

Farry Town Planning Ltd.

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1 March 2023

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1

AN BORD PLEANÁLA	
LDG-	061569-23
ABP-	
01 MAR 2023	
Fee: €	220
Type:	CHQ
Time:	
By:	REG POST

DEVELOPMENT ON LAND AT PAINESTOWN KILL CO. KILDARE (REF ED/0989)

Dear Sir

We refer to the above and we confirm that we act for the joint referrer in this instance, Tom Kelliher, Pat O'Reilly, John Kerin and David Donnellan, whose address details appear on the attached papers.

We take this opportunity to refer a particular question to An Bord Pleanála under s.5(3)(b) of the Planning and Development Act, 2000 (as amended) on the basis that the statutory period for the issue to be determined by Kildare County Council has expired, without any decision having been reached.

We attach herewith a sheaf of background papers, which include details of the query being posed by the referrers in this case. We take this opportunity to confirm that we attended the offices of the Planning Authority on 1 March 2023 and were advised that a determination has not yet been issued.

The Council's request for further information closes with the sentence 'Please note that the landowner has also been requested to provide this information The time period for the Council's determination shall commence upon receipt of the information'. It is unclear as to whether the Council believes that the statutory clock will restart upon receipt of our response, or when the landowner replies, although we note how s. 5(2) of the Planning and Development Act, 2000 (as amended) envisages that the time available for considering a referral re-starts when the referrer answers the queries posed:

"(b) A planning authority may require any person who made a request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question and, where further information is received under this paragraph, the planning authority shall issue the declaration within 3 weeks of the date of the receipt of the further information. (emphasis added).

(c) A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question'.

The arguments supporting the conclusion that the subject works and use on the referral site comprise development, for which planning permission is required, are set out on the enclosed documents.

Yours faithfully


Farry Town Planning Ltd.

Vincent JP Farry BA MRUP LLB MSc DipEnvEng MRTPI MIPI MAPI

Kildare County Council
Declaration of Exempt Development under Section 5,
of the Planning and Development Act 2000 as amended

Incomplete application forms will
be deemed invalid and returned



All responses must be in block letter

Section 1	Details of Applicants
------------------	------------------------------

1. Name of Applicant(s) A. Mr. Tom Kelliher, Mr. Pat O'Reilly, Mr. John Kerin and Mr. David Donnellan

Phone No. 087-230-8429 Fax No. NONE

2. Address: Inchera, Painestown, Kill, Co. Kildare; Painestown Kill, Co. Kildare W91 PY76; Painestown House, Kill, Co. Kildare and Lexington, Painestown, Kill Co. Kildare (respectively)

Section 2	Person/Agent acting on behalf of applicant (if applicable)
------------------	---

1. Name of Person/Agent: Milan Schuster, Adamslaw (Solicitors).
Phone No. (01) 678-9774 Fax No. NONE

2. Address: 13 Herbert Street Dublin 2 D02 CT85

Section 3	Company Details (if applicable)
------------------	--

1. Name of Company NOT APPLICABLE.

Section 4	Details of Site
------------------	------------------------

1. Planning History of Site: Please refer to the attached planning report.
2. Location of Proposed Development: Painestown Kill Co. Kildare.
3. Ordnance Survey Sheet No. Please refer to the attached planning report.
4. Please state the Applicants interest in the site : None.
5. Please state the extent of the proposed development: Please refer to the attached planning report.
6. Under what Section of the Planning and Development 2000 as amended and/or what provision of the Planning and Development Regulations 2001 as amended is exemption sought (*specific details required*): Project does not constitute exempted development (Please refer to the attached planning report).

7. Please give a detailed description of the Proposed Development: Please see the attached planning report.

Section 5	The following must be submitted for a valid application
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		(Please Tick)
1.	Site Location Map (1:2500 Rural Areas) (1:1000 Urban Areas)	
2.	A Site Layout Plan (Scale 1:500) in full compliance with Article 23 of Planning and Development Regulations 2001 as amended	
3.	Drawings of the development (Scale 1:50) in full compliance with Article 23 of Planning and Development Regulations 2001 as amended	
4.	All drawings to differentiate between the original building, all extensions and proposed development	
5.	Fee of 80 Euro	

Section 6	Declaration
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I, Milan Schuster, Solicitor, certify that all of the above information is correct and that this submission satisfies the requirements in section 5 of the Planning and Development Act, 2000 (as amended). Section 5 of the Planning and Development Act, 2000 (as amended) does not expressly prescribe the content of referral requests, as observed in the Report of the Inspector in An Bord Pleanála ref. no. PL28.RL2176 'The section does not set out rules for the form and content of this type of referral...'.

Signature: _____



Date: 30-09-2022

Kildare County Council
Declaration of Exempt Development under Section 5,
of the Planning and Development Act 2000 as amended

Incomplete application forms will
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All responses must be in block letter

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5. Please state the extent of the proposed development: Please refer to the attached planning report.
6. Under what Section of the Planning and Development 2000 as amended and/or what provision of the Planning and Development Regulations 2001 as amended is exemption sought (specific details required): Project does not constitute exempted development (Please refer to the attached planning report).



Farry Town Planning Ltd.

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15 May 2022

M. Schuster
Adamslaw
13 Herbert Street
Dublin 2
D02 CT85

DEVELOPMENT ON LAND AT PAINESTOWN KILL CO. KILDARE

Dear Sir

We refer to the above and we confirm that we act for a selection of local residents whose homes are immediately adjacent to the above land (with the subject site being illustrated in the attached report).

As explained in the planning opinion which is attached to this cover letter, part of the above tract of land is being used for industrial purposes, comprising the importation of soil and subsoil in bulk quantities and the packaging of this material in smaller loads, for final dispatch to end-users, off-site.

It is our opinion that this operation, which is taking place both within a building whose permitted purpose is as a 'hay shed' and on open land beside this structure, is a non-agricultural activity and that the carrying out of this business in such a manner represents a material change in the use of this land.

Under planning law, permission is required for such developments, as a matter of generality and no part of the Planning Register, which comprises the Council's record of planning applications, contains an entry for this activity. Whilst planning law also prescribes a range of operations which comprise 'exempted development', for which permission is not needed, this operation is not covered by any of these provisions. It is our opinion that this business is not exempt from the need to obtain permission.

The types of development which can and which cannot be undertaken in a particular area, either urban or rural, are controlled by the provisions of the *Kildare County Development Plan, 2017-2023* and it would be unlawful, in essence, for the Council to grant permission for a development which breaches the terms of this instrument. It is our opinion that this operation, which essentially comprises a waste-related construction activity, is of a type which adopted planning policy would classify as an urban-related use which should locate in an existing industrial estate, rather than on agricultural land.

Although planning law contains a mechanism which would allow developments which materially contravene the development plan for the area to be approved, this process is cumbersome and, requiring the collaboration of the applicant, the Council staff and the Elected Members, is infrequently undertaken. This is possibly because s.34(6) of the Planning and Development Act, 2000 (as amended) stipulates that, for a motion in support of a material contravention to be passed, it must be endorsed by 'not less than three-quarters of the total number of the members of the planning authority'.

We thus advance three somewhat overlapping points, by way of conclusion, in this particular instance:

Firstly, the current use of the subject site, as summarised above and as described and illustrated more fully below, comprises development under planning law, for which planning permission is required.

Secondly, no planning permission(s) have been granted for the use of this land for such activities and this operation is unlawful, under the terms of the Planning and Development Act, 2000 (as amended).

Thirdly, should an application for permission be advanced, such a proposal is most unlikely to proceed partly on the basis that it would breach adopted policy and partly because of the rigours needed to secure permission for the retention of a development of a type which is discouraged in the countryside.

Please contact the undersigned should you have any queries or concerns regarding this submission.

Yours faithfully



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REPORT IN RELATION TO A DEVELOPMENT AT PAINESTOWN KILL CO. KILDARE

PLANNING SUBMISSION PREPARED BY FARRY TOWN PLANNING LTD.

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- 1. Introduction**
 - 2. The Site and its Surroundings**
 - 3. Select Planning History**
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 - 5. Select Planning Law**
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 - (ii) Regulatory Provisions
 - (iii) Discussion
 - 6. Referral Decisions**
 - 7. County Development Plan**
 - 8. Opinion**
 - (i) A large barrel-vaulted structure has been erected on this land
 - (ii) Soil and / or subsoil has been placed in a number of large heaps beside the building
 - (iii) An industrial vehicle bearing, a large arm (or a type which can be used to distribute / move soil and / or subsoil) occupies this land;
 - (iv) Non-agricultural External Storage
 - (v) A number of commercial trucks are parked on this site;
 - (vi) A circa 3.0 metre tall timber fence has been erected on the land.
 - 9. Concluding Comment**
-

1. Introduction

This report relates to a tract of land at Painestown, Kill, Co. Kildare and has been prepared to examine firstly, whether certain operations and activities on this property are authorised and secondly, if unlawful, whether it is likely that an application for the retention of this development would succeed.

This report discusses the subject site and its environs, traces the planning history of this tract (in terms of the permissions which have previously been granted, outlines the development on this tract, identifies the relevant legal provisions and addresses the two questions which are articulated above.

2. The Site and its Surroundings

The subject site comprises a regularly-shaped tract of land which covers an area of 2.51 hectares (6.2 acres)¹ and which is located in a rural area in central Co. Kildare. As shown in Aerial Image 1 below, this land is 15.84 km (9.84 miles) and 5.16 km (3.21 miles) to the north-east of Newbridge and Naas (respectively) 6.5 km (4 miles) to the south-east of Clane and 1.76 km (1.1 miles) to the north of Kill.



Aerial Image 1: The subject site is located in a rural area in central Co. Kildare.

This tract is located in open countryside, outside the boundary of any settlement capital and in an area which is characterised by a variety of agricultural operations, along with occasional one-off houses.

In this regard and as depicted in a number of photographs which are set out overleaf and throughout this report generally, the subject site traditionally comprised a parcel of farmland which, in itself, is banal, to the degree that it contains no mature stands of specimen trees or other notable features of natural vegetation, no rock outcrops, mountains or cliff edges, no scenic rivers or lakes, no protected structures and no particular items of any environmental, town planning or ecological importance.

The appearance of the application site, including built development on this landholding, is illustrated in a selection of photographs and aerial images which are distributed throughout the present report.

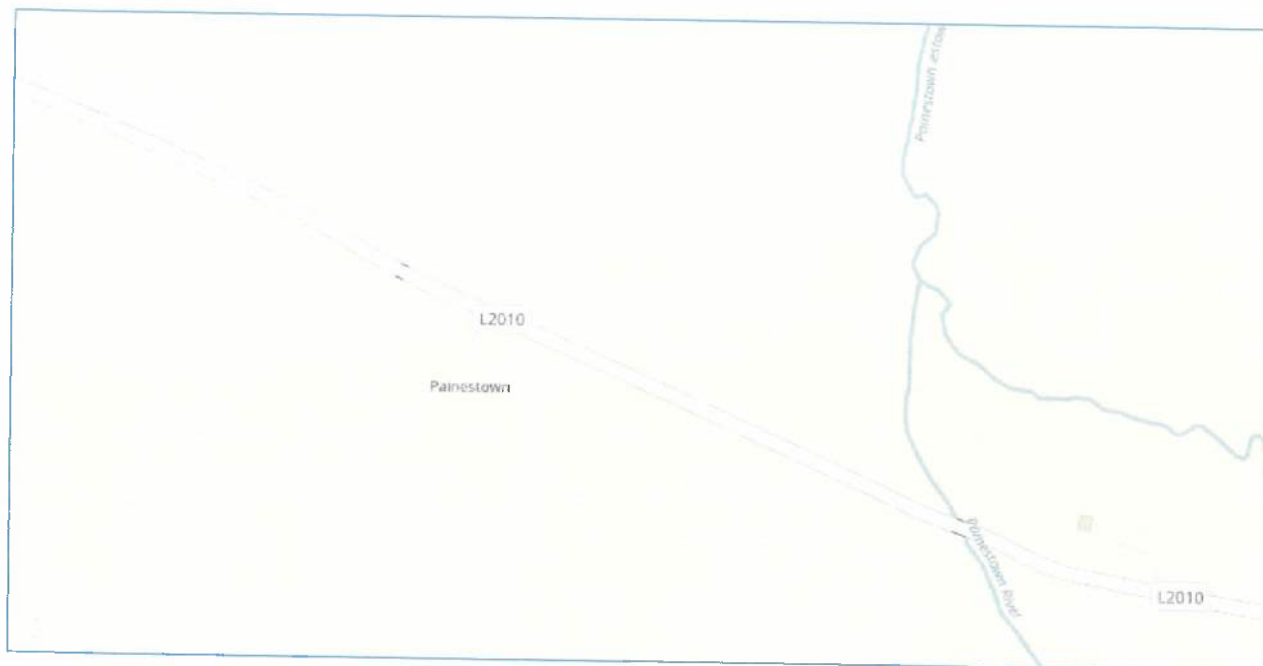
¹ This comprises the area which was provided by the applicant in response to question no. 11 of the planning application form in the case of reg. ref. no. 14415 (this is discussed in section 3 ('Select Planning History') below).



Photographs 1 & 2: This landholding (on right side of above image and on left-side below) , is bounded by a mature hedgerow of varying height.



The land to which this present planning report relates fronts directly onto Local Road L-2010, which comprises a properly-formed and constructed rural route which, not linking two town centres, carries primarily agricultural and local residential, (but including commuter), traffic, as illustrated overleaf.



Map 1: The site fronts directly onto Local Road L-2010 at Painestown Kill Co. Kildare.

The subject site was described in the Council's Report of the Planning Officer in reg. ref. 14415 as:

'The proposed development is located in the rural townland of Painestown, to the north-west of Kill Village and north of the N7 National Primary Route. The site of the proposed hayshed already contains a recessed entrance from the public road with wooden post and rail fencing marking the boundary. The site is bounded by 4existing mature vegetation to the front. There are 2 no. single storey houses located to the west of the site. The site has a stated area of 2.51ha'.

3. Select Planning History

The Planning Register contains a number of entries for the landholding to which this report relates.



Map 2: Extract from the Planning Register, which contains several entries for this site.

The less relevant permissions comprise nos. 13141 (new farm entrance), 20790 (single storey detached house) and 21818 (for the amendment of the site boundaries and relocation of secondary effluent treatment system on reg. 20/790). Consent was also denied under reg. 18823 for a dormer bungalow.

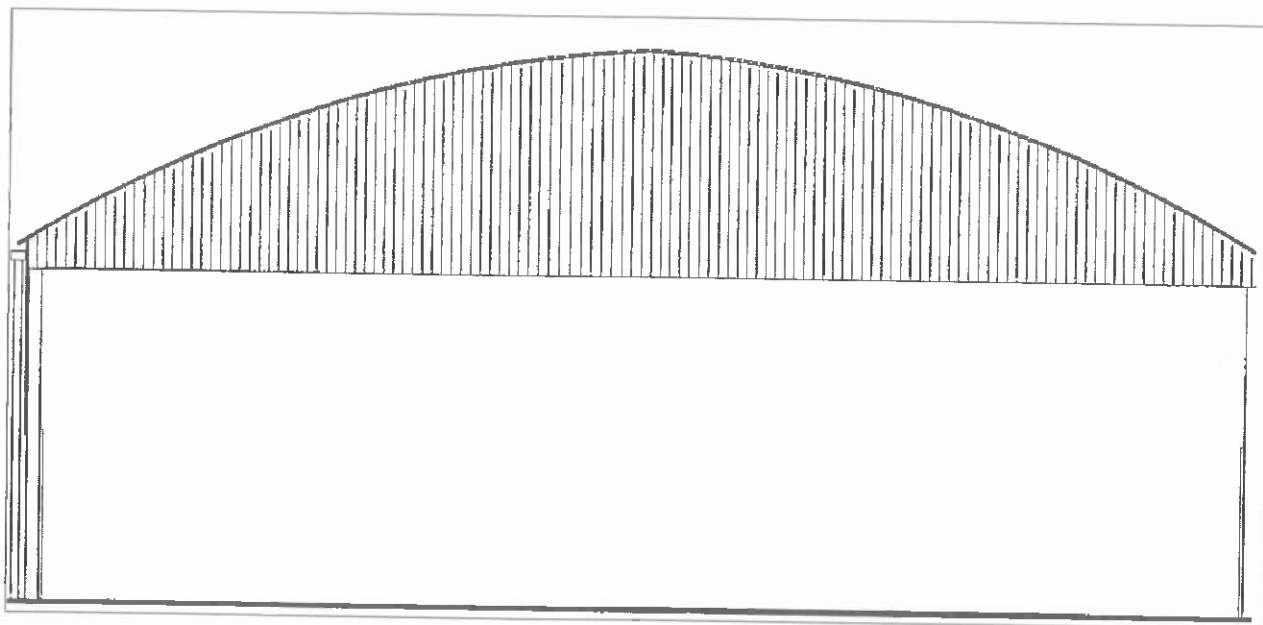
By application dated 21 May 2014, permission was sought under reg. ref. no. 14415 for the following²:

'Construction of hayshed and access driveway'



Map 3: The land to which application reg. ref. no. 14415 related.

The proposed building would contain 564 sq. metres (6070 square feet) and would appear as follows:

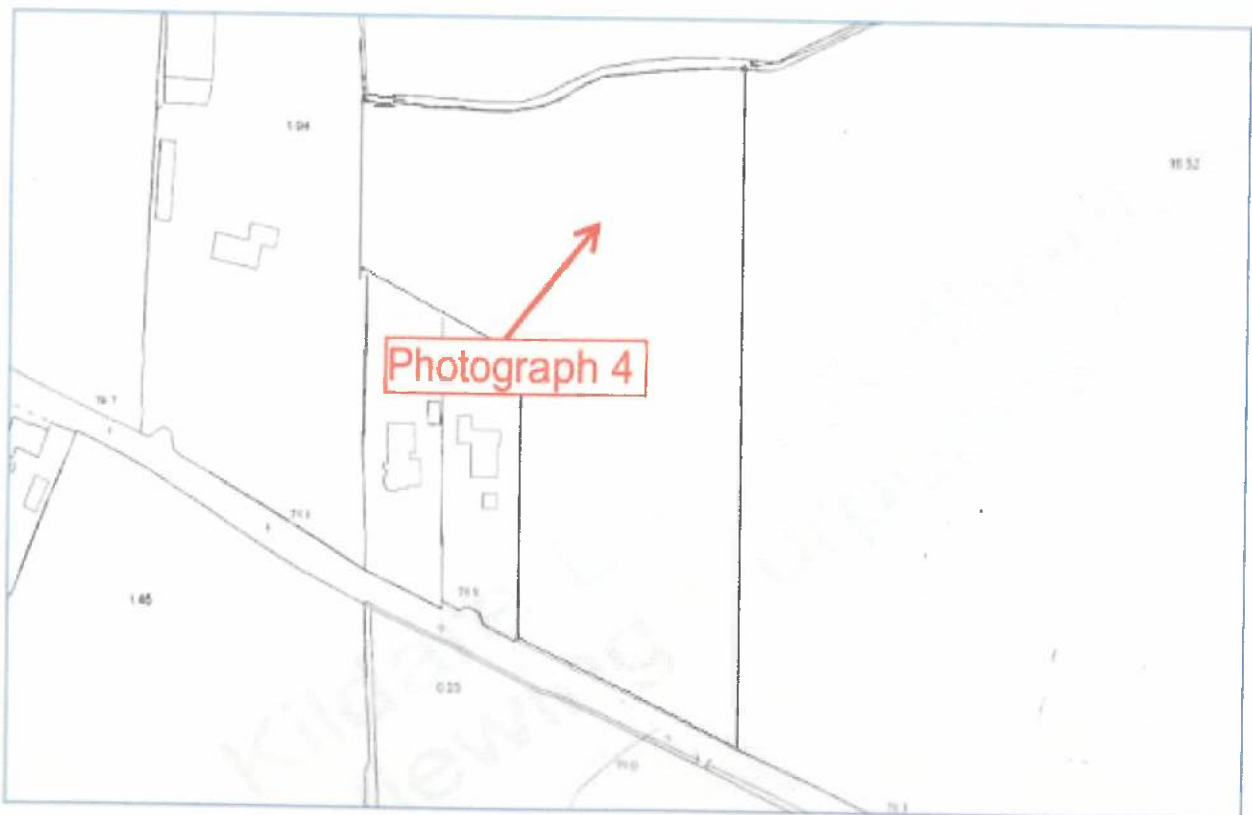


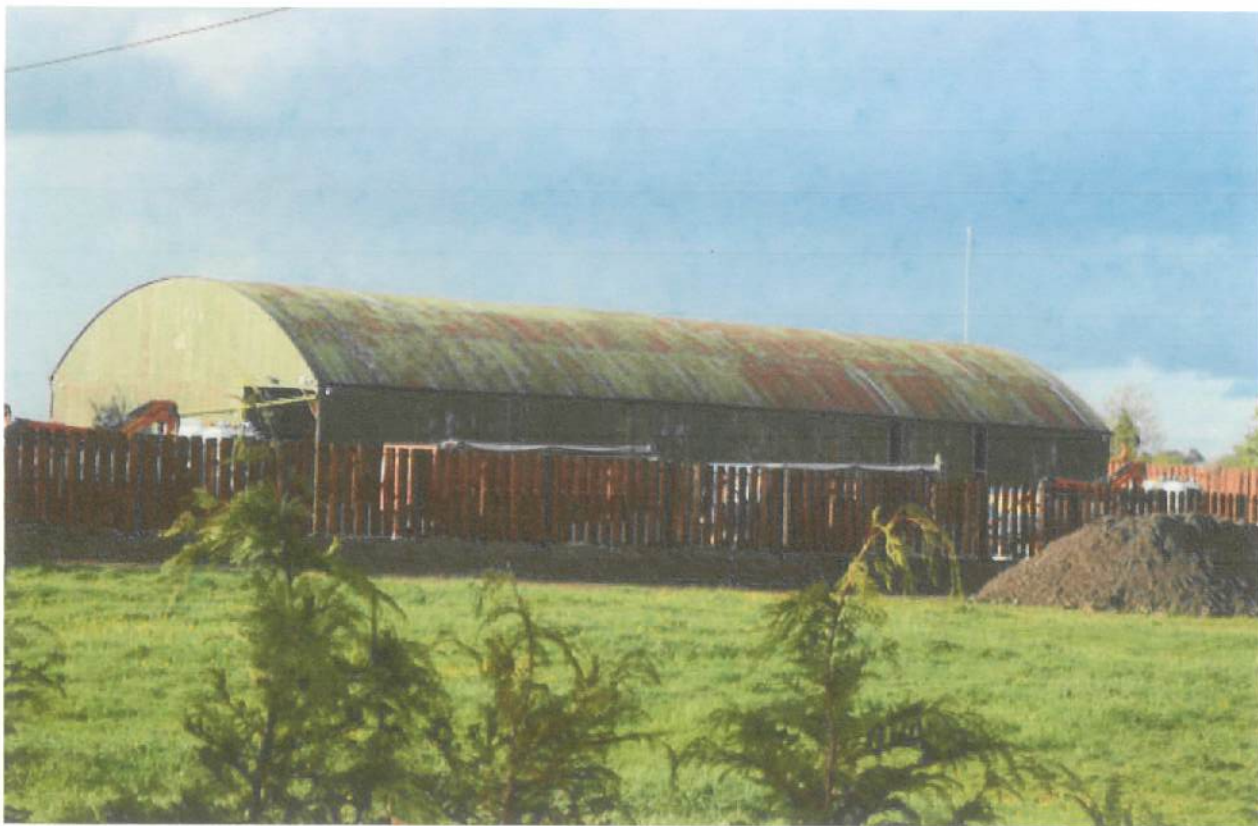
Drawing 1: The barrel-vaulted elevation of the proposed hayshed.

² This was the description which was provided in response to question no. 9 of the planning application form, viz. *'Description of Proposed Development'*.

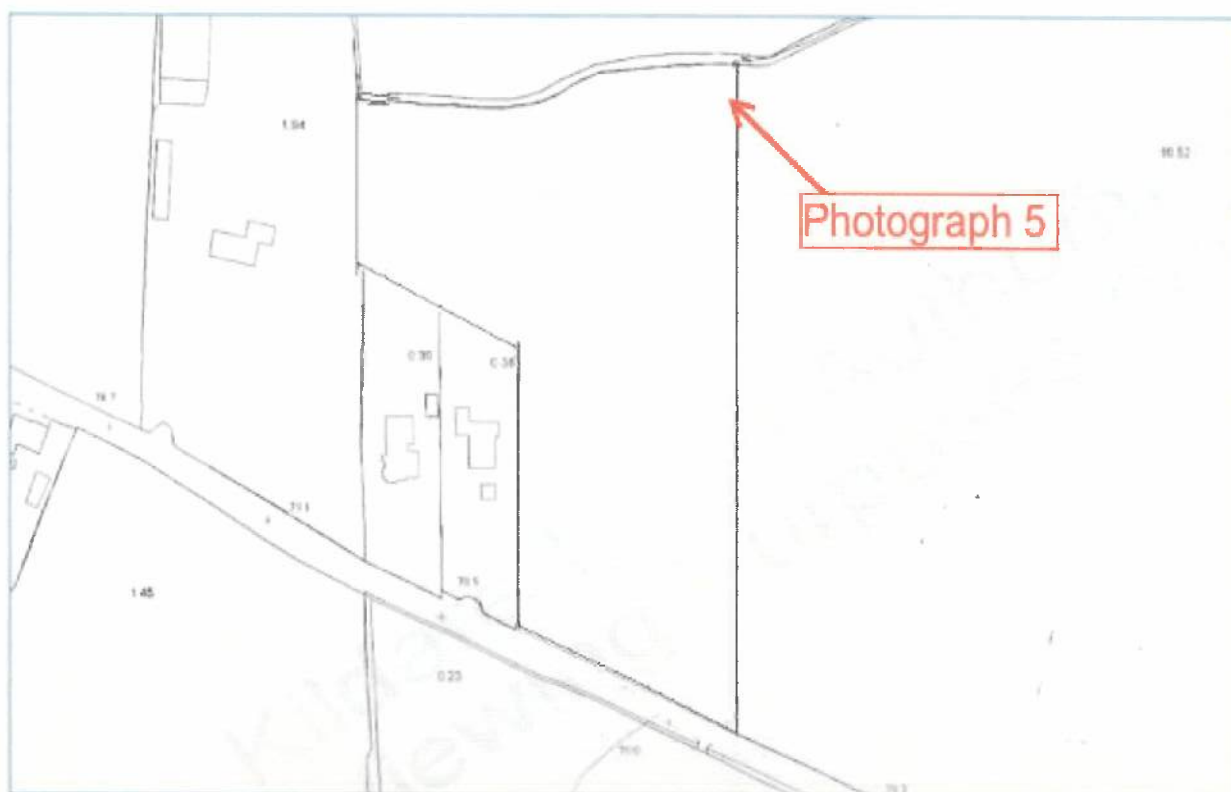


Photograph 4: The subject development when seen from the vantage point below.





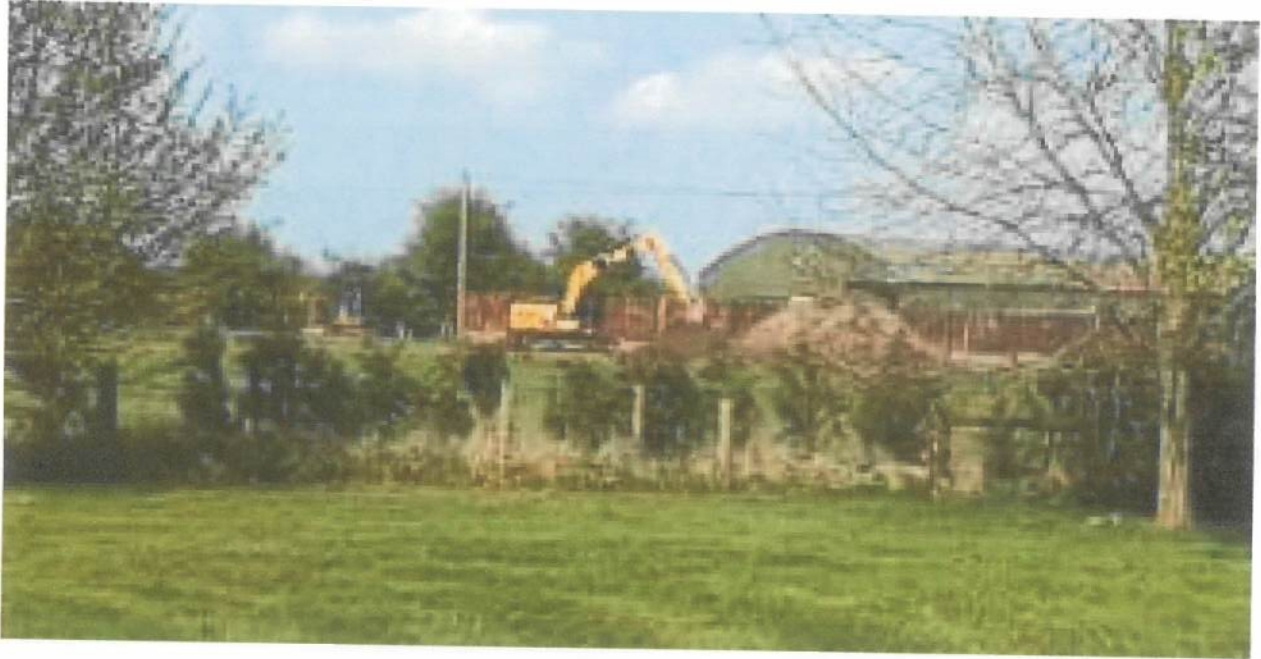
Photograph 5: The subject development when seen from the vantage point below.



4. Client Instructions

We have personally observed, including in video form, how the following development has already taken place in the north-eastern corner of the subject site or is currently occurring on this landholding:

- A large barrel-vaulted structure has been erected on this land;
- Soil and / or subsoil has been placed in a number of large heaps beside the above building;
- An industrial vehicle bearing, a large arm (or a type which can be used to distribute / move soil and / or subsoil) occupies this land;
- Non-agricultural External Storage
- A number of commercial trucks are parked on this site;
- A circa 3.0 metre tall timber fence has been erected on the land.



Photographs 6 & 7:

A large industrial vehicle with a mechanical arm is used on the site.



We are also instructed that the following activities are being undertaken on the subject property:

- Soil and / or subsoil from development sites is being imported onto the land;
- This material is being sorted and placed into bags, before being taken off the site;
- This activity is occurring both inside and outside the barrel-vaulted building.

5. Select Planning Law

(i) Statutory Provisions

The definition of ‘agriculture’ in the Planning and Development Act, 2000 (as amended) includes:

‘horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds’

Section 4(1) of the Planning and Development Act, 2000 (as amended) is reproduced as follows:

*‘The following shall be exempted development for the purposes this Act-
(a) 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’.*

(ii) Regulatory Provisions

Class 6 in Part 3 of the Second Schedule to the Planning and Development Regulations 2001 covers:

‘Works consisting of the provision of a roofed structure for the housing of cattle, sheep, goats, donkeys, horses, deer or rabbits, having a gross floor space not exceeding 200 square metres (whether or not be extension of an existing structure) or any ancillary provision for effluent storage’.

Class 8 in Part 3 of the Second Schedule to the Planning and Development Regulations 2001 concerns:

‘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 gross floor space not exceeding 200 square metres, and any ancillary provision for effluent storage’

Class 9 in Part 3 of the Second Schedule to the Planning and Development Regulations, 2001 states:

‘Works consisting of the provision of any store, barn, shed, glass-house or other structure, not being of a type specified in class 6, 7 or 8 of this Part of this Schedule, and having a gross floor space not exceeding 300 square metres’.

Class 10 in Part 3 of the Second Schedule to the Planning and Development Regulations 2001 covers:

‘The erection of an unroofed fenced area for the exercising or training of horses or ponies, together with a drainage bed or soft surface material to provide an all-weather surface’.

Article 6(3) of the Planning and Development Regulations, 2001 (as amended) states that the provisions in the Second Schedule can comprise exempted development, in the following locations:

‘...in areas other than a city, a town or an area specified in section 19(1)(b) of the Act or the excluded areas as defined in section 9 of the Local Government (Reorganisation) Act, 1985 (No. 7 of 1985).’

(iii) Discussion

The general provisions in the Planning and Development Act, 2000 (as amended) are summarised by Dr. David Browne in Simons on Planning Law in various paragraphs between pp. 136-138, as follows:

'The concept of development is central to the planning legislation...Under s.32 of the PDA 2000 there is a general requirement to obtain planning permission (a) in respect of the development of land, not being exempted development and (b) in the case of development which is unauthorised, for the retention of that unauthorised development...Under s.3 of the PDA 2000, "development" means,...the carrying out of any works in, on, over or under land or the making of any material change in the use of any structures or other land...The concept of development therefore consists of two limbs: "works" and "material change of use".'

Planning legislation also prescribes certain types of development for which planning permission is not actually required, with Dr. D. Browne considering this issue and concluding, at page 164, as follows:

'...the breadth of the concept of development is such as to capture even relatively minor works and some unexceptional changes of use. All of this is compensated for somewhat by the creation of classes of exempted development. In short, certain types of development are exempted from the need to obtain planning permission



Aerial Image 2: The site consists of an agricultural allotment with a detached building.

6. Referral Decisions

An Bord Pleanála is empowered to consider whether permission is needed in certain circumstances³.

In case no. RL3479, the Board considered *'Whether the importation of inert soil for the purposes of site restoration, and restoration works using imported inert soil, in respect of a quarry is or is not development or is or is not exempted development'* at Powerstown, Co. Carlow. Its Order affirmed:

³ Section 5 of the Planning and Development Act, 2000 (as amended) states *'If any question arises as to what...is or is not development or is or is not exempted development...any person may...request in writing from the relevant planning authority a declaration on that question... where a declaration is issued under this section, any person issued with a declaration...may...refer a declaration for review by the Board...'*

'An Bord Pleanála has concluded that - (b) the subject works involves the importation and deposition on land of inert soil (whether or not it is deemed to comprise a waste or a by-product) and therefore, pursuant to section 3(2)(b)(iii), the use of the land has materially changed and this constitutes development...' An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the importation of inert soil for the purposes of site restoration, and restoration works using imported inert soil, in respect of a quarry at Powerstown, County Carlow is development and is not exempted development'.

A similar approach was also taken in a number of other cases regarding the importation of soil.



Aerial Image 3: The site accommodates a detached building in its north-eastern corner.

7. County Development Plan

The Council's aim, in terms of rural development, as set out in Ch. 12 of its *Development Plan*, seeks:

'To support the provision of a high quality rural environment; encourage diversification and improved competitiveness of the rural economy; sustain the livelihood of rural communities and promote the development of the wider rural economy, all within the context of the sustainable management of land and resources'.

This chapter focuses on different types of farming, but s.10.4.10 discusses 'Rural Enterprises', states:

'The Council acknowledges that the development of rural enterprise and employment opportunities will be vital to sustaining the rural economy. In accordance with the economic strategy for the overall count, employment, servicing the rural areas, should, in general, be directed to local employment centres, small towns and villages ...catering for local investment and small scale industry. Within the rural settlements / nodes and the rural countryside, agriculture, horticulture, forestry, tourism, energy production and rural resources-based enterprise should be facilitated. Key considerations for rural enterprise will include:

-- In general, existing 'footloose' commercial or industrial activities in towns and villages will not be permitted to re-locate to unserved rural areas.

-- Horticulture, forestry, tourism, energy production and rural resource-based enterprises will be facilitated in the rural areas, subject to proper planning considerations.

-- Where established authorised rural based enterprises seek to expand beyond their existing capacity and, in the opinion of the planning authority, the expansion proposed would seriously affect the rural nature or amenity of the rural areas and surrounding countryside, it will generally be encouraged to locate in serviced zoned lands.

-- One-off enterprises in the rural area may be located in the open countryside only where the Council is satisfied that the enterprise is suitable for that location in the first place and that it will comply with the criteria outlined in Table 10.3.

-- Commercial / industrial developments in rural areas may be acceptable subject to proper planning considerations, where the Council is satisfied that the proposed development requires to be located in the rural area due to its dependence on an existing local resource or source material that is required for the carrying out of the industrial process / commercial activity / service. the local resource or source of material shall be in close proximity to the location of the proposed development.

-- Apart from rural housing, as provided for in Chapter 4, there are other land-uses which may be considered in the rural countryside. Where an area is not within an identifiable settlement, and is not otherwise zoned as part of this Plan, or any of the Local Area Plans, the use of such land shall be deemed to be primarily agricultural'.

Similarly, policy REO2 also aims to 'Ensure that all planning applications for one off enterprises in rural areas have regard to the criteria listed at Table 10.3 of the Plan' which is reproduced below:

'Proposals for the development of one-off new small-scale enterprises in rural areas outside of designated employment centres will be assessed against the following criteria:

- *As a general guide, development proposals shall be limited to small-scale business development with a floor area at circa 200 sq. m. and shall be appropriate in scale to its location;*
- *The development will enhance the strength of the local rural economy;*
- *The proposed development shall be located on the site of a redundant farm building / yard or similar agricultural brownfield site;*
- *There is a social and economic benefit to being located in a rural area;*
- *The proposal will not adversely affect the character and appearance of the landscape;*
- *The development will not be detrimental to the amenity of nearby properties, and in particular the amenities of nearby residents;*
- *The existing or planned local road network and other essential infrastructure can accommodate extra demand generated by the proposal;*
- *The proposal should be accompanied by a mobility plan catering for employees' home to work transportation;*
- *Adequate proposals to cater for any waste arising at the facility;*
- *All advertising should be kept to a minimum and be suitable in design and scale to serve the business;*

- Proper planning and sustainable development;
- The proposals should conform to other objectives of the County Development Plan’.

Selected policies from Ch. 12 of the *Development Plan* are reproduced below, for ease of reference:

‘RE 4 Support the provision of a high-quality rural environment, encourage diversification and improved competitiveness of the rural economy, sustain the livelihood of rural communities and promote the development of the wider rural economy, all within the context of the sustainable management of land and resources.

RE 5 Support and facilitate sustainable agriculture, horticulture, forestry, renewable energy and other rural enterprises at suitable locations in the count.

RE6 Support the restoration, preservation and enhancement of ecosystems dependent on agriculture and forestry. Promote social inclusion, poverty reduction and economic development in rural areas.

Support farm diversification, where a proposed business initiative is subordinate to the primary agricultural use of the site, subject to traffic and environmental safeguards.

RE7 Promote social inclusion, poverty reduction and economic development in rural area

RE8 Support farm diversification, where a proposed business initiative is subordinate to the primary agricultural use of the site, subject to traffic and environmental safeguards.

RE 9 Protect agriculture and traditional rural enterprises from unplanned and/or incompatible urban development’.

8. Opinion

We have personally observed, including in video form, how the following development has already taken place in the north-eastern corner of the subject site or is currently occurring on this landholding:

(i) A large barrel-vaulted structure has been erected on this land

Although we have not entered onto the subject site, the barrel-vaulted structure which occupies the north-eastern corner of this allotment is of the same general character, in terms of its size and its position, as the building which was permitted by the County Council under application reg. ref. 14415.

(ii) Soil and / or subsoil has been placed in a number of large heaps beside the above building

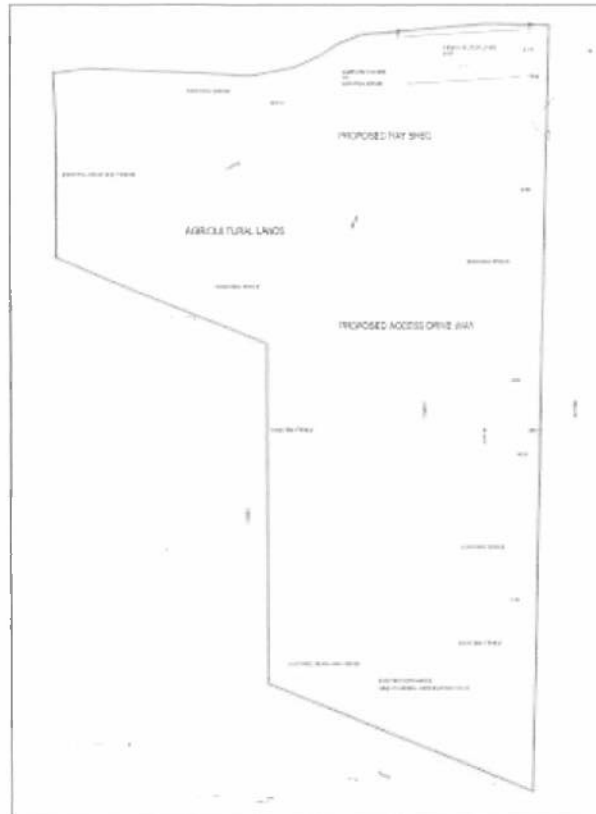
It is our opinion that the importation of soil onto the site requires planning permission, even if such an operation was intended to improve the quality of the soil for agricultural purposes. Indeed, farmers have traditionally been required to obtain planning permission for this type of development and we cite An Bord Pleanala appeal ref. nos. PL04.121112⁴, PL04.229343⁵ and PL18.223997⁶ as examples.

Moreover, we have already observed how the importation of inert material (soil) for the purposes of site restoration is not exemplified development and this requires planning permission in ref. RL3479.

⁴ The Board’s Order described this proposal as ‘Fill and raise level of land for agricultural purposes...Rathpeacon, Mallow Road, County Cork’.

⁵ This development comprised ‘Raise Agricultural Land Levels with earth, subsoil and inert construction materials at Monaperson, Mourneabbey, Mallow, Co. Cork’.

⁶ This appeal approved the ‘Placement of soil and sub-soil Fill material to low-lying lands and ancillary works ... Cremartin, Castleblayney, Co. Monaghan’.



Drg. 2: The permitted layout under reg. 14415

We observe how planning law contains remarkably few examples where planning permission is always needed, although we note how s.3(2) of the Principal Act prescribes that ‘*the deposit of vehicles...old metal, mining or industrial waste builders’ waste, rubbish or debris*’ comprises a material change in the use of land, for which permission is needed. Although soil and subsoil are not expressly identified in this clause, the *eiusdem generis*⁷ rule of statutory construction would support the approach that permission is required for the import of this type of material onto agricultural land.

We have perused the Planning Register for this site and we can find no record of any planning permission having been granted by either the Council for the importation of soil and / or subsoil onto this land or for the sorting and portion control accompanying a packaging operation, prior to dispatch.

Furthermore, having regard to the policies of the *Kildare County Development Plan 2017-2023* insofar as such provisions govern the type of activities which can be undertaken in the countryside, it is our opinion that the importation and separation / sorting of soil and subsoil would run counter to this statutory instrument and that it would be unlawful for the Planning Authority to grant planning permission for the retention of this operation without engaging in an elaborate set of political, administrative and legal procedures, as prescribed in the Planning and Development Act, 2000 (as amended). Dr. D. Browne, in *Simons on Planning Law* (3rd Edn) explains at page 275, as follows:

‘...the planning authority cannot grant planning permission for development in contravention of the development plan without first going through a rigorous procedure

Prof. Y. Scannell in *Land Use Planning and Development* (2nd Edn) concurs with this view, at p. 145:

‘A planning cannot legally grant permission for development which materially contravenes its development plan unless it adopts a special procedure for doing so.

⁷ This italicised phrase means ‘*and things of a similar nature*’.



Photographs 8 & 9: Spoil heaps or piles have been placed onto this tract of agricultural land.



- (iii) An industrial vehicle bearing, a large arm (or a type which can be used to distribute / move soil and / or subsoil) occupies this land;**

It would be difficult to argue that the parking or the installation of a commercial vehicle onto land whose purpose is economic requires planning permission, in its own right. We take account of the principle which was established in the Supreme Court judgement in the case of *Dublin Corporation v-Moore* in which McCarthy J rejected the view of the trial judge and seemed to show some flexibility:

"The learned trial judge held that the use of the front driveway of Number 144 as described was a development...and appears from his note, to have adverted in that regard to subsection 2(b)(i). In my view, the note must be mistaken; subsection 2(b)(i) in purporting to identify "material change" refers...to the placing or keeping of vans, not just as such, but for a particular purpose – here, the sale of goods. In my view, what the section contemplates is that the van is kept in the particular land and there used for the sale of goods. Such is not the case here; the vans are, as it were, "parked" when not in use...

The "fall back" position adopted by the Corporation has been to say that, in any event, the use complained of constitutes "material change in the use of land" and is therefore to be prohibited. It is important to recognise that the consequences of breaches of the planning code are penal in nature and therefore the statutes enforcing them must be strictly construed. I do not need, however, the aid of any such rule of strict construction to hold that the conduct complained of does not constitute development...

However, the subject feature, has been sited on the land in order to facilitate an unauthorised operation and, for this reason, it is our view that the industrial vehicles which is illustrated in photographs 6 and 7 above requires planning permission, by reason of its facilitation of and connection with this activity.

(iv) Non-agricultural External Storage

As depicted in photograph 10 below, the tract of open farmland to which this report relates is being used for the storage of materials and apparatus which is non-agricultural in nature; it is our view that such items are related to construction activity and we have formed the opinion that this land is being used for the storage of items which would often be used in building activity of a commercial character.



Photograph 10: Construction-relates items are being stored on the subject site.

Having regard to the policies of the *Kildare County Development Plan 2017-2023* insofar as such provisions govern the type of activities which can be undertaken in the countryside, it is our opinion that the use of land in the countryside for the storage of non-agricultural would run counter to this statutory instrument and that it would be unlawful for the Planning Authority to grant planning consent for the retention of this particular operation without engaging in the abovementioned statutory process.

(v) A number of commercial trucks are parked on this site;

We have observed the presence of large construction-related vehicles on the site, of a type illustrated in photograph 11 below and we have formed the view that this land is being used as a heavy goods vehicle park. Although this type of development might be facilitated beside a truck-driver's home in the countryside, we do not consider that an activity of this type would otherwise be permitted by the Council. As this existing land-use does not abut the landowner's home, we are of the view that this development materially contravenes the *County Development Plan 2017 – 2023* and that permission would not ordinarily be granted for its retention, in the absence of strong political and official support.



Photograph 11: Construction-relates items are being stored on the subject site.

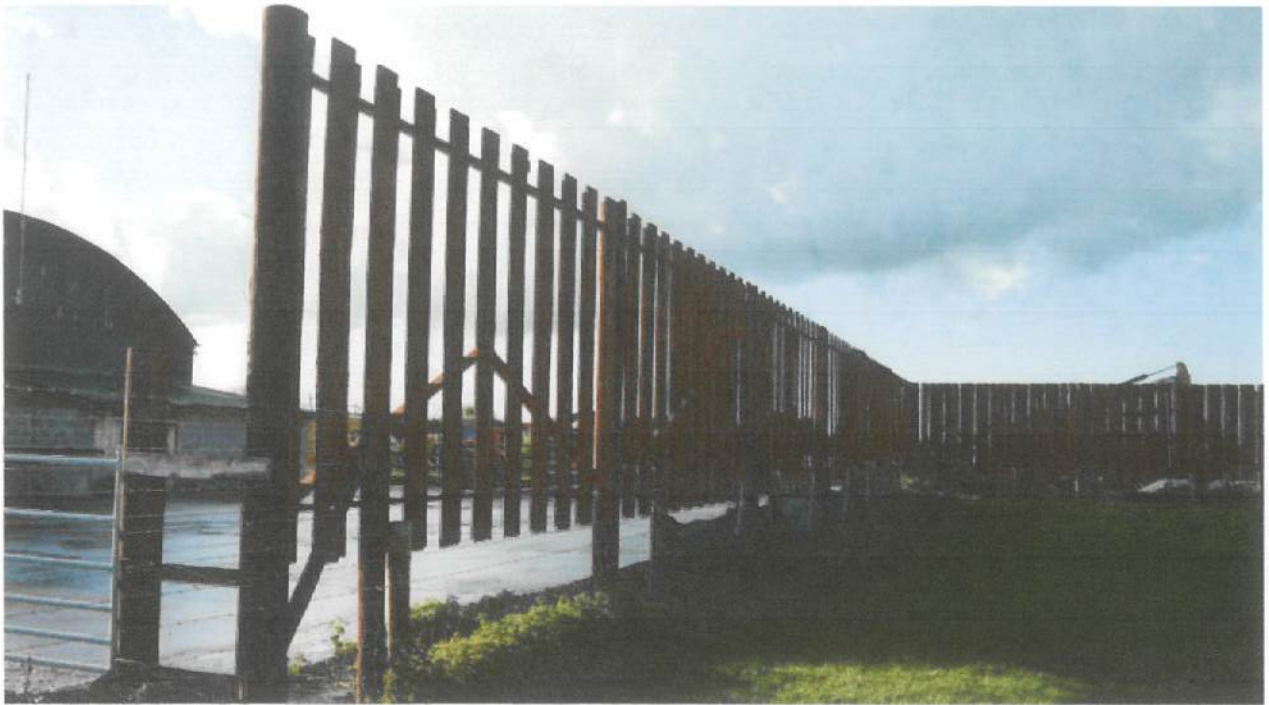
(vi) A circa 3.0 metre tall timber fence has been erected on the land.

A fence has also been erected on this land and this feature is illustrated in photograph no. 12 below.



Photograph 12: A fence has been erected on the subject site.

Although the Planning and Development Regulations, 29001 (as amended) allow the erection of a fence without consent in a number of situations, all but one of these provisions limit the height of such a feature to 2 metres and whilst Class 4 of Part 3 '*Exempted Development — Rural*' states that fences can be erected up to a maximum height of 3 metres '*for the purposes of deer farming or conservation*'.



Photograph 13: The subject fence screens unapproved activity being conducted on the site.

9. Concluding Comment

It is well-established that the primary land-use within the open countryside should be agriculture, or a business which is otherwise based on a rural resource, such as extractive industry or tourism. Although planning principles allow for the importation of soil and subsoil, it is clear that operations of this type require planning permission. It is our opinion that the activities and / or structures which currently exist on the subject site comprise '*development*' within the meaning of the Planning and Development Act, 2000 (as amended) and that, as such operations and features do not fall within any of the categories of '*exempted development*' planning permission is required for this overall operation.

We do not believe that this activity is of a type which falls within the ambit of the *Kildare County Development Plan 2017 – 2023* and we find it difficult to conclude that any application for the retention of this development would gain the support of Council officials. In such circumstances, any such submission is most unlikely to be referred to the Elected Members for approval, in line with the material contravention procedures which are set out in planning law. As a result, we conclude that it is highly improbable that planning permission would ever be granted for this existing operation.


Farry Town Planning Ltd.

Painstown House
Kill
Co. Kildare

September 2022

Kildare County Council
Planning Department
Aras Chill Dara
Devoy Park
Naas
County Kildare

Re: Unauthorised Development at Agricultural Site at Painstown Kildare, County Kildare

Dear Sir or Madam

I refer to the above matter and wish to make a complaint and draw your attention to the unauthorised development currently taking place on farmland at Painstown, Kill, Co. Kildare comprised in Land Registry Folio KE62336F County Kildare and in the ownership of Mr. Vincent Talbot (the "Subject Site").

The Subject Site is zoned agricultural and directly abuts my farm. I believe that the Subject Site is being used for commercial / industrial purposes including but not limited to:-

- (a) the importation of soil and subsoil to the Subject Site in bulk quantities, the placing of same in large heaps and the packaging of this material in smaller loads for final dispatch to end-users off-site; and
- (b) the occupation on the Subject Site of an industrial vehicle with a large arm which is being used to facilitate an unauthorised operation and usage of the Subject Site; and
- (c) the usage of the Subject Site for non-agricultural external storage; and
- (d) the usage of the Subject Site for the parking of commercial trucks; and
- (e) the erection of a 3.0 metre tall timber fence.

I believe these uses of the Subject Site in this manner are unauthorised development and are in conflict of the Kildare County Development Plan 2017-2023, represent a material change of use of the Subject Site and are unlawful under the Planning and Development Act 2000 (as amended). I enclose herewith completed and signed complaint form and report carried out by Farry Town Planning setting out further details of the unauthorised development together with photographs and maps of the Subject Site.

I would greatly appreciate if Kildare County Council as the party responsible for the enforcement of planning legislation in the county would investigate the unauthorised development on the Subject Site as soon as possible.

Yours sincerely

John Kerin



Painestown, Kill,

Naas

W91PY76

1st Sept., 2022

Farry Town Planning Ltd.,

Suite 180, 28 South Frederick Street, Dublin 2

Dear Mr Farry,

Farmlands at Painestown, Kill, Naas.

Land Registry Folio KE62336F – Registered Owner Vincent Talbot

I write to you in relation to the above farmland, an Access Driveway and the Hay Shed for which Planning permission was granted by Kildare County Council in 2014

In considering this application I noted that it was stated by the Council "Please note that no work should be carried out in connection with the proposal until a written grant of permission to do so has been received by you from this council"

Within the past 6 months significant changes have taken place in the usage and activity and surrounding area of the Hay Shed

- I. A Tall Timber Fence has been erected around the Shed which has been and is being utilised to distract and undertake covertly a Construction / Commercial Operation
- II. Commercial Vans, Site Clearance Heavy Equipment and Heavy-Duty Trucks have been and are being utilising the Shed and surrounding area for Parking
- III. Talbot Building and civil Engineering and its Heavy-Duty Trucks are using the site as a Recycling Centre by dumping / holding / offloading/sorting/recycling / loading rubble and soil
- IV. There is, on a daily basis Monday to Saturday, a constant stream of Trucks into and out of the site – commencing in the early morning and all during the day

The Above 4 points raise the questions – Why / Who is arranging / using this Hay Shed and Site facility in this way? and secondly, Has Planning Permission by KCC been granted for utilising the site and the changes which have been made?

In April 2022 I was one of 3 people who spoke with Vincent Talbot and when asked if he was undertaking Construction related work on the site – His response was - I am but if given time I will sort things out.

He made this admission as he showed us a large number of Bags in the Shed which were filled with Soil and ready for sale and delivery. On that day on site there was Heavy Duty Construction Machinery, Trucks and Rubble.

This site and the Hay Shed are not being used for Farm related activities / work for which Planning Permission was granted in 2014 – It is now in the process of being used for Construction related activities and changes have been made to the Shed to facility this activity – Is there Planning ?.

I respectfully say that if Planning Permission has not been granted then Vincent Talbot shows total disrespect to the Planning Officials, the Planning instructions of the Council and total disregard to the statutory Obligations of the Planning / Zoning Laws and the Environment.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'P. O'Reilly', written in a cursive style.

Pat O'Reilly

Farry Town Planning Ltd.,
Suite 180,
28 South Frederick Street,
Dublin 2.

Inchera,
Painstown,
Kill,
Co Kildare

Dear Mr Farry,

12th September 2022

Re: Site and lands at Painstown, Kill, Co Kildare,
Owned by Vincent Talbot, Alasty, Kill, Co Kildare.

I refer to my telephone consultation with you, Farry Town Planning Ltd., which was instigated at the request of my immediate neighbours John Kerin, Painstown House, Pat O' Reilly, Painstown, David Donnellan, Lexington, Painstown, and myself.

You will recall from our conversation our concern was in relation to the construction by Mr. Talbot, in the last 6 months, of an unusually high slatted timber fence around the existing farm hayshed on Vincent Talbot lands at Painstown, Kill, County Kildare. Mr. Talbot's land is adjacent to our four residential properties, and my observations (both audible and visual) of activities such as the parking, loading and unloading of trucks and operation of heavy machinery within the now fenced-off hayshed and site. The unauthorised activity has created significant noise and dust from various types of working/construction machinery and c 6 trucks [marked Talbot Grab & Hire] coming and going from the entrance at the main road to the site at all times of the day. It would seem to me that Mr. Talbot is carrying out a commercial soil processing operation on his lands. I can both see and hear the activity going on from my own property.

For my part, my concern was heightened following a visit to the surrounds of the Talbot site on the evening of the 15th April 2022 with both John Kerin and Pat O'Reilly to observe and investigate the extent of the development and activities being carried on.

I initially observed the very large scale of the site behind the recently constructed slatted timber fence, and through the slatted fence I could observe :-

- almost the entire area surrounding the hayshed within the fence had been laid in concrete flooring/foundations and clearly this was not for agricultural use.
- building/concrete rubble was being stored in a large heap/mound in a corner outside the hayshed, this material was brought on to the site and was not from any building on the site.
- several commercial trucks [marked Talbot Grab & Hire] were parked to the side of the hayshed
- construction/heavy machinery was parked to another side of the hayshed together with a conveyor belt /sifting type machine.

Vincent Talbot arrived on the site and we indicated to him our shock and total surprise at the sheer size and scale of the recent developments. These include an unusually very high slatted timber fence surrounding the hayshed, the storage of vehicles, together with machinery and operational activities,

on essentially farmland, of which we had no prior knowledge, nor had we seen any planning notice, application or planning approval in connection with the site.

When queried by us as to what activities were being carried out behind the high slatted timber fence, Mr Talbot invited us to look around the site as well as inside the hayshed during which we observed a very large mound of top soil in the hayshed and a number of one tonne bags filled with top soil. He told us the following -

- he was running a buildings materials processing business,
- he was not engaged in any stone crushing and had no plans to do so,
- the top soil mound was being bagged in the one tonne bags for onward sale,
- the parking of trucks was part of the building materials processing business,
- the slatted timber fence was erected for security and visual reasons,
- he had planning permission for sheds to the rear of the field/farm which were already staked out and he was intending to transfer his business operations down there, and
- when asked if he had planning permission for this building materials processing business he stated that he had not

Mr Talbot said he was not now going to lay concrete foundations on the small remaining area within the fenced off area not yet completed, in view of our serious concerns. He asked that we give him three months to transfer his business to the new location to be constructed to the rear of his field/farm.

We indicated to Mr Talbot our complete shock, surprise and disappointment at what we had witnessed, and also at his expansion plans for his business which he had outlined to us including construction of an extended roadway to the rear of the field/farm so that additional sheds could be constructed in this alternative location.

The decision by us to engage your Company's services was made with a view to your Company preparing a planning report on the requirement for planning permission for such developments and activities as witnessed by us and detailed to us by Vincent Talbot. In addition we wanted clarification on whether a planning application was lodged with the appropriate authority and subsequently granted in respect of the site. Such report was also to include strategic advice as to our options in the light of these unauthorised developments and activities.

Yours sincerely,



Thomas N. Kelleher

Farry Town Planning Ltd.

Suite 180
28 South Frederick Street
Dublin 2

Phone (01) 677 8180
Mobile 087 288 7311
vincentfarry@gmail.com

2 February 2023

Director of Planning
Kildare County Council
Aras Chill Dara
Naas
Co. Kildare

DEVELOPMENT ON LAND AT PAINESTOWN KILL CO. KILDARE KILDARE COUNTY COUNCIL REFERENCE NUMBER ED/0989

Dear Sir

We refer to the above and we confirm that we act for the joint referrer, Tom Kelliher, Pat O'Reilly, John Kerin and David Donnellan. We confirm that a copy of the Council's letter of 3 November 2022 has been passed to this office and we respond to the Planning Authority's queries, as follows:

1. Operative Planning Permissions

We confirm that a dwelling is currently in the course of construction on land which is near the site of the referral site, although we cannot confirm whether it complies with the plans and particulars of permission reg. 20790 (as this would require a detailed inspection and survey of the development). Moreover, as the decision on whether to implement permission reg. 21818 is not within the purview of our clients (and indeed, does not have to be taken for several years to come), we cannot answer the query posed. We can, however, provide an image of the building to which the Local Authority refers.



Photograph 1: The partly-built structure on land which is near the referral site

2. Barrel-Vaulted Building

Although we have not entered onto the subject site, the barrel-vaulted structure which occupies the north-eastern corner of this allotment is of the same general character, in terms of its size and its position, as the building which was permitted by the County Council under application reg. ref. 14415.

As our clients do not own the referral site, we are not in a position to determine whether this structure accords with the permitted particulars, or to provide any floorplans or elevations of this development.

3. Use of Machinery

Our clients ask the Council to take account of the original referral submission, which discusses the use of any machinery on-site (at pp. 18-23). We cannot provide numerical details of the quantity of any soil or subsoil which has been taken from this land or imported thereon, although we observe how the descriptions of this operation in the letters which have already provided to the Council by Messrs. Kerin, O'Reilly and Kelliher clearly indicate that this activity is notable in scale and is not *de minimis*.

4. Timber Fence

We do not consider that the timber fence which has been erected on-site either comprises exempted development or otherwise forms part of any planning permission for development on the referral site.

Yours faithfully



Farry Town Planning Ltd.



Vincent Farry <vincentfarry@gmail.com>

Development at Painstown Kill, Co. Kildare

PlanningControl <planningcontrol@kildarecoco.ie>
To: Vincent Farry <vincentfarry@gmail.com>

Tue, Feb 7, 2023 at 1:02 PM

Can you please confirm the reference number in relation to the attached and if this is for the Unauthorised development section.

Kind regards

Planning Control Department

Telephone: +353 45 980839

Email: planningcontrol@kildarecoco.ie | Web: www.kildarecoco.ie

Kildare County Council | Áras Chill Dara | Devoy Park | Naas | Ireland | W91 X77F

From: Vincent Farry <vincentfarry@gmail.com>
Sent: Tuesday 7 February 2023 07:30
To: PlanningControl <planningcontrol@kildarecoco.ie>; Customer Service <plandept@kildarecoco.ie>
Subject: Development at Painstown Kill, Co. Kildare

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[Quoted text hidden]



Tá an ríomhphost seo príobháideach agus ní ceadmhach úsáid an ríomhphoist seo d'éinne ach don té ar seoladh chuige é. D'fhéadfadh go mbeadh eolas ann atá faoi phribhléid agus rúnda de réir an dlí. Munar duit an ríomhphost seo, déan teagmháil leis an seoltóir chomh luath agus is féidir. D'fhéadfadh nach iad tuairimí Chomhairle Contae Chill Dara na tuairimí atá curtha in iúl sa ríomhphost seo. Déanann Comhairle Contae Chill Dara iarracht ríomhphoist a chosaint ó víris. Mar sin féin, moltar duit gach ríomhphost a scanadh, mar ní ghlacann an Chomhairle aon dliteanas i leith damáiste do do chórais. Le haghaidh eolas ar do chearta príobháideachta agus ar conas a bhainistimid sonraí pearsanta, logáil isteach ar <https://kildarecoco.ie/YourCouncil/GovernanceandCompliance/DataProtection/> Chun do chuid sonraí pearsanta a nuashonrú cuir ríomhphost chugainn ag customercare@kildarecoco.ie Caithfidh tú deis a thógáil don Chomhairle cé thú féin a chinntiú trí cruthúnas céannachta agus/nó seoladh a sholáthar, sula ndéanaimid aon athruithe. *****

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Vincent Farry <vincentfarry@gmail.com>

Development at Painstown Kill, Co. Kildare

Vincent Farry <vincentfarry@gmail.com>

Tue, Feb 7, 2023 at 1:21 PM

To: PlanningControl <planningcontrol@kildarecoco.ie>

Hello Planning Control

As per the heading in bold ink in the text, this correspondence relates to Council reg. ED/0989 (under s.5 of the Planning and Development Act, 2000 (as amended) and is most probably being handled by the Development Control section.

Regards and many thanks.

Vincent JP Farry BA MRUP LLB MSc PDipEnvEng MRTPI MRAPI MIPI

Farry Town Planning Ltd.

Chartered Town Planners and Environmental Engineers

Suite 180 / 28 South Frederick Street, Dublin 2

Mobile: 087 288 7311

E-mail : vincentfarry@gmail.com

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Comhairle Contae Chill Dara
Kildare County Council



Date: 03/11/2022.
Our Ref: ED/0989.

REGISTERED POST

Vincent Talbot,
Painestown,
Kill,
Co. Kildare.

RE: Application for a Declaration of Exempted Development under Section 5 of Planning and Development Act 2000 (as amended) at Painestown, Kill, Co. Kildare.

Dear Mr. Talbot,

I refer to a request for a Declaration of Exempt Development under Section 5 of the Planning and Development Act 2000 as amended and wish to advise that in order to process this request the following Further Information is required:

1. Please clarify which, if any permissions are currently being taken up on site i.e. reg. ref. 21/818 (amendment of boundaries and treatment system) and reg. ref. 20/790 (construction of dwelling etc). Please confirm details of any works carried out to date in relation to these permitted developments.
2. Please clarify the nature of the barrel vaulted building on site and specify which permission if any that this structure was permitted under. Please describe the nature of this structure and submit floorplans and elevations of the structure to determine its gross floor area etc.
3. Please clarify the use of any machinery on site and confirm the amount of any soil or subsoil removed or imported to the subject site. Please clarify the nature of this importation, if any.
4. Please clarify the nature of a timber fence erected on site and clarify which permission if any this fence was permitted under. From a review of the planning history of the site, it would not appear that a timber fence of the height constructed was permitted as part of the previous developments.

The time period for the Council's determination shall commence upon receipt of the above information.

Yours sincerely,

**Senior Executive Officer,
Planning Department.**

Registered Post

Kildare County Council,
Head Office,
Aras Chill Dara,
Devoy Park,
Naas,
Co Kildare,
W91 X77F.

Our ref.: MS/MN/02340/01

6th October, 2022

**RE: OUR CLIENTS - TOM KELLEHER, PAT O'REILLY,
JOHN KERIN AND DAVID DONNELLAN
MATTER - SUBMISSION DATED 30TH SEPTEMBER, 2022
UNDER SECTION 5 OF THE PLANNING AND
DEVELOPMENT ACT, 2000 AS AMENDED.**

Dear Sirs,

I refer to our clients' recent application under Section 5 of the Planning and Development Act, 2000 as amended and dated 30th September 2022. For clarification purposes the question our client is asking is as follows:-

"Whether or not any and / or all of the following structures or activities comprise development and / or exempted development:

- The importation and deposit of soil and / or subsoil from off-site into a number of heaps on the land at Painestown, Kill, County Kildare;
- The parking of an industrial vehicle bearing a large arm (or a type which can be used to distribute / move soil and / or subsoil) on this land;
- The use of this property for non-agricultural external storage;
- The parking of commercial trucks on this site;
- The erection of a circa 3.0 metre tall timber fence on the land;
- The sorting of soil and subsoil, the placing the sorted matter into bags and the transportation of these bags off the site;
- The use of a large barrel-vaulted structure which has been erected on the referral site for sorting, bagging and dispatch of soil and subsoil".

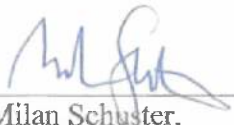
Kildare County Council,
Head Office.

adams LAW
6th October, 2022

-2-

I hope this fully clarifies matters.

Yours faithfully,



Milan Schuster,
Adams Law LLP.

