a well as a water source is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.



Dáire McDevitt
Senior Planning Inspector

7th May 2024

Appendix 1

Screening the need for Appropriate Assessment

Screening Determination

I have considered the development which is the subject of this section 5 referral, comprising the provision of a well as a water source in light of the requirements S177U of the Planning and Development Act 2000 as amended.

The subject site is located within Kenmare River SAC (site code 002158)

The development comprises the provision of a well as a water source.

No nature conservation concerns were raised by the planning authority in their assessment of the section 5 referral.

Having considered the nature, scale and location of the project, I am satisfied that it can be eliminated from further assessment because there is no conceivable risk to any European Site. The reason for this conclusion is as follows:

- small scale and nature of the development

I conclude that on the basis of objective information, that the proposed development would not have a likely significant effect on any European Site either alone or in combination with other plans or projects.

Likely significant effects are excluded and therefore Appropriate Assessment (stage 2) (under Section 177V of the Planning and Development Act 2000) is not required.

D. McDermott 7/15/24

