

Werner Vosloo

From: Werner Vosloo
Sent: 08 August 2022 11:39
To: 'Mary Tucker'; Niamh Cassidy
Subject: RE: EX 39/2022
Attachments: RE: Section 5 Referral

Good day Mary,

I responded to similar referral query received from 'Sorcha Skelly' s.skelly@pleanala.ie on Friday. Please see attached email correspondence in this regard.

Further to your questions please see my reply in red below.

Regards,

Werner Vosloo | Planning Department
Wicklow County Council, County Buildings, Station Road, Wicklow Town. A67 FW96
☎ 0404 20148 | ✉ wvosloo@wicklowcoco.ie

From: Mary Tucker [<mailto:M.Tucker@pleanala.ie>]
Sent: 08 August 2022 10:32
To: Niamh Cassidy
Cc: Werner Vosloo
Subject: EX 39/2022

Hi Niamh,

A Referral under section 5 of the Planning and Development Act, 2000 (as amended) was received on 2nd August, 2022 in relation to Declaration reference number EX 39/2022. The Referral is **INVALID**

Will you please confirm the following:

1. The date the question/request for declaration under Section 5 was submitted to the planning authority - **21 June 2022**
2. The question put to the planning authority – **The questions are detailed in the attachment to the attached email response.**
3. The date the declaration issued by the planning authority - **18 July 2022**
4. The names and addresses of the owners of the land and occupier, if different, and any other parties involved in the case
 - **Owner: Kerrin Buck c/o Caroline and Tony Buck, Ballinatone Lower, Greenan, Co. Wicklow**

Kind regards,

Mary

Mary Tucker
Executive Officer
Processing Section
An Bord Pleanála
64 Marlborough Street
Dublin 1

D01 V902
Teil: 01-873-7132
Facs: 01-8722684

Má fhaigheann tú an ríomhphost seo lasmuigh de na gnáthuaireanta oibre, ní bheidh mé ag súil le freagra ná gníomh lasmuigh de d'uaireanta oibre féin.

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Tabhair faoi deara led thoil: aon tuairimí nochtaithe san ríomhphost seo is iad tuairimí an tseoltóra féin agus níl sé intuigthe gurb iad tuairimí An Bhoird Pleanála nó go gcloíonn siad le polasaithe ráite an Bhoird.

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Werner Vosloo

From: Werner Vosloo
Sent: 05 August 2022 17:20
To: 'Sorcha Skelly'; Niamh Cassidy
Subject: RE: Section 5 Referral
Attachments: scan.pdf

Good afternoon Sorcha,

The Section 5 Declaration was issued on 18th July 2022.

The referrer is Eileen and Brendan Buck c/o BPS Planning Consultants Ltd of Ballinatone Lower, Greenan, Co. Wicklow, A67 W662.

Please see the attachment in respect of a copy of the development description. Not sure whether this is what you are looking for, if not please revert back.

Regards

Werner Vosloo | Planning Department
Wicklow County Council, County Buildings, Station Road, Wicklow Town. A67 FW96
☎ 0404 20148 | ✉ wwosloo@wicklowcoco.ie

From: Sorcha Skelly [<mailto:s.skelly@pleanala.ie>]
Sent: 05 August 2022 14:24
To: Niamh Cassidy; Werner Vosloo
Subject: Section 5 Referral

Hi,

I'm looking for some information on a Section 5 referral (Exemption Reference No 39/2022).

Can you tell me the date of the declaration for this case and the name and address of referrer? Also, could I ask for a copy of the development description for this referral also.

Thanks

Sorcha

Sorcha Skelly
Senior Executive Officer
Processing Section
An Bord Pleanála
64 Marlborough Street
Dublin 1
D01 V902
Tel: 01-873-7164
Facs: 01-8722684

Má fhaigheann tú an ríomhphost seo lasmuigh de na gnáthuaireanta oibre, ní bheidh mé ag súil le freagra ná gníomh lasmuigh de d'uaireanta oibre féin.

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Tabhair faoi deara led thoil: aon tuairimí nochtaithe san ríomhphost seo is iad tuairimí an tseoltóra féin agus níl sé intuigthe gurb iad tuairimí An Bhoird Pleanála nó go gcloíonn siad le polasaithe ráite an Bhoird.

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payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question. You should therefore set out the query for which you seek the Section 5 Declaration:

The questions over which this Section 5 is submitted are (see cover letter):

1. Are existing substantially incomplete works toward building a rural house started under a now lapsed planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended) and after planning permission lapses for a rural house after partial works are constructed, does the future use of the lands as residential then constitute exempted development within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).
2. Are new development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).
3. Does the erection of and inhabitation of 2 tents on lands with no planning permission constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).
4. Does the storage of waste and construction materials including blocks, cement, bags of sand, insulation boards, etc. on these lands constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).

These questions are set out in more detail in the attached letter.

- v. Indication of the Sections of the Planning and Development Act or Planning Regulations you consider relevant to the Declaration:

Planning and Development Act 2000:

Section 3 'Development'.

Section 4 'Exempted development'.

Section 32 'General obligation to obtain permission'.

Section 33 'Regulations regarding applications for permission'.

Section 34 'Permission for development'.

Section 40 'Limit of duration of permission'.

WICKLOW COUNTY COUNCIL

PLANNING & DEVELOPMENT ACTS 2000 (As Amended)
SECTION 5

Director of Services Order No: 1182/2022

Reference Number: EX 39/2022

Name of Applicant: Eileen & Brendan Buck C/O BPS Planning Consultants Ltd

Nature of Application: Section 5 Referral as to whether or not 1) Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission. 2) Whether upon lapsing of permission for rural house the future use of lands for residential. 3) New development works carried on an incomplete rural house after the lapsing of 5 years planning permission. 4) Erection of and inhabitation of 2 tents on with no planning permission. 5) Storage of waste and construction materials on lands. At Ballinatone Lower, Co Wicklow is or is not exempted development.

Location of Subject Site: Ballinatone Lower, Co Wicklow

RECOMMENDATION: Report from Edel Bermingham SEP

With respect 1) Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission. 2) Whether upon lapsing of permission for rural house the future use of lands for residential. 3) New development works carried on an incomplete rural house after the lapsing of 5 years planning permission. 4) Erection of and inhabitation of 2 tents on with no planning permission. 5) Storage of waste and construction materials on lands. At Ballinatone Lower, Co Wicklow to the query under Section 5 of the Planning & Development Act 2000 as to whether or is exempted development within the meaning of the Planning & Development Act 2000 (as amended)

Having regard to:

- The details submitted with the Section 5 application.
- PRR 05/3286 and PRR 11/4667
- An Bord Pleanala Referral ABP - ABP-300417-17
- Section 2, 3, 4, 5 and 40 of the Planning and Development Act 2000(as amended)
- Article 6,9 and Schedule 2: Part 1 : Class 16 and Part 3 : Class 1. of the Planning and Development Regulations 2001(as amended).

Main reasons with respect to section to Section 5 Declaration:

- The construction of a dwelling is works, and would come within the definition of development as set out under Section 3 of the Planning and Development Act 2000 (as amended). The development that was undertaken prior to the expiration of PRR 05/3286 would be permitted by reference to PRR 05/3286. Section 40 (1) of the Planning and Development Act 2000(as amended) provides that

Subject to subsection (2), permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards— (b) in case the development is commenced during that period, so much of the development as is not completed within that period.

Therefore, as set out in Section 40 that part of the development carried out prior to the expiration of the appropriate period are deemed permitted by reference to PRR 05/3286.

- The abandonment of the development does not constitute works on, in over or under land or the making of any material change of use of any structure or other land, therefore, it does not constitute 'development'.
- Works carried out after the duration of permission of PRR 05/3286 to complete the dwelling would not come within the provisions of Section 40 (2) (iii), and therefore are not exempted development.
- The placement of two tents on site would come within the definition of development having regard to the provisions of Section 3 (2) (b)(i). Given two tents have been placed on site, and for in excess of 10 days, they would not come within the exemption provisions of Schedule Part 3: Class 1 of the Planning and Development Regulations 2001(as amended)
- The storage of waste and construction materials on lands would be development having regard to the provisions of Section 3 (2) (b)(iii). There is no exemption for such storage as it would not come within the provisions of Class 16 : as there is no current valid permission on site, and the works would not be taking place on foot of exempted development .

The Planning Authority considers that:

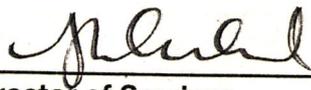
- Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission is development and is permitted development
- Whether upon lapsing of permission for rural house the future use of lands for residential is not development
- New development works carried on an incomplete rural house after the lapsing of 5 years planning permission is development and is not exempted development
- Erection of and inhabitation of 2 tents on with no planning permission is development and is not exempted development
- Storage of waste and construction materials on lands is development and is not exempted development.

ORDER:

That a declaration to issue stating:

- Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission **is development and is permitted development** within the meaning of the Planning & Development Acts 2000 (as amended) .
- Whether upon lapsing of permission for rural house the future use of lands for residential **is not development** within the meaning of the Planning & Development Acts 2000 (as amended) .
- New development works carried on an incomplete rural house after the lapsing of 5 years planning permission **is development and is not exempted development** within the meaning of the Planning & Development Acts 2000 (as amended) .
- Erection of and inhabitation of 2 tents on with no planning permission **is development and is not exempted development** within the meaning of the Planning & Development Acts 2000 (as amended) .
- Storage of waste and construction materials on lands **is development and is not exempted development** within the meaning of the Planning & Development Acts 2000 (as amended).

Signed:



A/ Director of Services
Planning Development & Environment

Dated 18th day of July 2022



Comhairle Contae Chill Mhantáin
Wicklow County Council

Forbairt Pleanála agus Comhshaol
Planning Development and Environment

Áras An Chontae / County Buildings
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Rphost / Email: plandev@wicklowcoco
Suíomh / Website: www.wicklow.ie

Eileen & Brendan Buck C/O BPS Consulting

July 2022

**RE: Declaration in accordance with Section 5
of the Planning & Development Acts 2000 (As Amended)**

I enclose herewith Declaration in accordance with Article 5 (2) (A) of the Planning & Development Act 2000 in respect of the following:

Exemption Ref. No: EX 39/2022

Applicant: Eileen & Brendan Buck C/O BPS Planning Consultants Ltd

Nature of Application: 1) Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission. 2) Whether upon lapsing of permission for rural house the future use of lands for residential. 3) New development works carried on an incomplete rural house after the lapsing of 5 years planning permission. 4) Erection of and inhabitation of 2 tents on with no planning permission. 5) Storage of waste and construction materials on lands. At Ballinatone Lower, Co Wicklow

Location: Ballinatone Lower, Co Wicklow

Where a Declaration is used under this Section any person issued with a Declaration under subsection (2) (a) may, on payment to An Bord Pleanála of such fee as may be prescribed, refer a declaration for review by the Board within four weeks of the date of the issuing of the declaration by the Local Authority.

Is mise, le meas,


ADMINISTRATIVE OFFICER
PLANNING DEVELOPMENT & ENVIRONMENT.





Comhairle Contae Chill Mhantáin Wicklow County Council

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Forbairt Pleanála agus Comhshaol Planning Development and Environment

DECLARATION IN ACCORDANCE WITH ARTICLE 5 (2) (A) OF THE PLANNING & DEVELOPMENT ACT 2000 AS AMENDED

Applicant: Eileen & Brendan Buck C/O BPS Planning Consultants Ltd

Location: Ballinatone Lower, Co Wicklow

DIRECTOR OF SERVICES ORDER NO. 1182/2022

A question has arisen as to whether or not 1) Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission. 2) Whether upon lapsing of permission for rural house the future use of lands for residential. 3) New development works carried on an incomplete rural house after the lapsing of 5 years planning permission. 4) Erection of and inhabitation of 2 tents on with no planning permission. 5) Storage of waste and construction materials on lands. At Ballinatone Lower, Co Wicklow is or is not exempted development.

Having regard to:

- The details submitted with the Section 5 application.
- PRR 05/3286 and PRR 11/4667
- An Bord Pleanála Referral ABP - ABP-300417-17
- Section 2, 3, 4, 5 and 40 of the Planning and Development Act 2000(as amended)
- Article 6,9 and Schedule 2: Part 1 : Class 16 and Part 3 : Class 1 of the Planning and Development Regulations 2001(as amended).

Main Reasons with respect to Section 5 Declaration:

- The construction of a dwelling is works, and would come within the definition of development as set out under Section 3 of the Planning and Development Act 2000 (as amended). The development that was undertaken prior to the expiration of PRR 05/3286 would be permitted by reference to PRR 05/3286. Section 40 (1) of the Planning and Development Act 2000(as amended) provides that
Subject to subsection (2), permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards— (b) in case the development is commenced during that period, so much of the development as is not completed within that period.
Therefore, as set out in Section 40 that part of the development carried out prior to the expiration of the appropriate period are deemed permitted by reference to PRR 05/3286.
- The abandonment of the development does not constitute works on, in over or under land or the making of any material change of use of any structure or other land, therefore, it does not constitute 'development'.





COMHAIRLE CONTAE CHILL MCHANTÁIN Wicklow County Council

Forbairt Pleanála agus Comhshaol Planning Development and Environment

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- Works carried out after the duration of permission of PRR 05/3286 to complete the dwelling would not come within the provisions of Section 40 (2) (iii), and therefore are not exempted development.
- The placement of two tents on site would come within the definition of development having regard to the provisions of Section 3 (2) (b)(i). Given two tents have been placed on site, and for in excess of 10 days, they would not come within the exemption provisions of Schedule Part 3: Class 1 of the Planning and Development Regulations 2001(as amended)
- The storage of waste and construction materials on lands would be development having regard to the provisions of Section 3 (2) (b)(iii). There is no exemption for such storage as it would not come within the provisions of Class 16 : as there is no current valid permission on site, and the works would not be taking place on foot of exempted development .

The Planning Authority considers that:

- Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission is development and is permitted development within the meaning of the Planning & Development Acts 2000 (as amended).
- Whether upon lapsing of permission for rural house the future use of lands for residential is not development within the meaning of the Planning & Development Acts 2000 (as amended).
- New development works carried on an incomplete rural house after the lapsing of 5 years planning permission is development and is not exempted development within the meaning of the Planning & Development Acts 2000 (as amended).
- Erection of and inhabitation of 2 tents on with no planning permission is development and is not exempted development within the meaning of the Planning & Development Acts 2000 (as amended).
- Storage of waste and construction materials on lands is development and is not exempted development within the meaning of the Planning & Development Acts 2000 (as amended).

Signed:

ADMINISTRATIVE OFFICER
PLANNING DEVELOPMENT & ENVIRONMENT

Dated July 2022



Section 5 Application EX 39/2022.

Date : 12th July 2022.

Applicant : Eileen & Brendan Buck

Address : Ballinatone Lower, Greenane, Co. Wicklow.

Exemption Query :

Whether or not :

1. Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission is 'development' and is 'exempted development'.
2. Whether upon lapsing of permission for rural house the future use of lands as residential is exempted development
3. New development works carried on an incomplete rural house after the lapsing of 5 years planning permission is 'development' and is 'exempted development'.
4. Erection of and inhabitation of 2 tents on with no planning permission, is 'development' and is 'exempted development'
5. Storage of waste and construction materials on lands is 'development' and is 'exempted development'

Planning History :

PRR 05/3286 Permission granted for Dwelling, Septic tank and Percolation Area on site. Final Grant Date 12/10/2006.

PRR 11/4667 Extension of Time - 21/6/2014.

UD 3237 File closed on foot of compliance with enforcement notice. (march 2015)

An Bord Pleanála Declaration :

UD5592 (site clearance, block walls, tents)
Awaiting inspection. JQ.

ABP-300417-17

WHEREAS a question has arisen as to whether

(i) an extension of the duration of planning permission granted by An Bord Pleanála for a Strategic Infrastructure Development (under reference number 08.PA.0002) for the Shannon LNG Project at Kilcolgan, Tarbert, County Kerry is a material change that is or is not development or is or is not exempted development, and

(ii) Whether the complete abandonment of the Shannon LNG Project at Kilcolgan, Tarbert, County Kerry by its promoter is a material change that is or is not development or is or is not exempted development:

AND WHEREAS An Bord Pleanála has concluded that -

(a) the extension of duration of the grant of planning permission for the Shannon LNG Project does not constitute works on, in, over or under land or the making of any material change of use of any structure or other land and therefore does not constitute 'development'.

(b) the complete abandonment of the proposed Shannon LNG Project by its promoter does not constitute works on, in, over or under land or the making of any material change of use of any structure or other land and therefore does not constitute 'development':

Relevant Legislation

Planning and Development Act 2000 (as amended)

Section 2 of the Planning and Development Act 2000:

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

Section 3 :

3.—(1) 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.

(2) For the purposes of *subsection (1)* and without prejudice to the generality of that subsection—

(a) where any structure or other land or any tree or other object on land becomes used for the exhibition of advertisements, or

(b) where land becomes used for any of the following purposes—

(i) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods,

(ii) the storage of caravans or tents, or

(iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders' waste, rubbish or debris,

the use of the land shall be taken as having materially changed.

Section 4(2) provides that the Minister may by regulations provide any class of development to be exempted development. The Regulations which are applicable in this case are the Planning and Development Regulations 2001 (as amended).

(2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act

(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

(5) 5.—(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

Section 40

40.—(1) Subject to *subsection (2)*, a permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards—

(a) in case the development to which the permission relates is not commenced during that period, the entire development, and

(b) in case the development is commenced during that period, so much of the development as is not completed within that period.

(2) (a) *Subsection (1)* shall not apply—

(i) to any permission for the retention on land of any structure,

(ii) to any permission granted either for a limited period only or subject to a condition which is of a kind described in *section 34(4)(n)*,

(iii) in the case of a house, shop, office or other building which itself has been completed, in relation to the provision of any structure or works included in the relevant permission and which are either necessary for or ancillary or incidental to the use of the building in accordance with that permission, or

(iv) in the case of a development comprising a number of buildings of which only some have been completed, in relation to the provision of roads, services and open spaces included in the relevant permission and which are necessary for or ancillary or incidental to the completed buildings.

(b) *Subsection (1)* shall not affect—

(i) the continuance of any use, in accordance with a permission, of land,

(ii) where a development has been completed (whether to an extent described in *paragraph (a)* or otherwise), the obligation of any person to comply with any condition attached to the relevant permission whereby something is required either to be done or not to be done.

(3) In this section and *sections 42* and *42A*, "the appropriate period" means—

(a) in case in relation to the permission a period is specified pursuant to *section 41*, that period, and

(b) in any other case, the period of five years beginning on the date of the grant of permission.

Planning and Development Regulations 2001(as amended).

Article 6.

(1)

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)

Development to which article 6 relates shall not be exempted development for the purposes of the Act— (See Regs for full list)

Schedule 2 : Part 1

CLASS 16

The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant or machinery needed temporarily in connection with that development during the period in which it is being carried out.

Such structures, works, plant or machinery shall be removed at the expiration of the period and the land shall be reinstated save to such extent as may be authorised or required by a permission under the Act

Schedule 2 : Part 3

CLASS 1

Temporary use of any land for the placing of any tent, campervan or caravan or for the mooring of any boat, barge or other vessel used for the purpose of camping.

1. Not more than one tent, campervan or caravan shall be placed within 100 metres of another tent, campervan or caravan at any time.
2. No tent, campervan, caravan or vessel shall remain on the land for a period greater than 10 days.
3. No tent, campervan, caravan or vessel shall be used for the storage, display, advertisement or sale of goods or for the purposes of any business.
4. No tent, campervan or caravan shall be placed on land within 50 metres of any public road unless the land is enclosed by a wall, bank or hedge, or any combination thereof, having an average height of not less than 1.5 metres

Submission

See full submission by the applicant in relation to the questions, following are extracts from same -

Works began on the subject land 2011/2012 and carried on until approx. August 2013 with large gaps in between. Works were abandoned fully after this with nothing happening in 2014. A visit to these lands would presently show what our clients have been forced to tolerate for over ten years including:

- A large heap of subsoil spoil sited alongside their driveway.
- A few lines of blocks built within the site and then abandoned.
- Surface water discharging from the site

By the end of 2013 and start of 2014, the landowner had fully abandoned the site

This man returned to the site at the end of April and re-started works as though planning permission still existed for the development. The landowner, the wife and the child currently reside in two tents on the subject lands wherein there are no sanitary facilities, no running water, and no power - this is visible from the laneway to our client's property.

At the end of April 2022, the adjoining landowner returned to the site, erected two tents, and began inhabiting the site. Works began to clear the site of trees and vegetation. Works were then carried out to widen the entrance to the site to allow trucks to pass in and out. Large trucks delivered hard core stone to the site and a digger has undertaken work on the site to spread this and there is now a new surfaced laneway into the site. Deliveries to the site over the past month have included cement, sand, and insulation boards. The rising walls have increased in height and preparations are clearly underway to pour ground level foundations with

There can be no doubt that the re-starting of works on the site involves elements of construction including alterations to the existing

part built unauthorised structure, alterations to the entrance to the site, alterations to the access lane, etc. and as such undoubtedly falls within the definition of 'works' (see Figs. 5 to 15). It is reasonable therefore for wcc to conclude that the proposed re-starting of development falls within the definition of 'works' and therefore constitutes development. It is also reasonable to note that the use of the site remains as a piece of land only as no residential use has ever been established by way of a completed planning permission, etc.

Regarding the specific issue of abandonment, BPS notes how a use of land can be abandoned and accordingly a change of use will occur when an abandoned use is recommenced. This site was fully abandoned for 9 years leaving our clients living with the consequences of an incomplete development. BPS acknowledges how the issue of abandonment is a complex one. It is a question of requiring a review of all relevant factors. These include:

- (i) *The intention of the owner/occupier:* The landowner disappeared for 9 years leaving an abandoned site and a mess behind.
- (ii) *The physical condition of the lands:* The lands were left in a poor condition with spoil heaps and other waste visible, etc. - see Figs. 12 to 15.
- (iii) *The period of time for which the land was abandoned:* 9 years.
- (iv) *Intervening uses:* The land has been in use as open space for 9 years with trees and vegetation growing up and over it as is shown in the aerial photographs here submitted.

The two tents which are placed within metres of one another have been in place for 4 weeks and as such they have been in place over 10 days and are no longer exempt.

ASSESSMENT

The site the subject of this Section 5 query is located in Ballinatone Lower. Permission was granted for a dwelling on the site in 2005 under PRR 05/3286, and the duration of this permission was extended in 2011 up to 21/6/2014 .



From the details and from review of photos/ aerial photos it is evident that the dwelling permitted by reference to PRR 05/3286 was never completed, and appears rising walls up to 8 blocks above ground level were in place on site in 2015 (see attached photographs).

Question 1 -

The first query with respect to the Section 5 Declaration is –

1. Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission is 'development' and is 'exempted development'.

The construction of a dwelling is works, and would come within the definition of development as set out under Section 3 of the Planning and Development Act 2000 (as amended). The works that were undertaken prior to the expiration of PRR 05/3286 would be permitted by reference to this decision, and the provisions of Section 40 of the Planning and Development Act 2000(as amended) are applicable with respect to same i.e. :

Section 40

.—(1) Subject to *subsection (2)*, a permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards—

- (a) in case the development to which the permission relates is not commenced during that period, the entire development, and
- (b) in case the development is commenced during that period, so much of the development as is not completed within that period.

Therefore, the works that took place prior to the expiration of PRR 05/3286 are development and are permitted development.

Question 2 -

2. *Whether upon lapsing of permission for rural house the future use of lands for residential is exempted development*

The question in this instance is whether development has occurred. Development is 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. Therefore, the query is has a material change of use taken place. The works carried out on the site for the construction of a dwelling in so far as they were carried out under PRR 05/3286 are valid by reference to Section 40 of the Planning and Development Act 2000 (as amended). The indicated abandonment of the development

does not constitute works on, in over or under land or the making of any material change of use of any structure or other land, therefore, it does not constitute 'development'.

Question 3

3. *New development works carried on an incomplete rural house after the lapsing of 5 years planning permission is development' and is 'exempted development'.*

Permission for the development ceased in June 2014. The development was not at a stage where the provisions of Section 40 (2) (iii) are applicable which allows for the completion of works where the dwelling is itself complete i.e.

(iii) in the case of a house, shop, office or other building which itself has been completed, in relation to the provision of any structure or works included in the relevant permission and which are either necessary for or ancillary or incidental to the use of the building in accordance with that permission, or

As the dwelling is not complete any works to complete same is development, and is not exempted development.

Question 4

4. *Erection of and inhabitation of 2 tents on with no planning permission, is development' and is 'exempted development'*

The erection of tents on site would come within the definition of development having regard to the provisions of Section 3 (2) (b)(i).

Schedule 2; Part 3: Class 1 of the Planning and Development Regulations 2001(as amended) provides that -

CLASS 1

Temporary use of any land for the placing of any tent, campervan or caravan or for the mooring of any boat, barge or other vessel used for the purpose of camping.

1. Not more than one tent, campervan or caravan shall be placed within 100 metres of another tent, campervan or caravan at any time.
2. No tent, campervan, caravan or vessel shall remain on the land for a period greater than 10 days.
3. No tent, campervan, caravan or vessel shall be used for the storage, display, advertisement or sale of goods or for the purposes of any business.
4. No tent, campervan or caravan shall be placed on land within 50 metres of any public road unless the land is enclosed by a wall, bank or hedge, or any combination thereof, having an average height of not less than 1.5 metres

As more than one tent has been placed on the land , and the tents are indicated to be in place for over 4 weeks , the tents erected would not come within the exemption set out under Class 1, and are therefore not exempted development.

Question 5

5. Storage of waste and construction materials on lands is development' and is exempted development.

The storage of waste and construction materials on site would come within the definition of development having regard to the provisions of Section 3 (2) (b)(iii).

Class 16 : Part 1 : Schedule 2 would not be applicable in this instance as there is no current valid permission on site, and the works would not be taking place on foot of exempted development .

Recommendation

With respect to the query under Section 5 of the Planning and Development Act 2000, as to whether

- Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission .
 - Whether upon lapsing of permission for rural house the future use of lands for residential
 - New development works carried on an incomplete rural house after the lapsing of 5 years planning permission .
 - Erection of and inhabitation of 2 tents on with no planning permission
 - Storage of waste and construction materials on lands
- at Ballinatone Lower, Co. Wicklow is or is not exempted development

The Planning Authority considers that:

- Existing substantially incomplete works toward building a rural house started under a now lapsed planning permission is development and is permitted development
- Whether upon lapsing of permission for rural house the future use of lands for residential is not development
- New development works carried on an incomplete rural house after the lapsing of 5 years planning permission is development and is not exempted development
- Erection of and inhabitation of 2 tents on with no planning permission is development and is not exempted development
- Storage of waste and construction materials on lands is development and is not exempted development.

Main Considerations with respect to Section 5 Declaration:

- The details submitted with the Section 5 application.
- PRR 05/3286 and PRR 11/4667
- An Bord Pleanala Referral ABP - ABP-300417-17
- Section 2, 3, 4, 5 and 40 of the Planning and Development Act 2000(as amended)
- Article 6,9 and Schedule 2: Part 1 : Class 16 and Part 3 : Class 1 of the Planning and Development Regulations 2001(as amended).

Main Reasons with respect to Section 5 Declaration:

- The construction of a dwelling is works, and would come within the definition of development as set out under Section 3 of the Planning and Development Act 2000

(as amended). The development that was undertaken prior to the expiration of PRR 05/3286 would be permitted by reference to PRR 05/3286. Section 40 (1) of the Planning and Development Act 2000(as amended) provides that

Subject to *subsection (2)*, permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards— (b) in case the development is commenced during that period, so much of the development as is not completed within that period.

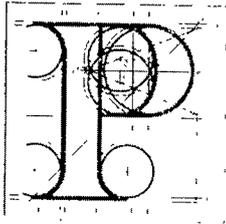
Therefore, as set out in Section 40 that part of the development carried out prior to the expiration of the appropriate period are deemed permitted by reference to PRR 05/3286.

- The abandonment of the development does not constitute works on, in over or under land or the making of any material change of use of any structure or other land, therefore, it does not constitute 'development'.
- Works carried out after the duration of permission of PRR 05/3286 to complete the dwelling would not come within the provisions of Section 40 (2) (iii), and therefore are not exempted development.
- The placement of two tents on site would come within the definition of development having regard to the provisions of Section 3 (2) (b)(i). Given two tents have been placed on site, and for in excess of 10 days, they would not come within the exemption provisions of Schedule Part 3: Class 1 of the Planning and Development Regulations 2001(as amended)
- The storage of waste and construction materials on lands would be development having regard to the provisions of Section 3 (2) (b)(iii). There is no exemption for such storage as it would not come within the provisions of Class 16 : as there is no current valid permission on site, and the works would not be taking place on foot of exempted development .

 SED

12/7/22

Agreed 
A/DOs 18/07/2022



An
Bord
Pleanála

Board Order
ABP-300417-17

Planning and Development Acts 2000 to 2017

Planning Authority: Kerry County Council

Planning Register Reference Number: EX613

WHEREAS a question has arisen as to whether

- (i) an extension of the duration of planning permission granted by An Bord Pleanála for a Strategic Infrastructure Development (under reference number 08.PA.0002) for the Shannon LNG Project at Kilcolgan, Tarbert, County Kerry is a material change that is or is not development or is or is not exempted development, and
- (ii) Whether the complete abandonment of the Shannon LNG Project at Kilcolgan, Tarbert, County Kerry by its promoter is a material change that is or is not development or is or is not exempted development:

AND WHEREAS Safety before LNG care of John McElligott of Island View, Convent Street, Listowel, County Kerry requested a declaration on the question from Kerry County Council and the Council issued a declaration on the 10th day of November, 2017 stating that the matter is not development:

AND WHEREAS Safety before LNG care of John McElligott referred the declaration for review to An Bord Pleanála on the 6th day of December, 2017:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to Section 2(1) and Section 3(1) Planning & Development Act 2000, as amended:

AND WHEREAS An Bord Pleanála has concluded that -

- (a) the extension of duration of the grant of planning permission for the Shannon LNG Project does not constitute works on, in, over or under land or the making of any material change of use of any structure or other land and therefore does not constitute 'development'.
- (b) the complete abandonment of the proposed Shannon LNG Project by its promoter does not constitute works on, in, over or under land or the making of any material change of use of any structure or other land and therefore does not constitute 'development':

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 extension of duration of the grant of planning permission for the Shannon LNG Project and the complete abandonment of the proposed Shannon LNG Project at Kilcolgan, Tarbert, County Kerry by its promoter is not a material change that is development.

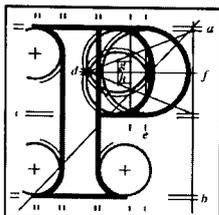
Matters Considered

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

John Connolly

**Member of An Bord Pleanála
duly authorised to authenticate
the seal of the Board.**

Dated this day of 2018.



An
Bord
Pleanála

Inspector's Report

ABP-300417-17

Question

- A) Whether an extension of the duration of planning permission for the Shannon LNG Project is a material change that is or is not development or is or is not exempted development.
- B) Whether the complete abandonment of the Shannon LNG Project by its promoter HESS is a material change that is or is not development or is or is not exempted development.

Location

Kilcolgan, Tarbert, Co.Kerry

Declaration

Planning Authority

Kerry County Council

Planning Authority Reg. Ref.

EX613

Applicant for Declaration

Safety Before LNG

Planning Authority Decision

Does not constitute development. The complete abandonment of the proposed Shannon LNG Project by its

promoter would neither comprise works nor a material change of use and would, therefore, not constitute development that comes within the scope of Section 3(1) of the Planning and Development Acts 2001 – 2017.

Referral

Referred by

Safety Before LNG.

Owner/ Occupier

Shannon LNG Ltd.

Observer(s)

None.

Date of Site Inspection

None Required

Inspector

Fiona Fair

1.0 Site Location and Description

- 1.1. The site, with a stated area of approximately 104ha, is located in a rural area on the north coast of Co. Kerry, approximately 4km west of Tarbert and 4km northeast of Ballylongford.
- 1.2. The site is described in detail in both Reg. Ref 08.PA0002 and Reg. Ref. 08.PM0014 for which site visits were carried out.
- 1.3. I highlight that no development has been carried out to date on this site and from my knowledge there has been no change to the site description as set out in the aforementioned reports.

2.0 The Question

- 2.1. (i) Whether an extension of the duration of planning permission for the Shannon LNG Project is a material change that is or is not development or is or is not exempted development.

(ii) Whether the complete abandonment of the Shannon LNG Project by its promoter HESS is a material change that is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

A section 5 application was received by the planning authority on the 17th October 2017. The question was stated as follows;

- A) On whether an extension of the duration of planning permission for the Shannon LNG Project granted under PA002 (condition number 2) is a material change that is or is not development or is or is not exempted development.
- B) On whether the complete abandonment of the Shannon LNG Project by its promoter HESS is a material change that is or is not development or is or is not exempted development.

The planning authority issued a declaration on the 10th November 2017 which stated:

'I hereby certify that the Planning Authority considers that:

The works listed at Schedule 1 hereunder do not constitute development having regard to the considerations inserted hereunder:

Schedule 1

- 1) Whether an extension of the duration of planning permission for the Shannon LNG Project is a material change that is or is not development or is or is not exempted development.
- 2) Whether the complete abandonment of the Shannon LNG Project by its promoter is a material change that is or is not development or is or is not exempted development.

The complete abandonment of the proposed Shannon LNG Project by its promoter would neither comprise works nor a material change of use and would, therefore, not constitute development that comes within the scope of Section 3(1) of the Planning and Development Acts 2001 – 2017'.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Senior Executive Engineer (SEE) report on file dated 10.11.17 states that:

'The extension of duration of the grant of planning permission for the Shannon LNG Project is a matter for An Bord Pleanala and is not a matter of exempted development that it would be appropriate for Kerry County Council to deal with under Section 5 of the Planning and Development Act, 2000 (as amended). To this end Shannon LNG has made a request to An Bord Pleanala to alter condition No. 2 of case reference number PL08PA002, Condition no. 2 states, that the permission shall be for a period of 10 years from the date of the An Bord Pleanala order to grant'.

'The abandonment of a proposed development project neither comprises works nor a material change of use and, therefore, is not development.'

The report recommends that the complete abandonment of the Shannon LNG Project by its promoter would neither comprise works nor a material change of use

and would therefore not constitute development that comes within the scope of section 3 (1) of the Planning and Development Act, 2000 (as amended).

3.2.2. Other Technical Reports

None

4.0 Planning History

- 4.1. **Ref 08.PA0002:** An application under section 37E of the Strategic Infrastructure Development provisions of the Planning and Development Act, 2000 (as amended), was granted permission by the Board (under Section 37G), on 31st March 2008, for development of a liquefied natural gas (LNG) regasification terminal on this site. No development has taken place to date on foot of this permission.

Condition 2 states-

This permission shall, in accordance with the application, be for a period of ten years from the date of this order.

Reason: In order to allow a reasonable period for the completion of this extensive development.

- 4.2. **Ref. 08.PM0002:** Relates to an application to the Board under section 146B of the Planning and Development Act, 2000 (as amended), to make modifications / alterations to approved development ref. 08.PA0002, as follows-

- Allow for option to construct one storage tank in phase 1, rather than 2 storage tanks.
- Slight alteration to jetty head.
- Reduction in width of trestle decking.
- Alterations to pipeline supports close to sea-water pump-house.
- Running of pipes under rather than over a section of the outer perimeter road.
- Relocation of main electrical switchyard.
- Relocation of utility area electrical substation building.

- Relocation of LNG impoundment sumps.
- Reduction in width of some service roads from 9.0m to 6.0m.
- Changes to perimeter fencing.

By order dated 4th March 2013, the Board consented to the proposed changes, and amended Condition no. 3 of permission ref. 08.PA0002. No development has been carried out to date on this site.

- 4.3. **Ref. 08.GA0003 & 08.DA0003:** Refer to a Strategic Infrastructure Development application by Shannon LNG Ltd, under section 182C(1) of the Planning and Development Act, 2000 (as amended), to construct a 26km underground pipeline to link the proposed LNG terminal at Ralappane with the national gas transmission grid near Foynes, Co. Limerick. The application was accompanied by a compulsory acquisition order application. By Order dated 17th February 2009, the Board issued permission for the gas pipeline project, and consented to the compulsory acquisition of the necessary lands. Whilst the conditions of permission did not specifically refer to a 10-year permission, I note that the Board's Inspector did address this issue in her report, and condition no. 1 of the permission requires that the development shall be carried out in accordance with the plans and particulars, including the EIS, lodged with ABP on 14th August 2008. This development has not been carried out to date.
- 4.4. **Ref. 08.PA0028:** Refers to a Strategic Infrastructure Development application by Shannon LNG Ltd, under section 37E of the Planning and Development Act, 2000 (as amended), to construct a 500MW combined heat & power plant on the site of the proposed LNG terminal. By order dated 9th July 2013, the Board granted permission subject to 27 no. conditions. Condition no. 2 indicated that the permission was for a period of ten years. There is no development to date on foot of this permission.
- 4.5. **Ref. 08.PM0014:** Refers to a concurrent application under section 146B of the Planning and Development Act, 2000 (as amended), received by the Board on 22nd September 2017, to alter Condition no. 2 of permission ref. 08.PA0002.

The request relates to an additional five-year timeframe to construct the development – such that cond. 2 would read- “This permission shall, in accordance with the application, be for a period of fifteen years from the date of this order”.

There is no decision to date on the application.

4.6. RL2607: Ralappane, Co. Kerry. (GA 00003)

Safety Before LNG lodged a referral on the 06/01/2009. The Question asked was stated as: 'Whether works associated with Shannon LNG project (PL08.GA003) is or is not development or is or is not exempted development'. An Bord Pleanála decided on the 17/02/2009 that the referral was 'invalid-no grounds'.

5.0 Policy Context

5.1. Development Plan

5.2. Kerry County Development Plan 2015-2021

- Map 12.1a indicates that the site is zoned for industry.
- There are no Views or Prospects indicated for protection on Map 12.1a.
- Section 4.6 deals with the Shannon Estuary.
- Section 4.7 deals with the Tarbert/Ballylongford Land Bank of 390ha – zoned for marine-related industry, compatible or complimentary industries and enterprises which require deep water access.
- It is an objective of the Council to- "Support the implementation of the Shannon [sic] Integrated Framework Plan to facilitate the sustainable economic development of the Shannon Estuary" (ES-22).
- It is an objective to the Council to- "Promote and facilitate the sustainable development of these lands for marine related industry, utilising the presence of deep water, existing infrastructure, natural resources and waterside location to harness the potential of this strategic location" (ES-23).

5.3. Strategic Integrated Framework Plan for the Shannon Estuary 2013-2020

Kerry County Council, in association with Clare County Council, Limerick City Council, Limerick County Council, Shannon Development, and the Shannon Foynes Port Company, commissioned a land- and marine-based plan for the future development and management of marine-related industry and tourism along the estuary. Clare County Council is the lead in this inter-jurisdictional plan. The

Ballylongford development lands are identified in the Plan as a 'Strategic Development Location'. The Kerry County Development Plan references the SIFP.

5.4. Natural Heritage Designations

The relevant European sites are the Lower River Shannon SAC (Site code 002165) and the River Shannon and River Fergus Estuaries SPA (Site code 004077). At the time of consideration of the original SID application (ref. 08.PA0002), only parts of Tarbert Bay and Ballylongford Bay were included within the above-mentioned wider SPA, in the vicinity of the LNG Terminal site. The SPA was subsequently expanded to encompass the entire Shannon Estuary. The entire Shannon Estuary was within the aforementioned SAC at the time of the original SID application to the Board – ref. 08.PA0002).

6.0 The Referral

6.1. Referrer's Case

- The extension of the duration of the planning permission for the Shannon LNG project and the abandonment of the project by its promoters are material changes which are development and are not exempted development.
- Any material change in the use of land is defined as development as per Section 3 of the Planning & Development Act 2000.
- Not extending planning permission would lead to what is currently agricultural farmland remaining as agricultural farmland. Conversely, allowing an extension of planning permission would lead to agricultural farmland being developed for an LNG terminal and this would therefore, logically, be a material change of use.
- The abandonment of the Shannon LNG project by its promoters would also represent development because it would also be a material change of use of land.
- The former promoters HESS presented its project and strategy for the proposed LNG terminal throughout the development consent process but another promoter will be forced to develop this enormous project 10 years later in a totally different

way and cannot stand over all the commitments made by HESS throughout the planning process.

- Commitments given at the time that planning permission was obtained cannot now be relied upon e.g. concern with respect to scale of and sourcing of Fracked US gas.

- **Referral Accompanied by:**

1. Original Section 5 Submission to Kerry County Council, dated October 17th 2017 summarised as follows:

- Planning permission for the Shannon LNG project will expire on March 31st 2018.
- Since the original planning permission PA0002 was given, the lower Shannon Estuary, including in the vicinity of the site has been added to the River Shannon and River Fergus Estuaries Special Protection Area (SPA) - site code 004077 under EU Directives.
- The site is declared to be the most important coastal wetland site in the country.
- No development has taken place on the site.
- The original promoters Hess has pulled out of the project.
- No SEA was undertaken before the original permission was granted even though the site had to be rezoned
- No SEA undertaken for the development of the "strategic energy hub" (as it is now referred to in the County Development Plan 2015-2021) on the southern shores of the Shannon Estuary.
- The Planning Authority cannot be satisfied that the development will be completed in a reasonable time
- Extending the duration of planning for an imaginary LNG terminal in Tarbert which has been abandoned by its promoters now serves no purpose due to the live Cork LNG project.

- No Risk Assessment of an LNG spill on water has been carried out.
- The level of relevant new developments, criteria, parameters, plans and contexts that has taken place in the ten years since planning permission was first granted is now such that, the development can no longer reasonably be assumed to be consistent with the proper planning and development of the area.

2. Declaration from Kerry County Council (App. No. EX613) dated November 10th 2017.

3. Undated, 'open letter' to An Bord Pleanala calling for a public consultation on the requested extension of the expiring planning permission from:

- NotHereNotAnywhere
- Friends of the Earth Ireland
- Food & Water Europe
- Food & Water Watch
- Friends of the Irish Environment
- Love Leitrim
- North West Network Against Fracking
- Fracking Free Ireland
- No Fracking Ireland
- Safety Before LNG
- Fossil Free TCD
- UCC Environmental Society

4. Referral Letter, dated 5th January 2009 to ABP Re: Section 5 referral on whether changes to the Shannon LNG project at Tarbert, County Kerry granted permission under PA0002 constitute work on the original project which is or is not development and is or is not exempted development.

Inspectors Note: See paragraph 4.6 above, An Bord Pleanála decided that this referral (RL2607: Ralappane, Co. Kerry (GA 00003)) was 'invalid-no grounds'.

5. Response Letter from the Planning Authority to Safety before LNG, dated 16th December 2008

- It considers that given that the development in question is the subject of a current permission / current application, and that a determination under Section 5 of the Planning and Development Act, 2000 is not relevant and inappropriate in this instance.

6. Application to KCC, by Safety before LNG, seeking a declaration under Section 5 (1) of the Planning and Development Act, dated 28th November 2008, on whether changes to the Shannon LNG project at Kilcolgan, Tarbert, County Kerry granted permission under PA0002 constitute work on the original project which is or is not development and is or is not exempted development.

7. Letter of Support, dated 28th November 2008, to KCC, by Pierce and Keely Brosnan, for Section 5 Declaration filed by Safety Before LNG Challenging Permissions for Shannon LNG Project.

6.2. Planning Authority Response

- None received.

7.0 Statutory Provisions

7.1. Planning & Development Act 2000, Part I, Section 2(1):

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

"works" includes any act or operation of construction, excavation, demolition,

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

7.2. Planning & Development Act 2000, Part I, Section 3(1):

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 of use of any structures or other land.

7.3. Planning and Development (Strategic Infrastructure) Act 2006.

The following was inserted into Chapter III of Part VI of the Principal Act, ‘Additional powers of Board in relation to permissions, decisions, approvals, etc.’ Specifically Section 146 B relates to ‘Alterations by Board of strategic infrastructure development on request made of it’.

It states; ‘Section 146B(1) Subject to subsections (2) to (8) and section 146C, the Board may, on the request of any person who is carrying out or intending to carry out a strategic infrastructure development, alter the terms of the development the subject of a planning permission, approval or other consent granted under this Act’. (Excerpt attached as appendix to this report.)

8.0 Assessment

8.1. Is or is not development

The question which arises is as follows:

(i) Whether an extension of the duration of planning permission for the Shannon LNG Project is a material change that is or is not development or is or is not exempted development.

(ii) Whether the complete abandonment of the Shannon LNG Project by its promoter is a material change that is or is not development or is or is not exempted development.

Section 3(1) of the Planning and Development Act 2000, as amended states: '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 of use of any structures or other land'.

In the first instance the test to be applied is whether an extension of the duration of planning permission for the project is a material change that is or is not development. It is my opinion that the question asked does not constitute works on, in over or under land or the making of any material change of use of any structure or other land. With reference to the definition as contained in Section 3(1) of the Planning & Development Act 2000, I am, therefore, satisfied that extension of duration of planning permission also does not constitute 'development'.

In the second instance the test to be applied is whether the complete abandonment of the Shannon LNG Project by its promoter is a material change that is or is not development. Notwithstanding that An Bord Pleanála are not in a position to decide upon the purported abandonment of the project, given the referral question asked was deemed valid, I consider, once again, that the test to be applied is Section 3 (1) of the Planning and Development Act 2000, as amended. I am satisfied that by reference to the definition as contained in Section 3(1) of the Planning & Development Act 2000, that the purported abandonment of the project by its promoter does not constitute works on, in over or under land or the making of any material change of use of any structure or other land, therefore, it does not constitute 'development'.

Albeit that GA0003 & DA0003 relates to construction of a 26 Km underground pipeline and therefore not the terminal as is the subject of the current referral I highlight that Safety Before LNG lodged a referral on the 06/01/2009 (RL2607: Ralappane, Co. Kerry (GA 00003). The Question asked was stated as: 'Whether works associated with Shannon LNG project (PL08.GA003) is or is not development

or is or is not exempted development'. An Bord Pleanála decided on the 17/02/2009 that the referral was 'invalid as no question has been raised that comes within the scope of Section 5 of the Act'. See also section 4.6 planning history section of this report. I consider this referral is of significance to the subject referral case.

9.0 Recommendation

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

WHEREAS a question has arisen as to

(i) Whether an extension of the duration of planning permission for the Shannon LNG Project is a material change that is or is not development or is or is not exempted development.

(ii) Whether the complete abandonment of the Shannon LNG Project by its promoter is a material change that is or is not development or is or is not exempted development.

AND WHEREAS Safety before LNG requested a declaration on this question from An Bord Pleanála on the 6th December 2017:

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

(a) Section 2(1) and Section 3(1) Planning & Development Act 2000, as amended.

AND WHEREAS An Bord Pleanála has concluded that:

(a) the extension of duration of the grant of planning permission for the Shannon LNG Project does not constitute works on, in over or under land or the making of any material change of use of any structure or

other land and therefore does not constitute 'development'.

- (b) the complete abandonment of the proposed Shannon LNG Project by its promoter does not constitute works on, in over or under land or the making of any material change of use of any structure or other land and therefore does not constitute 'development'.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) of the 2000 Act, hereby decides that the extension of duration of the grant of planning permission for the Shannon LNG Project and the complete abandonment of the proposed Shannon LNG Project by its promoter is not a material change that is development.

Fiona Fair

Planning Inspector

02.05. 2018



2

17.03.2015



20.11.15





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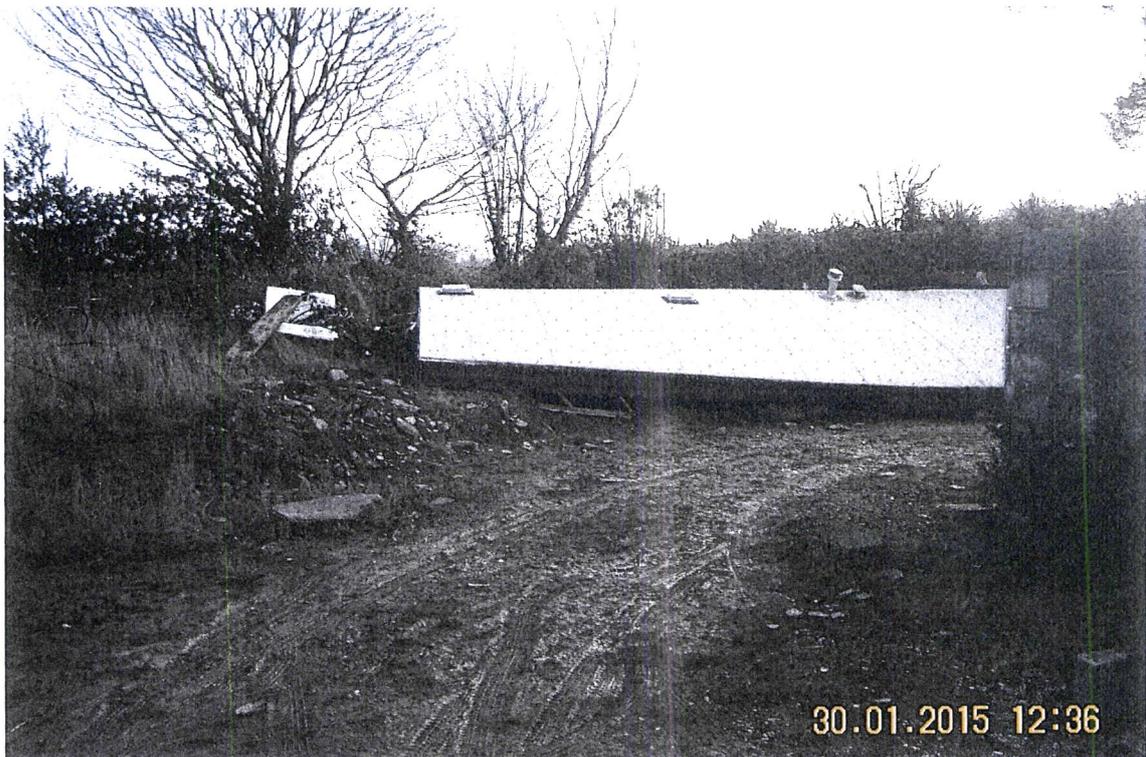


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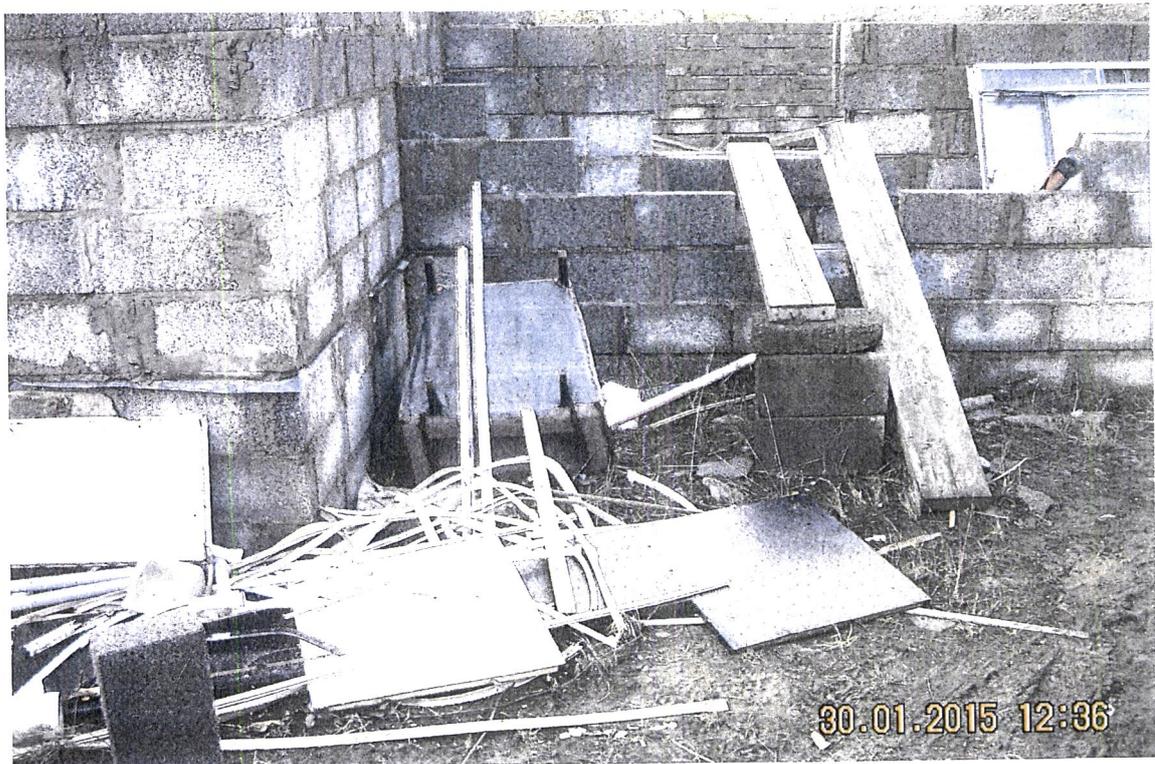




01/15/15











30.01.2015 12:37

MEMORANDUM

WICKLOW COUNTY COUNCIL

**TO: Edel Bermingham
Executive Planner**

**FROM: Crystal White
Assistant Staff Officer**

**RE:- Ex 39/2022- Declaration in accordance with Section 5 of the
Planning & Development Acts 2000 (as amended)
Eileen & Brendan Buck C/O BPS Consulting Ltd Purposed works as
per letter questions 1-4 at Ballinatone Lower, Greenan, Co Wicklow**

I enclose herewith for your attention application for Section 5 Declaration received 21st June 2022.

The due date on this declaration is the 18th July 2022.

**Senior Staff Officer
Planning Development & Environment**

Wicklow County Council
County Buildings
Wicklow
0404-20100

07/06/2022 15:53:29

Receipt No L1/0/295935

BPS PLANNING CONSULTANTS LTD
BALLINATONE LOWER
GREENAN
CO WICKLOW
A67W662

EXEMPTION CERTIFICATES	80 00
GOODS	80 00
VAT Exempt/Non-vatable	

Total 80 00 EUR

Tendered
Cheque 80 00
EILEEN & BRENDAN BUCK

Change 0 00

Issued By Cashier5MW
From Revenue Section
Vat reg No 001523311

WICKLOW COUNTY COUNCIL

21 JUN 2022

PLANNING DEPT.



Wicklow County Council
County Buildings
Wicklow
Co Wicklow
Telephone 0404 20148
Fax 0404 69462

Office Use Only

Date Received _____

Fee Received _____

**APPLICATION FORM FOR A
DECLARATION IN ACCORDANCE WITH SECTION 5 OF THE PLANNING &
DEVELOPMENT ACTS 2000 (AS AMENDED) AS TO WHAT IS OR IS NOT
DEVELOPMENT OR IS OR IS NOT EXEMPTED DEVELOPMENT**

1. Applicant Details

(a) Name of applicant: Eileen and Brendan Buck

Address of applicant:

Note Phone number and email to be filled in on separate page.

2. Agents Details (Where Applicable)

(b) Name of Agent (where applicable): BPS Planning Consultants LTD.

Address of Agent: Ballinatone Lower, Greenan, County Wicklow, A67W662.

Note Phone number and email to be filled in on separate page.

3. Declaration Details

- i. Location of Development subject of Declaration: Ballinatone Lower, Greenan, County Wicklow, A67W662.
- ii. Are you the owner and/or occupier of these lands at the location under i. above?
No.
- iii. If 'No' to ii above, please supply the Name and Address of the Owner, and or occupier: Kerrin Buck, c/o Caroline and Tony Buck, Ballinatone Lower, Greenan, County Wicklow.
- iv. Section 5 of the Planning and Development Act provides that : If any question arises as to what, in any particular case, is or is not development and is or is not exempted development, within the meaning of this act, any person may, an

payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question. You should therefore set out the query for which you seek the Section 5 Declaration:

The questions over which this Section 5 is submitted are (see cover letter):

1. Are existing substantially incomplete works toward building a rural house started under a now lapsed planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended) and after planning permission lapses for a rural house after partial works are constructed, does the future use of the lands as residential then constitute exempted development within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).
2. Are new development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).
3. Does the erection of and inhabitation of 2 tents on lands with no planning permission constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).
4. Does the storage of waste and construction materials including blocks, cement, bags of sand, insulation boards, etc. on these lands constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).

These questions are set out in more detail in the attached letter.

- v. Indication of the Sections of the Planning and Development Act or Planning Regulations you consider relevant to the Declaration:

Planning and Development Act 2000:

Section 3 'Development'.

Section 4 'Exempted development'.

Section 32 'General obligation to obtain permission'.

Section 33 'Regulations regarding applications for permission'.

Section 34 'Permission for development'.

Section 40 'Limit of duration of permission'.

Section 41 'Power to vary appropriate period'.
Section 42 'Power to extend appropriate period'.
Section 43 'Regulations regarding sections 40, 41 and 42'.
Section 48 'Development contributions'.
Part 8 'Enforcement'.

Planning and Development Regulations 2001-2021 (consolidated version)

Part 2 'Exempted Development'.
Article 9 'Restrictions on Exemptions'
Part 4 'Control of Development'.
Schedule 2.

vi. Does the Declaration relate to a Protected Structure or is it within the curtilage of a Protected Structure (or proposed protected structure)? No.

vii. List of Plans, Drawings submitted with this Declaration Application:

Site Location Plan (OS).

Site Plan (OS).

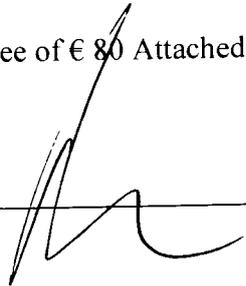
Photographs of the site.

All previous drawings pertaining to this land and previous planning permissions are available on WCC planning file, reg. ref. 053286 and a subsequent Extension of Duration Permission file, reg. ref. 114667.

This complaint pertains to the re-starting of works to complete development originally set out under these permissions which lapsed over 9 years ago. There is no way to offer any more than the photographs in the attached letter without trespassing on the site.

viii. Fee of € 80 Attached? Receipt from WCC for e80 attached

Signed :



Dated :

20/6/2022



Planning & Development Consultants

· 087 261 5871
· 01 539 4960
· info@bpsplanning.ie
www.bpsplanning.ie

Ballinatore
Greenan
Wicklow
A67W662

Planning Department,
Wicklow County Council,
County Buildings,
Wicklow Town,
County Wicklow

20 June 2022

Dear Sir/Madam,

Section 5 referral / exemption declaration. Questions arise as to what is or is not development or exempted development: (1) Are existing substantially incomplete works toward building a rural house started under a now lapsed planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended) and after planning permission lapses for a rural house after partial works are constructed, does the future use of the lands as residential then constitute exempted development within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended); (2) Are new development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended); (3) Does the erection of and inhabitation of 2 tents on lands with no planning permission constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended); and (4) Does the storage of waste and construction materials including blocks, cement, bags of sand, insulation boards, etc. on these lands constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended). The lands are at Ballinatore Lower, Greenan, County Wicklow.

BPS Planning Consultants LTD, a firm of Irish Planning Institute accredited town planning consultants has been retained by Brendan and Eileen Buck [hereafter referred to as "client" or "clients"] of Ballinatore, Greenan, County Wicklow, A67 W662 to prepare and to lodge a Section 5 referral / exemption declaration application to Wicklow County Council [hereafter "WCC"] regarding questions which have arisen as to what is or is not development or exempted development on land adjoining their home property

The area of land adjoining our clients' home is owned by Kerrin Buck [hereafter "the adjoining landowner"] whose postal address is currently that of his parents¹ which is Caroline and Tony Buck of Ballinatore Lower, Greenan, County Wicklow²

Section 10 of this Section 5 sets out a summary of the questions which arise as to what is and what is not development and/or exempted development. These questions are set out in more detail in Section 4.0 Section 2.0 sets out the location of the subject land relative to our clients' property, while Section 3.0 sets out the previous enforcement history of the site³

i Validation response to WCC letter received re. validation of this Section 5

Thank you for your letter sent by registered post to the BPS address. There was a delay in collecting this from Wicklow Town following the post man being unable to deliver this as there was no one at the office at the time. We trust that the attached fee receipt remains valid. Following receipt of your letter, BPS

1 Has discussed our previous submission to WCC with a representative of the Data Protection Commission <https://www.dpc.gov.ie/en/About-Us/Our-Work/Information-Access-Requests>. Following this discussion, we have removed sections of the previous letter which provided photographs of the owner of the lands to which this Section 5 relates and also other points pertaining to other legal matters. We have also blocked out pictures of any other individuals photographed. Beyond this, we have had it confirmed that Section 5 of the Planning and Development Act 2000 does not preclude the submission of Section 5's by parties who do not own given lands⁴. Indeed, BPS can furnish copies of many Section 5s we have made for clients in such circumstances. We note also that

¹ Unauthorised tents on a piece of land cannot be considered a postal address

² These details were ascertained by way of reference to the Wicklow County Council planning search function which contained two previous planning application records for the landowner. These are matters of public record (see Fig. 1)

³ Matters included are only those which are already available online within WCC's planning records

⁴ Just weeks ago under Dun Laoghaire-Rathdown County Council Section 5 ref 3622 BPS determined that a telecommunications mast was not exempted development adjoining our client's property as it had been built in the wrong location with regard to its licence. This was completed work and so development and not exempted development

we are aware of a wide array of instances where 3rd parties have sought Section 5s on lands they do not own – see, for example, *Narconon Trust v An Bord Pleanála*, Court of Appeal, Mr Justice Costello, 17 November 2021. [2021] IECA 307 under which a community group sought a Section 5 declaration in 2018 as to whether the change of use from a nursing home to a drug rehabilitation facility constituted “exempted development”. It was declared by ABP not to be exempt. The landowner was named, and the question asked by the community group was simply whether planning permission was required. This current Section 5 may be summarised as asking if planning permission is required to re-start works on a project which was abandoned 9 years ago when its last permission lapsed, i.e. does this constitute development and/or exempted development?

The Data Protection Commission has confirmed by phone that planning applications are a matter for the public record and in this instance the lands in question are identified as being owned by Kerrin Buck on both the WCC planning website and on the national database of planning applications managed by the Department⁵ The online records held by WCC include all the enforcement cases which have not been removed from this letter and these are published online and part of the public record. These records have been online for many years. This Section 5 cannot avoid mentioning either the landowner or these records which are fundamental to the Section 5.

If WCC does not wish to comment on the submitted Section 5 then it is not required to do so. Section 5 (3) (b) provides for this and states:

Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

Search Results

Selected Site(s): Wicklow County Council

File number:

Surname: kerrin buck

At Address:

Development Description:

For: ALL years

Page Number : 1

File Number	Application Status	Decision Due Date	Decision Date	Decision Code	Received Date	Applicant Name	Development Address	Development Description	Local Authority Name
053286	APPLICATION FINALISED	10/08/2006	09/08/2006	CONDITIONAL	06/07/2005	Kerrin Buck	Ballinatore Greenane Rathdrum Co Wicklow	Dwelling with septic tank and percolation area...	WICKLOW CO.CO.
114867	APPLICATION FINALISED	14/11/2011	01/11/2011	CONDITIONAL	20/09/2011	Kerrin Buck	Ballinatore Greenan Rathdrum Co. Wicklow	dwelling with septic tank and percolation area...	WICKLOW CO.CO.

Fig. i: Online records in the public domain as discussed with the Data Protection Commission

- BPS asked - by way of peer review - David Mulcahy Planning Consultant (david.mulcahy@bpc.ie) MIPI who has previously worked for over 5 years for Fingal County Council to review this Section 5. He made a range of suggestions which are now incorporated and which we understand address the issues raised.

Mr Mulcahy and BPS consider that, based on a review of other Section 5s lodged throughout the country, that Section 5 is generally interpreted very widely and was included in the Planning and Development Act 2000 to address exactly the type of questions which arise in this case. Section 5 states:

If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

The Act refers to how any party can ask a question or question in “any particular case” as to what is or is not development and what is or is not exempted development. David Mulcahy has reviewed and revised our questions as follows:

- Are **existing** substantially incomplete works toward building a rural house started under a now lapsed planning permission ‘development’ and are they ‘exempted development’ within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended) and after planning permission lapses for a rural house after partial works are constructed, does the future use of the lands as residential then constitute exempted development within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).

⁵ <https://housinggovie.maps.arcgis.com/apps/webappviewer/index.htm>

2. Are **new** development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)
3. Does the erection of and inhabitation of 2 tents on lands with no planning permission constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)
4. Does the storage of waste and construction materials including blocks, cement, bags of sand, insulation boards, etc. on these lands constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)

These types of question arise in many Section 5 cases including

- ABP RL92 306388 "Whether the erection of wind turbines and access road at Curraghmarky, Birchgrove, Moanvaun, Tooreen, Garracummer, Cummer More, Cummer Beg, Turraheen Upper and Rossmore, Hollyford, Co. Tipperary is or is not development and is or is not exempted development"⁶
- ABP Ref RL2891 This refers to a 2011 decision of the Board on a referral in relation to a question stated as to whether alterations to turbines in a wind farm as constructed (ie the turbines as constructed were different in terms of certain dimensions to those for which permission had been obtained) at Kilvinane and Garranure, Ballinacarriga, Dunmanway, County Cork, is or is not development or is or is not exempted development.
- ABP Ref. RL2713 This refers to a 2010 referral by Cork County Council in relation to a question stated as to whether an alleged change of use from light industry/warehousing to retail is or is not development or is or is not exempted development
- ABP Ref. 304496-19 This refers to a 2019 decision of the Board on a referral in relation to a question stated as to whether works relating to alterations to wind turbine specification and locations by reference to PA Ref 11510251 at Castlewaller, Newport, County Wexford is or is not development or is or is not exempted development. The alterations included increases to the permitted rotor diameter from 90m to 97m, tip height from 145m to 148.5m (all relating to 16 turbines) and relocation of 11 of the 16 turbines by up to 20m. The Board decided that the alterations were development and not exempted development
- ABP RL29S 305802 "Whether works consisting of demolition and construction are or are not development or are or are not exempted development. "The development as carried out is development and is exempted development"⁷

We, two firms of planning consultants, note how there appears to be no provision under the Act for a planning authority to refuse to accept a valid Section 5 question. We have taken on board the concerns raised in your letter and this is ~~not~~ a valid Section 5. As noted above, if WCC does not wish to comment on the submitted Section 5 then it is not required to do so, Section 5 (3) (b) provides for this and states

Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

ii General validation matters

In terms of the general validation of this Section 5, we again refer to Section 5—(1) of the Planning and Development Act 2000 (as amended) which states

If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter

Please find a cheque for €80 attached which is the statutory fee payable for a Section 5.

To further support this Section 5 application, BPS has

1. Set out in this letter the questions which arise in this case as to whether development undertaken on the lands the subject of this Section 5 is or is not development or is or is not exempted development within the meaning of this Act
2. Set out in this letter details including aerial photographs of the site and photographs of the matters the subject of the Section 5
3. Set out in this letter the planning history and enforcement history of this land (matters which are already on the public record)
4. Attached OS Site Location Maps

⁶ <https://www.pleanala.ie/en-ie/case/306388>

⁷ <https://www.pleanala.ie/en-ie/case/305802>

We accept that WCC may need more detail and we note how under Section 5 (2) (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".

However, we consider that the details required would be needed from the landowner. In this regard, we note how under Section 5 (2) (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**" [emphasis added] and how Section 5 (7) sets out how: "A planning authority, before making a declaration under this section, shall consider the record forwarded to it in accordance with subsection (6)(c)".

Contents

1.0	Summary list of Section 5 questions arising
2.0	The location of the subject lands relative to clients' property
3.0	Enforcement history of the landowner and this land
4.0	Detailed questions over which this Section 5 referral application is submitted to WCC
4.1	Are existing substantially incomplete works toward building a rural house started under a now lapsed planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended) and after planning permission lapses for a rural house after partial works are constructed, does the future use of the lands as residential then constitute exempted development within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).
4.2	Are new development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)
4.3	Does the erection of and inhabitation of 2 tents on lands with no planning permission constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)
4.4	Does the storage of waste and construction materials including blocks, cement, bags of sand, insulation boards, etc. on these lands constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)
5.0	Conclusion
6.0	In the event of a planning application being lodged
6.1	Retention & cognisance of Section 35 of the Planning and Development Act 2000 (as amended)
6.2	No Appropriate Assessment screening has been conducted
6.3	No site suitability assessment has been conducted under the 2021 EPA Code of Practice
6.4	Environmental and ecological concerns arising

1.0 Summary list of Section 5 questions arising

The questions over which this Section 5 is submitted are

1. Are substantially incomplete works toward building a rural house started under a now lapsed planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended) and after planning permission lapses for a rural house after partial works are constructed, does the future use of the lands as residential then constitute exempted development within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).
2. Are development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)
3. Does the erection of and inhabitation of 2 tents on lands with no planning permission constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).
4. Does the storage of waste and construction materials including blocks, cement, bags of sand, insulation boards, etc. on these lands constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)

2.0 The location of the subject lands relative to clients' property

Our clients live at Ballinatone Lower – see Figs 1 and 2 - where they obtained planning permission in 2006 (under permission reg. ref 06/6091) for a rural house which was revised in 2008 (under permission reg. ref 08/47). This house has been completed since 2009 and is their home. The house has been completed for 14 years. If WCC would like to inspect any part of our clients' property

and home at any time this would be welcomed. The records of our clients' two planning permissions are available at the offices of WCC.⁸

The land the subject of this Section 5 adjoins our clients' property to the east. The subject land also adjoins our clients' access laneway. In 2005, this land was the subject of planning permissions, reg. refs. 053286 and a subsequent Extension of Duration Permission, reg. ref. 114667, for a 'Dwelling with septic tank and percolation area' were granted adjoining our clients' property. These permissions lapsed 9 years ago.

Works began on the subject land 2011/2012 and carried on until approx. August 2013 with large gaps in between. Works were abandoned fully after this with nothing happening in 2014. A visit to these lands would presently show what our clients have been forced to tolerate for over ten years including:

- A large heap of subsoil spoil sited alongside their driveway.
- A few lines of blocks built within the site and then abandoned.
- Surface water discharging from the site.

In short, the site has been a mess for many years; however, over the 9 years of abandonment trees and vegetation grew up and it became possible to ignore the mess. In 2012, the landowner left and went overseas.

By the end of 2013 and start of 2014, the landowner had fully abandoned the site and went travelling. According to his mother, he travelled through South America and eventually onto the Philippines which, with the passage of time, became his home. He married and had a child and continued to live 1000s of miles from this land. After 9 years away, this man returned to the site at the end of April and re-started works as though planning permission still existed for the development. The landowner, the wife and the child currently reside in two tents on the subject lands wherein there are no sanitary facilities, no running water, and no power – this is visible from the laneway to our client's property.

This Section 5 asks whether the landowner has any right to live on this site in two tents – as he previously did in an unauthorised mobile home which was removed by way of enforcement proceedings – and to continue working on a development project for which planning permission lapsed 9 years ago and the development (works and use) was fully abandoned.



Fig. 1: Location of client property relative to Ballinaclesh



Fig. 2: Location of client property relative to subject lands

⁸ In the likely event of a frivolous claim being made to WCC by the landowner about our clients in the manner BPS has experienced over many years in instances where unauthorised development is reported, our client will engage with WCC in the normal manner while retaining their right to pursue damages from the landowner under the Defamation Act 2009. The landowner may wish to consult Section 24.

3.0 Enforcement history of the landowner and this land⁹

BPS notes that there have been enforcement cases pertaining to the subject land (~~see Appendix 4~~) arising from:

- The non-payment of development contributions that were, we understand, eventually paid.
- The installation of a mobile home on the site which was eventually removed by the landowner's father in 2015 after the site had been abandoned. The responsibility for living with the mess is repeatedly left for the landowner's parents and our clients to live with.

See WCC Enforcement File, reg. ref. UD/3237 and Enforcement Notice Order No. Enf. 1688/2010, Enf. 1846/2011, Enf. 3021/2014.

The decision of the landowner to live on the site in tents is contrary to the previous Enforcement Notice matters – an excerpt is provided in Fig. 3. The landowner was to cease any such use which BPS assumes would include living in tents on this land.

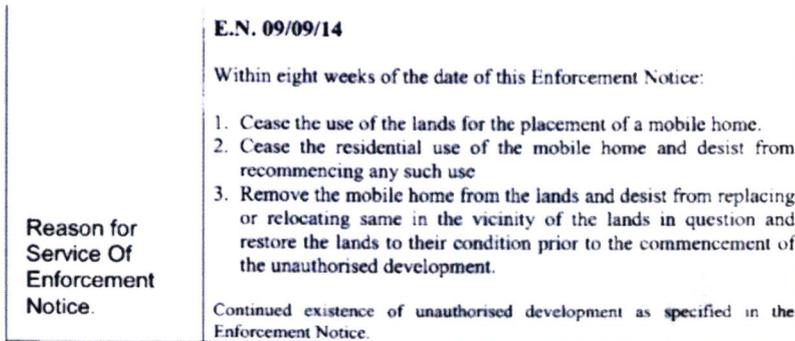


Fig. 3: Abandonment of site for 9 years left it overgrown and full of trees and vegetation - this is now cleared

4.0 Detailed questions over which this Section 5 referral application is submitted to WCC

The following questions arise for the purposes of this Section 5.

- 4.1** Are existing substantially incomplete works toward building a rural house started under a now lapsed planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended) and after planning permission lapses for a rural house after partial works are constructed, does the future use of the lands as residential then constitute exempted development within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).

In 2011/2012 works started on a rural house planning permission (permitted under reg. ref. 053286 – wherein no works started at all – and extended under Extension of Duration Permission reg. ref. 114667) were fully abandoned by the adjoining landowner to our clients' property. The site was left in a significant mess with a large spoil heap adjoining the shared accessway and several courses of laid blocks – with an old mobile home sitting above it all. Over the intervening 9 years trees and vegetation grew over the site and the spoil heap (see Figs. 12 to 15).

Our clients ask if these existing works – shown in Fig. 5A – and the previously granted use are now currently 'development' and/or whether they are 'exempted development'.

Conclusion: BPS asks that WCC confirm by way of this Section 5 that existing development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission are 'development' and are not 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended) and that the use of these lands as residential is development and is not exempted development, etc.

⁹ All of these details are available on and taken from the WCC planning web portal



Fig. 5A: Abandonment of site for 9 years left it overgrown and full of trees and vegetation - this is now cleared¹⁰

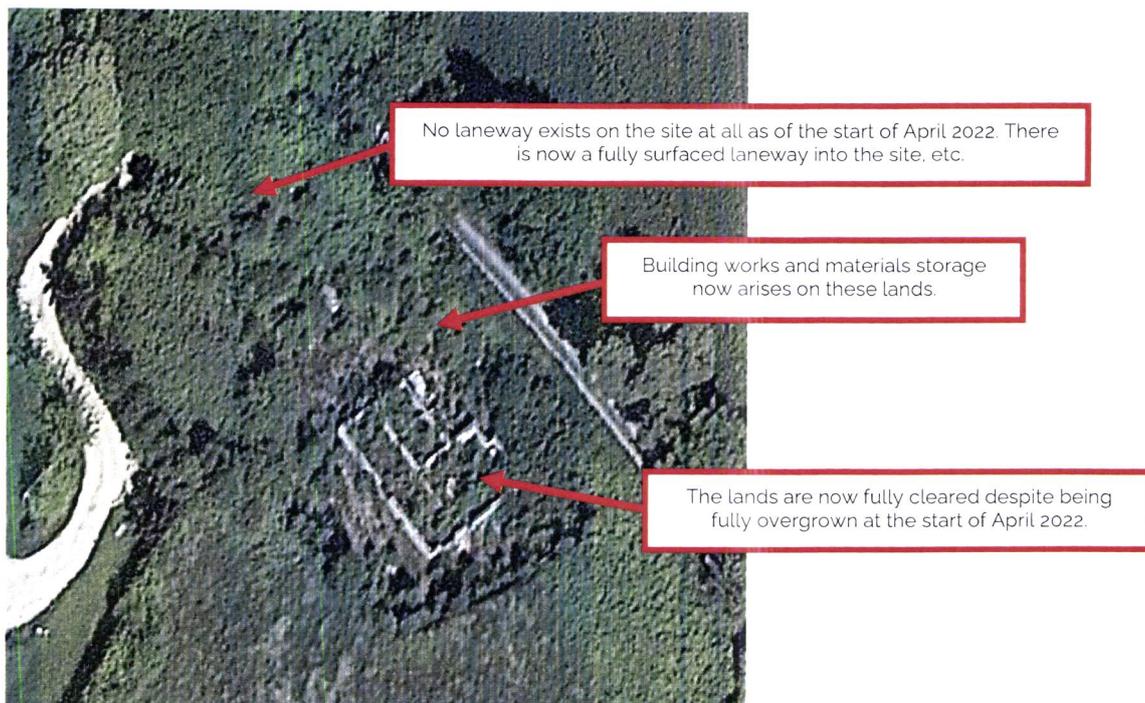


Fig. 5B: Abandonment of site for 9 years left it overgrown and full of trees and vegetation - this is now cleared¹¹

4.2 Are new development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).

Our clients ask WCC to answer the following Section 5 question: 'Are development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission 'development' and are they 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)'.

At the end of April 2022, the adjoining landowner returned to the site, erected two tents, and began inhabiting the site. Works began to clear the site of trees and vegetation. Works were then carried out to widen the entrance to the site to allow trucks to pass in and out. Large trucks delivered hard core stone to the site and a digger¹² has undertaken work on the site to spread this and there is now a new surfaced laneway into the site. Deliveries to the site over the past month have included cement, sand, and insulation boards. The rising walls have increased in height and preparations are clearly underway to pour ground level foundations with

¹⁰ This clearance work took place at the end of April 2022.

¹¹ This clearance work took place at the end of April 2022. The Google photo is dated 2022.

¹² Details are not provided of this digger and its driver as the man is local and was unaware at the time of the work that the site had no planning permission. He is not a commercial operator but appears to have been doing a favour or similar. A photo of this man's tractor is provided elsewhere in this Section 5 as this photo was taken after this local man was informed of the planning status of these lands and chose to continue work on these lands regardless.

insulation boards already laid, etc. The site has been visited by a well drilling firm such that it is clear there are plans to drill a well to access water for cement, etc.

Development is defined in the Planning and Development Act 2000 as the carrying out of any 'works' on, in, under or over land or the making of any material change of use in any of the structures or other land. Section 2 of the Planning and Development Act 2000, as amended, defines works as "any act or operation of construction, excavation, demolition, extension, alteration or renewal".

There can be no doubt that the re-starting of works on the site involves elements of construction including alterations to the existing part built unauthorised structure, alterations to the entrance to the site, alterations to the access lane, etc. and as such undoubtedly falls within the definition of 'works' (see Figs. 5 to 15). It is reasonable therefore for WCC to conclude that the proposed re-starting of development falls within the definition of 'works' and therefore constitutes development. It is also reasonable to note that the use of the site remains as a piece of land only as no residential use has ever been established by way of a completed planning permission, etc.

Section 3 (1) of the Act, defines development as the carrying out of works, in or under land or the making of any material change in the use of any such structures or other land. BPS satisfied that what is taking place is development works on a site for which there is no established use excepting agricultural land use. The subject matter of the referral constitutes "development" as per section 3(1) of the Planning and Development Act 2000, as amended.

The following figures demonstrate the works taking place on the site and deliveries, etc. insofar as is possible to detail without trespassing and without taking time away from our clients' full time jobs to monitor ongoing development within these lands.



Fig. 6A: Deliveries of cement, sand and other materials to these lands¹³

¹³ Brendan and Eileen Buck were approached by the delivery driver on the 7th of May and asked for directions. They were shown the delivery docket made out to the landowner. This docket refers to cement and other building materials. This was one of two deliveries to the site while they worked at home on one given day.

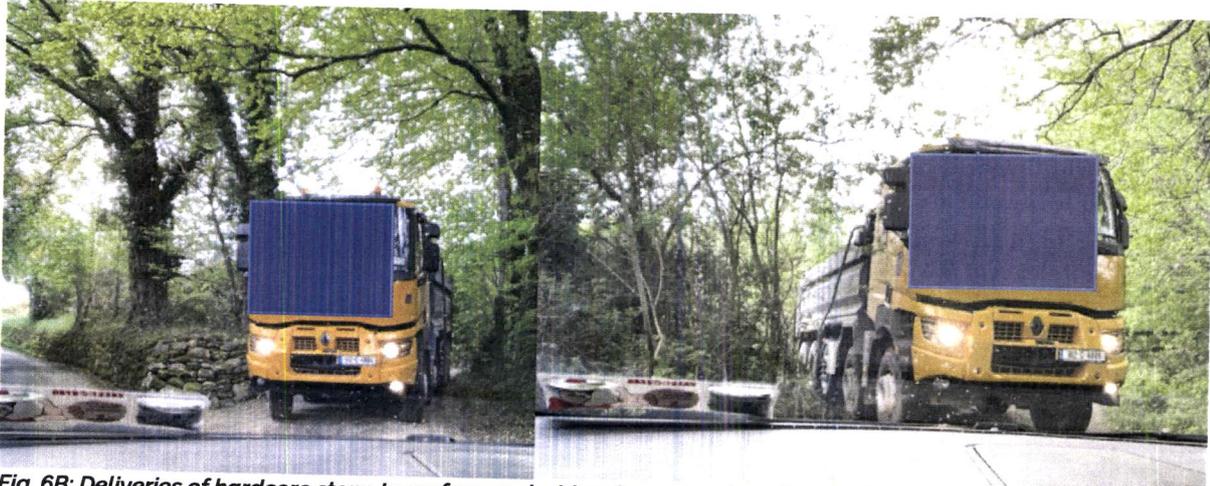


Fig. 6B: Deliveries of hardcore stone to surface and widen the access lane for which there is no extant planning permission¹⁴



Fig. 7A: Deliveries of hard core stone to the site's overgrown access – appearance prior to surfacing works



Fig. 7B: Deliveries of hard core stone to the site's overgrown access– appearance prior to surfacing works



Fig. 8: Widened entrance & spread hard core stone replaces overgrown access

¹⁴ These photographs were taken on the 12th of May 2022 after the landowner had cleared an access laneway into the site and was now having hardcore stone delivered to surface the access lane for which there is no extant planning permission.



Fig. 9: Newly widened and surfaced access laneway with truck marks



Fig. 10: Tracks of trucks and vehicles passing in and out each day



Fig. 11A: Deliveries of insulation boards to the site and rising concrete block walls



Fig. 11B: Deliveries of insulation boards to the site and rising concrete block walls

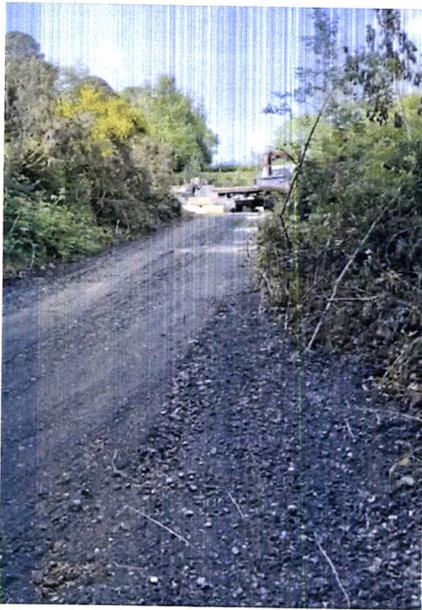


Fig. 11C: Deliveries of insulation boards to the site and rising concrete block walls



Fig. 12: Overgrown spoil waste heaps and new surfaced laneway – insulation boards and bags of sand, etc.

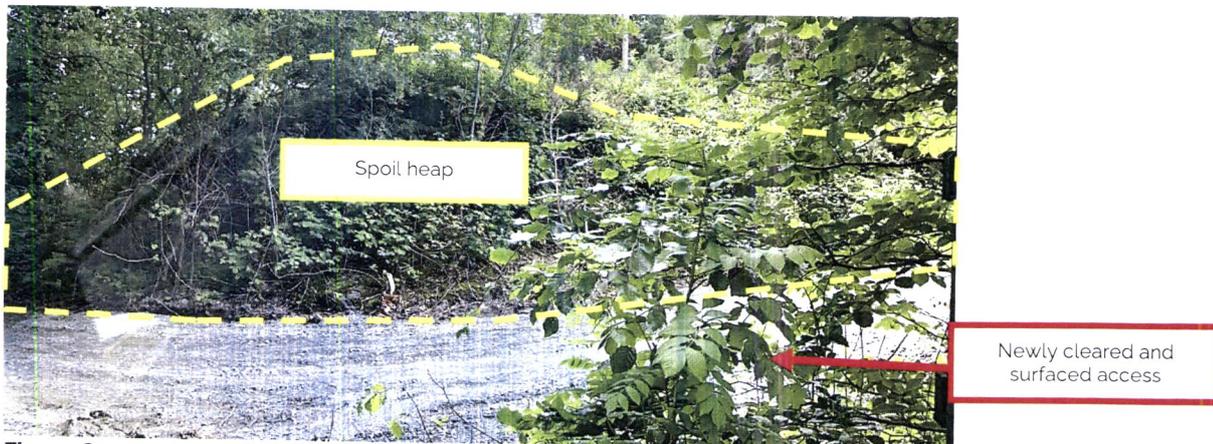


Fig. 13: Overgrown spoil waste heap and new surfaced laneway

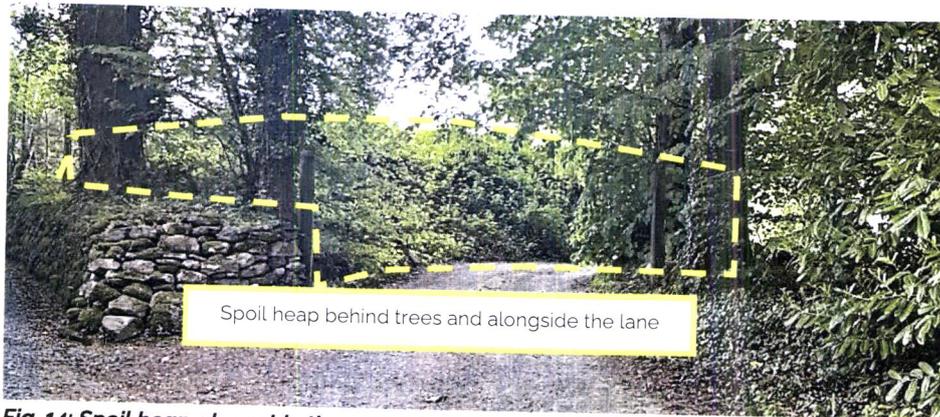


Fig. 14: Spoil heap alongside the access lane to clients' property



Fig. 15: Tractor working on this land on 4.6.2022

The Section 5 must reasonably address the issue of on what legal basis is any of this taking place. There is no extant planning permission, and the site was abandoned.

Regarding the issue of the previous planning permissions on the site, BPS notes how:

- **There is one parent planning permission dating back to 2005 (reg. ref. 053286)**. Despite the landowner being on unemployment benefit at the time, works started on the site in 2009. A digger arrived and created a significant mess on the access laneway to our clients' property including a spoil heap adjoining the laneway which has remained in place now for over 12 years (see Figs. 12 to 15). Some minimal block work was installed on the site in the five year lifetime of the permission.
- **There was one Extension of Duration Permission (reg. ref. 114667)**. Despite Having done little work on the site in 5 years primarily because someone on benefits cannot get a mortgage, the landowner proceeded to apply for a time extension under planning file, reg. ref. 114667. This was granted at the time by the Director of Planning, Des O'Brien, who stated on the file that the maximum further extension allowable should be 2 years. No further significant works were carried out on the site. Planning permission fully lapsed on this site 9 years ago.

The landowner failed to carry out any significant works over the 7 year period in which WCC granted the above permissions. The works which remained on site when the landowner abandoned the site in 2013 were then and remain a small fraction of the works permitted by the planning permission. The landowner maintains a piece of land with unauthorised works on it because, as WCC is aware, planning permissions cannot be completed in part.

Planning permissions are indivisible – see *Horne v. Freeney* [1982 WJSC-HC 2157]. Here it was held that the permission was indivisible, and that the planning permission should have been undertaken in its entirety. Mr Justice Murphy considered that: "it authorises the carrying out of the totality of the works for which approval has been granted and not some of them only. A developer cannot at his election implement a part only of the approved plans as not approval has been given for the part as distinct from the whole".

Not only do the existing works on the site maintain no planning permission and our clients are faced daily with views of an unauthorised spoil heap, site entrance, laneway, rising concrete walls, etc. the use of the site as a location for a rural house has been fully extinguished both because there has been no planning permission for 9 years, no planning permission has been completed on this land and the development was fully abandoned at the end of 2013.

Regarding the specific issue of exempted development, BPS notes the following points:

This landowner has no recourse to the exempted development provisions of the Planning Acts or Planning Regulations as they pertain to residential development because these lands maintain no valid planning permission for same and no dwelling exists on this land. The works currently being carried out are works which consolidate unauthorised development. That is, the works

contravene a condition attached to a permission under the Planning and Development Act 2000 (as amended) which required that all works be completed within the conditioned period

In any case, the works are not exempted development under the Act or under the Planning Regulations 2001 (as amended) In particular, the works are not exempt under SCHEDULE 2, ARTICLE 6, PART 1 'Exempted Development – General', 'Development within the curtilage of a house' does not apply as the land has no planning permission and is not a dwelling and Part 3 does not permit rural dwellings without planning permission We note in particular how Article 9 of the Planning Regulations 2001 (as amended) includes the following 'Restrictions on exemption':

Restrictions on exemption. 9. (1) 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 ... [emphasis added]

The ongoing unauthorised works on the site are contrary to planning conditions attached to the previous granted of planning permission including the permitted duration of those permissions and the ongoing works are alteration works to what is now an unauthorised structure and an unauthorised use

Regarding the specific issue of abandonment, BPS notes how a use of land can be abandoned and accordingly a change of use will occur when an abandoned use is recommenced. To determine whether there has been abandonment, it is necessary to establish (i) Cessation of use and (ii) No evidence of intention to resume the use. BPS refers WCC to the following planning law cases

- **Dublin County Council v. Tallaght Block Co. Ltd.** This case determined that a use of land can be abandoned and that a change of use will occur when an abandoned use is recommenced. Hederman J in the Supreme Court stated "Where a previous use of land has been not merely suspended for a temporary period and determined period, but has ceased for a considerable time, with no evidenced intention of resuming it at any particular time, the tribunal of fact was entitled to find that the previous use had been abandoned, so that the resumption constituted a material change of use".
- **Cork County Council v. Ardfert Quarries Ltd.** In this case a site had been used as an animal food processing plant from 1953 – 1966, it had been vacant from 1966 to 1970 and it had been used to manufacture and store tyres from 1970 to 1974 The High Court held that the use of the premises as a general industrial building from 1953-1956 had been abandoned by its none use from 1966-1970. Murphy J stated, "Having regard to the elapse of time and the absence of any satisfactory explanation therefore, I must conclude that the use as of the operative date was subsequently abandoned"
- **Meath County Council v. Daly.** The High Court held that the resumption of the use of premises which had been used for car repairs and petrol sales pre 1964, after that use had been abandoned since 1964 from time to time by the user of the premises for other purposes, and particularly by its user from 1969 for some years by a double glazing company, was a material change of use

This site was fully abandoned for 9 years leaving our clients living with the consequences of an incomplete development BPS acknowledges how the issue of abandonment is a complex one. It is a question of requiring a review of all relevant factors These include:

- (i) *The intention of the owner/occupier* **The landowner disappeared for 9 years leaving an abandoned site and a mess behind.**
- (ii) *The physical condition of the lands* **The lands were left in a poor condition with spoil heaps and other waste visible, etc. – see Figs. 12 to 15.**
- (iii) *The period of time for which the land was abandoned* **9 years.**
- (iv) *Intervening uses.* **The land has been in use as open space for 9 years with trees and vegetation growing up and over it as is shown in the aerial photographs here submitted.**

9 years of abandonment confirms the granted use of the site for a rural dwelling was fully abandoned

We note that a new planning application would be subject to new development contributions under Section 48 of the Planning and Development Act 2000 (as amended) as the previous planning permissions were abandoned Any new planning application would be a new planning application

Conclusion: BPS asks that WCC confirm by way of this Section 5 that incomplete works started under a now lapsed planning permission are 'development' and are not 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended)

4.2.1 Note re. the 7 year rule

It is not clear if the 7 year rule applies or not in this case as works have re-started on this site without planning permission after 9 years have passed since works stopped. Eileen Buck has pointed out to the landowner that he has no planning permission for ongoing unauthorised works to what is now unauthorised development The response received was "I've been into Wicklow County

Council" The landowner appears to genuinely believe he is above planning law and can proceed without any consideration as to what constitutes legal and illegal development

The only possible basis for this is an over-reliance on the 7 year rule. But the 7 year rule is not without limitations. If an unauthorised development has been in place for more than seven years, it is termed immune from prosecution, or unauthorised but immune. But whether such a development can avail of this immunity is not as straightforward as it might seem.

Section 157(4) of the Planning and Development Act 2000 provides "(a) No warning letter or enforcement notice shall issue and no proceedings for an offence under this part shall commence (i) in respect of a development where no permission has been granted, after seven years from the date of the commencement of the development, (ii) in respect of a development for which permission has been granted under part III, after seven years beginning on the expiration, as respects the permission authorising the development, of the appropriate period within the meaning of section 40 or, as the case may be, of the period as extended under section 42."

This is commonly known as the 'seven-year rule'. However, Section 157(4)(b) of the 2000 Act provides that irrespective of the time that has elapsed, enforcement action can still be taken where a person has failed to satisfy a planning condition concerning the use of land.

In the current instance, the landowner has entirely failed to satisfy the condition that this property be used as a residential dwelling which is completed to the standards set out in the WCC grant of planning permission with its many conditions.

The effect of section 157(4)(b) of the 2000 Act for the current case is that the landowner cannot rely on the Seven Year Rule because the issue is use. Any change of use from that which is permitted pursuant to a condition in a planning permission granted is actionable at any stage, irrespective of when such change of use has commenced. Some equitable issues – such as acquiescence, laches, or delay – may come into consideration but, ultimately, there is no statute of limitations with respect to use conditions in planning permissions.

Condition No. 3 (a) of the original parent planning permission states:

*The use of the proposed dwelling shall be restricted to the applicant or to other persons primarily employed or engaged in agriculture in the vicinity or to other such class of persons as the Planning Authority may agree to in writing. **This requirement shall be embodied by a legal undertaking that shall be registered as a burden against the title of the land in the Land Registry or Registry of Deeds and shall be of ten years duration from the date of this registration. Evidence of this registration shall be submitted to the Planning Authority within twelve months of the commencement of development on the site** (emphasis added).*

The landowner began work based on planning permission reg. ref. 053286. This work was never completed even after a 2 year extension. Condition No. 3 (a) has never been addressed and, as such, Section 157(4)(b) of the 2000 Act, allows that enforcement can still be taken after seven years because the landowner has failed to satisfy a planning condition concerning the use of the land.

Conclusion: BPS asks that WCC confirm by way of this Section 5 that development works carried out on an incomplete rural house after the lapsing of a 5 year planning permission are 'development' and are not 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).

4.3 Does the erection of and inhabitation of 2 tents on lands with no planning permission constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).

Our clients ask that WCC determine whether the landowner needs or does not need planning permission to live on his land in two tents. Two tents were erected within the site at the end of April and have been there ever since with the landowner being accompanied in inhabiting this land by a woman and a small child.

The site has no running water, no sanitary facilities and is a health and safety danger. Our clients do not want raw sewage, etc. being deposited alongside their property which will run-off during rainfall into the access laneway and down to the public road.

As you are aware Section 3.—(1) of the Planning and Development Act defines "Development".

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.

(2) For the purposes of subsection (1) and without prejudice to the generality of that subsection—

(a) where any structure or other land or any tree or other object on land becomes used for the exhibition of advertisements, or

(b) where land becomes used for any of the following purposes—

(i) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods,

(ii) the storage of caravans or tents, or

(iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders' waste, rubbish or debris,

the use of the land shall be taken as having materially changed.

(3) For the avoidance of doubt, it is hereby declared that, for the purposes of this section, the use as two or more dwellings of any house previously used as a single dwelling involves a material change in the use of the structure and of each part thereof which is so used (emphasis added).

As WCC is aware, tents can be exempted development for short periods. Class 1 of PART 3, Article 6, 'Exempted Development – Rural' allows:

Temporary use of any land for the placing of any tent, campervan or caravan or for the mooring of any boat, barge or other vessel used for the purpose of camping.

1. Not more than one tent, campervan or caravan shall be placed within 100 metres of another tent, campervan or caravan at any time.

2. No tent, campervan, caravan or vessel shall remain on the land for a period greater than 10 days.

3. No tent, campervan, caravan or vessel shall be used for the storage, display, advertisement or sale of goods or for the purposes of any business.

4. No tent, campervan or caravan shall be placed on land within 50 metres of any public road unless the land is enclosed by a wall, bank or hedge, or any combination thereof, having an average height of not less than 1.5 metres. (emphasis added).

The two tents which are placed within metres of one another have been in place for 4 weeks and as such they have been in place over 10 days and are no longer exempt.

Conclusion: BPS asks that WCC confirm by way of this Section 5 that:

1. Planning permission is required to maintain 2 tents on these lands.
2. ~~Planning permission is required to maintain two tents on these lands.~~

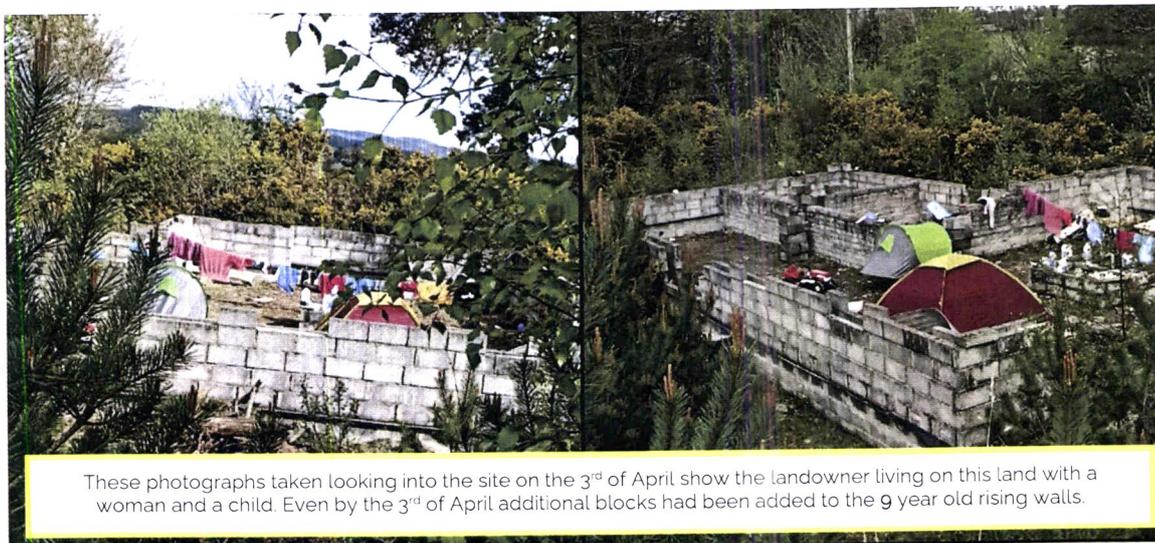


Fig. 16: Tents erected on the site within which the landowner, a woman and a child are living without sanitary facilities

4.4 Does the storage of waste and construction materials including blocks, cement, bags of sand, insulation boards, etc. on these lands constitute 'development' and is it 'exempted development' within the definitions of the Planning and Development Act 2000 and having regard to the Planning and Development Regulations 2001 (as amended).

BPS asks WCC to determine if the storage of construction waste on this site including a large spoil heap requires planning permission (see Figs. 12 to 15). This massive heap of waste has been sited alongside our clients' property for some time. It is unauthorised development as permission has never been obtained to store waste on the site.

BPS also asks WCC to determine if the storage of building materials including blocks (loose and as installed on rising walls), concrete bags, insulation boards, etc. on these lands requires planning permission. We can find no exemption for the storage of building materials within agricultural lands.

6 Permission to build a rural house at this location with all associated services, etc.

6.1 Retention & cognisance of Section 35 of the Planning and Development Act 2000 (as amended)

There is an acknowledgement in Irish planning law that one can make a genuine mistake and not realise that planning permission is required. This is not the case here. This is a landowner who has made a planning application previously, made an Extension of Duration Application previously and is wholly aware that planning permission is required. This is a man who appears to believe that the rules do not apply to him.

BPS notes how the landowner may likely seek retention and tell WCC that despite in the past telling the planning authority (as part of the Extension of Duration Application) that he ran an architecture business,¹⁷ he had no awareness of the need to apply for planning permission. The expression 'ignorance of the law is no excuse' is well-known and applies in this instance. That is, there is likely no person of sound mind in Ireland who is not aware of the need to obtain planning permission for a rural house. All planning authorities including WCC offer simple guides to applying for planning permission.¹⁸ Any person can type "rural housing planning" into Google, the results lead the searcher to the Sustainable Rural Housing Guidelines (2005) which detail the various requirements that must be addressed to obtain planning permission for a rural house.¹⁹

BPS notes how the making of an application for permission to retain an unauthorised development does not mean that you cannot still be prosecuted if enforcement action has already been initiated. An application for retention will be considered 'de novo'. This means that it will be considered as a new application and normal standards and policies will be adhered to. A planning authority is not obliged to grant permission for a retention application.

Behaving badly in planning terms is not welcomed. It draws higher fees and the unauthorised works already completed may be required to be removed. One cannot break the law and expect to be immune from all consequences.

In any new planning application, the landowner will need to address Section 5 'Refusal of planning permission for past failures to comply' of the Planning and Development Act 2000 (as amended) which states:

35—(1) Where, having regard to— (a) any information furnished pursuant to regulations made under section 33 (2)(l), or (b) any information available to the planning authority concerning development carried out by a person to whom this section applies, pursuant to a permission (in this subsection and subsection (2) referred to as a "previous permission") granted to the applicant or to any other person under this Part or Part IV of the Act of 1963, the planning authority is satisfied that a person or company to whom this section applies is not in compliance with the previous permission, or with a condition to which the previous permission is subject, the authority may form the opinion— (i) that there is a real and substantial risk that the development in respect of which permission is sought would not be completed in accordance with such permission if granted or with a condition to which such permission if granted would be subject, and (ii) that planning permission should not be granted to the applicant concerned in respect of that development. (2) In forming its opinion under subsection (1), the planning authority shall only consider those failures to comply with any previous permission, or with any condition to which that permission is subject, that are of a substantial nature.

The landowner has repeatedly shown blatant disregard for the requirements of the planning system. The site has been the subject of multiple Enforcement Files, Warning Letters, Enforcement Notices, etc. that extended up to 2015 when a mobile home on these lands was finally broken up and removed. This was removed by the landowner's parents as he had abandoned the site and was living in the Philippines. BPS can only assume that the parents wished to avoid a judgement on this property, etc. arising from what was looking like inevitable enforcement proceedings undertaken by WCC in the courts.

Despite barely avoiding being prosecuted for unauthorised development, the landowner is now living on site and consolidating unauthorised development each day. There can be no argument made that the landowner is somehow unaware of the consequences of these actions. No further planning permission could be justified on these lands when our clients have had to live with all the mess on these lands until present day and a mobile home on the site for approx. 6 years. A new Enforcement File is now open many years since the first was opened.

6.2 No Appropriate Assessment screening has been conducted

As WCC is aware development works cannot commence in Ireland since 2008 unless an applicant has applied for and obtained the requisite development consent and has first carried out appropriate assessment screening - see *Commission v Ireland* (2008) [Case C-215/06, 51].

The landowner never carried out a Stage 1 Appropriate Assessment Screening under Article 6(3) of Council Directive 92/43/EEC (Habitats Directive) for the development of a single rural dwelling house as this was not required at the time. This is now required, and none has been carried out regarding the matters set out in this Section 5.

As WCC is also aware, Appropriate Assessment (AA) is the process whereby the potential impacts of a project or plan are assessed in view of the sites conservation objectives. The first step in the process is to conduct AA screening to determine, on the basis of a preliminary assessment and objective criteria, whether the project or plan, alone or in combination with other projects or plans could have significant effects on the conservation objectives of a Natura 2000 site. Where significant effects are likely, uncertain

¹⁷ No VAT records, Business No. etc. were provided and the landowner indicated no proof of any architectural or related qualification.

¹⁸ <https://www.wicklow.ie/Living/Services/Planning/Planning-Applications/Apply-for-Planning>

¹⁹ <https://www.gov.ie/en/publication/23809-sustainable-rural-housing-development-guidelines/>

or unknown at the screening stage a Natura Impact Statement (NIS) is required to enable a consent authority to carry out an appropriate assessment

6.3 No site suitability assessment has been conducted under the 2021 EPA Code of Practice

BPS notes that the EPA published its 'Code of Practice Domestic Waste Water Treatment System (Population Equivalent <10) in 2021²⁰. This CoP replaces the previous Code of Practice Wastewater Treatment and Disposal Systems Serving Single Houses (p.e. ≤ 10) issued in 2009. This CoP applies to site assessments and subsequent installations carried out on or after 7th June 2021. The 2009 CoP may continue to be used for site assessments and subsequent installations commenced before 7th June 2021 or where planning permission has been applied for before that date.

The landowner is proceeding to carry out works regarding a project which must comply with the CoP. No consent has been given regarding these ongoing unauthorised works since the new CoP was introduced.

The use of the CoP is required under the Building Control and Planning regimes as follows:

- The design and construction of buildings is regulated under the Building Control Acts 1990 to 2014, in order to ensure the safety of people within the built environment. The Building Regulations (as amended) apply to the design and construction of a new building (including a dwelling) or an extension to an existing building. The minimum performance requirements are set out in the second schedule to these building regulations, and these requirements are set out in Parts A-M Technical Guidance Document (TGD) H - Drainage and Waste Water Disposal of 2016 (DEHLG, 2016) requires compliance with the CoP and Standard Recommendation 66 (NSAI, 2015)
- Where it is proposed to dispose of waste water from a proposed development other than to a public sewer, information on the on-site treatment system proposed and evidence as to the suitability of the site for the system proposed must accompany the planning application [Article 22(2)(c) of the Planning and Development Regulations, 2006]

Circular Letter PSSP 01/10 from the then Department of Environment, Heritage and Local Government, addressed to each county and city manager and An Bord Pleanála, requested that the 2009 CoP be implemented in respect of all planning applications. The Department stated that planning authorities must not, in any circumstances, approve development subject to conditions requiring compliance with the CoP without first satisfying themselves that the provisions within the CoP can be complied with, and on the basis of expert and verifiable evidence including a positive site suitability assessment by an appropriately trained and qualified assessor. The CoP also considers SR 66 and the Irish Standard (I S) European Standard (EN) 12566 Parts 1-7 that apply to DWWTSs (see Chapter 4)

6.4 Environmental and ecological concerns arising

BPS notes how there are no sanitary facilities on this land which is currently occupied by tents inhabited by the landowner, a woman, and a child. Surface water is currently pouring out of these lands during periods of high rainfall. This is not acceptable.

We also note how this land was home to bats, birds, and a range of trees prior to its clearance by the landowner at the end of April 2022. Our clients' children had experienced bats passing in and out of the site at night, a hawk flying in and out of the site and had watched over 9 years as trees grew within the site to complete a de facto re-wilding. The landowner has treated the land as though 9 years had not passed, etc. This is contrary to multiple national, regional and local planning policies aimed at protecting our rural areas.

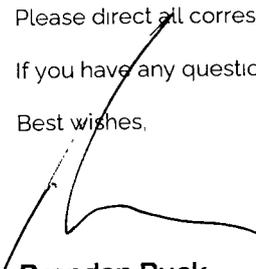
7.0 Finally

We trust that sufficient information has now been provided to allow this Section 5 to be fully assessed.

Please direct all correspondence to this office.

If you have any questions, please call BPS on 01-5394960 or 087-2615871.

Best wishes,


Brendan Buck
 Director
 BPS Planning Consultants
 Member of the Irish Planning Institute

²⁰ https://www.epa.ie/publications/compliance--enforcement/waste-water/2021_CodeofPractice_Web.pdf

SECTION 5 APPLICATION AT BALLINATONE LOWER, GREENAN, COUNTY WICKLOW



Fig. 2: Location of the subject land (2)