



An
Bord
Pleanála

Inspector's Report ABP-300352-17

Question

Whether the use of the site at the former Muckalee Creamery for coal and timber processing and fuel distribution and if is or is not development or is or is not exempted development is or is not a change of use.

Location

Jarrow Fuels, lands at the former Glanbia site in Muckalee, Co. Kilkenny.

Declaration

Planning Authority

Kilkenny County Council

Planning Authority Reg. Ref.

DEC461

Applicant for Declaration

Jarrow Fuels

Planning Authority Decision

None

Referral

Referred by

Kilkenny County Council

Owner/ Occupier

Jarrow Fuels

Observer(s)

Click here to enter text.

Date of Site Inspection

17th May, 2018

Inspector

Stephen Kay

1.0 Site Location and Description

- 1.1. The site of the subject referral is located in the village of Muckalee which is located 12km to the north, north east of Kilkenny City and approximately 6km to the south east of Castlecomer.
- 1.2. The area is characterised by a limited amount of residential development. There is a dormer dwelling located immediately adjoining the site to the east.
- 1.3. The site is characterised by a total of 8 no. buildings of varying sizes, three of which front onto the road. There is a long low level shed that is located adjoining the southern boundary of the site. To the rear there is a central yard area with additional shed located to the east. Beyond that to the east there is a further yard area located at the south east corner of the site.
- 1.4. The site was formerly occupied by Glanbia Creamery and was purchased by Jarrow Fuels who used the site as a coal and fuel distribution centre. From the information provided, it would appear that there was a fuel sales / distribution use associated with the previous use of the site by Glanbia.
- 1.5. The current operation on the site comprises the delivery of loose coal to the site, its storage both in open areas and also within a number of the buildings located on site and the bagging of coal for distribution. This bagging operation is undertaken inside one of the existing sheds. The shed where the coal bagging occurs is located in the central part of the site and is indicated as Shed No.7 on the response submission received from the third party, received by the Board on 12th April, 2018. Coal for bagging is fed into a hopper and loaded from the eastern side of the building with the bagging equipment housed internally. The site also provides for the sale of briquettes and timber. A timber splitting machine was observed on site at the time of inspection, located internally in one of the sheds. This piece of equipment appeared to be relatively recent. At the time of inspection it was also noted that there was a small volume of animal feed on the site which now also forms part of the business.

2.0 The Question

2.1. The question posed by the Planning Authority is as follows:

‘Whether the use of lands at the former Glanbia site in Muckalee County Kilkenny as a coal and timber processing and fuel distribution site is or is not development and is or is not exempted development..’

3.0 Planning Authority Declaration

3.1. Declaration

No declaration has been issued by the Planning Authority.

It is noted that the referral letter from the Planning Authority dated 27th November, 2017 makes reference to sections 2, 3, and 4 of the Planning and Development Act, 2000 and to Article 10 and Class 22 of Part 1 of the Second Schedule of the Planning and Development Regulations, 2001 (as amended). Stated that the Planning Authority are of the opinion that a change of use of the site has occurred and that this change of use is material in that the intensity of the use of the site as a fuel depot / distribution facility has increased and such that it gives rise to different planning considerations. Specifically, the intensification of the coal yard is seen as increasing the impacts of noise, dust, traffic generation. Stated that the Environment Section of the Council view the operation on the site as a potential risk to human health.

4.0 Planning History

ENF 16093 – enforcement case taken by the Planning Authority against the operation of the site and a warning letter was issued.

The report of the planning officer on the enforcement file (Ref. ENF16093) makes reference to two planning permissions granted to Avonmore Creamery and Muckalee Co-Op Dairy dating from 1977 and 1971 respectively.

The following referral case is of relevance to the determination of this case:

RL2701 – Referral as to whether the use of the premises, at the former Glanbia Creamery at Ballyneale, Co. Kilkenny, for wholesale distribution of coal as a primary use rather than former secondary use to the use as a creamery is or is not development, and if so, is or is not exempted development. Determined by the Board that the use of the site for the distribution of coal was not development. In coming to this decision the Board held that the history of the site was as an agri business distributing and selling products including fuels, that the storage and distribution of coal is an established use on the site and concluded that it had not been demonstrated to the satisfaction of the Board that intensification in the use of the premises for the wholesale distribution of coal has occurred that would bring about new material planning impacts.

5.0 Policy Context

5.1. Development Plan

The site is located in a rural area that is outside of any identified settlement. The site is not zoned for any particular purpose in the development plan.

The site was previously in use for an industrial / commercial activity namely the Glanbia creamery. There is therefore precedent for the commercial use of the site.

5.2. Natural Heritage Designations

The site is not located in or close to any European site. The River Barrow and River Nore SAC site (site code 002162) is located approximately 2.5 km to the west of the subject site at the closest point.

6.0 The Referral

6.1. Referrer's Case

The referral made by Kilkenny County Council is accompanied by a number of documents as follows:

- A report dated 21.11.2018 referring the case to An Bord Pleanala prepared by Senior Executive Planner.
- Letter from adjoining residents (Con and Mary O'Mahony) to Enforcement Officer of Kilkenny County Council dated 24.11.2016 setting out their concerns with regard to the operation on the site.
- Planning Report on enforcement case Ref. ENF16093 dated 6.3.2017.
- Copy of warning letter issued to Jarrow Fuels dated 14th March, 2017.
- Response to warning letter prepared by Peter Thompson Planning Solutions on behalf of Jarrow Fuels dated 10 April, 2017.
- Letter from Mr Con O'Mahony dated 6.6.2017 confirming that the coal filling machinery was installed on the site on 17.1.2011 and that activity commenced shortly after this date.
- Memo dated 27.10.2017 from Executive Planner to Senior Executive Planner regarding activity on the site.
- Extracts from Jarrow Fuels website.

The case made by the Planning Authority can be summarised as follows:

- That the site was previously used by Glanbia and prior to that by Muckalee Co Op. The sale of coal formed part of the creamery business at this time.
- That the scale and intensity of use of the site for coal sales has increased significantly. The operation now includes the bagging of coal and the cutting, bagging and sale of timber.
- That there is significant quantity of coal stockpiled externally on the site. Loose coal is also stored internally amongst five shed structures on the site.

- The equipment includes two external hoppers that feed coal into the bagging plant that is located within an existing shed.
- That the case made by the site operator is that fuel sales was always an inherent part of the business undertaken on the site. It is acknowledged that the volume of fuel trading on site has increased, however it is contended that the overall volume of trading on the site has not increased and that no material change of use has therefore occurred.
- That on the basis of information from the neighbouring residential property, the operation commenced on site in 2011.
- That the planning authority consider that a change of use has occurred and that this change of use is material in planning terms as it gives rise to new planning considerations particularly as regards dust and the use of more industrial type machinery on site as well as noise, traffic, environmental pollution and the hours of operation.
- That the evidence of the adjoining residential property owners is that the activity on site results in significant nuisance in terms of dust in particular, noise and the damage caused to the local roads by the deliveries to the site.
- That it is the opinion of the Planning Authority that a change of use of the site has occurred and that this change of use is material in planning terms. A warning letter has been issued.

6.2. Owner/ Occupier's response

The following is a summary of the main points made in the submission received from Peter Thomson Planning Solutions on behalf of Jarrow Fuels :

- That the description of the business operated on site as a '*coal production and distribution*' business is inaccurate and implies the making of something and that the buildings are being used for an industrial purpose.
- That while the site has been operating since 2011, the complaints have only been since 2016. The letter from the complainant does not make any statement regarding an intensification of use since the site was taken over by Jarrow fuels.

- It would appear from the complainant that the impacts that are of concern have occurred over the years and are not a very recent occurrence.
- That the submission of the Planning Authority does not mention the fact that the delivery of coal in bulk to the site, sorting and bagging occurred when it was operated by the Muckalee Co Op and by Glanbia.
- Submit an affidavit from Edward Cody stating that coal was delivered to the Muckalee Co Op site and stored externally before being sorted and bagged.
- That the Board determined in the case of Ref. RL2701 that the use of the former Ballyneale co-op site as a coal storage, bagging and distribution centre as the primary use was not development and that it had not been demonstrated to the satisfaction of the Board that intensification of the use of the site for the wholesale distribution of coal had occurred such as would bring about new planning impacts.
- Noted that the question posed and answered in case Ref. RL2701 was whether the use of the site for the distribution and storage of coal as a primary rather than secondary use is or is not development and is or is not exempted development. It is suggested that a question along these lines would be appropriate in this case as the circumstances are very similar.
- Regarding each of the considerations reached in the Board decision under Ref. RL2701 in the context of the subject case, the following points are raised:
 - That the original use of the site as a creamery involved in agri business including fuels dates to c. 1911. Glanbia was the last business to operate from the site and the site was sold in 2011. The use of the site was never abandoned and the original use pre dates 1964.
 - That the Planning Authority accept that fuel was stored and retailed from the site prior to it being purchased by the current owner. The external storage, bagging, wholesale distribution and general retailing of fuel products including coal timber, briquettes LPG and diesel all took place on the site before the current owners took control of the premises.

- Stated that in the Ballyneale case what occurred was that the agri storage and sales aspects of the business were significantly scaled back when the premises were sold in 2007 meaning that the fuel use became the primary use of the site. The Board held that there was no indication of an intensification in the use of the site for fuel sales.
- That in the Ballyneale case the Board accepted that the fuel storage and distribution business mainly served the local area and local retail outlets. The same situation occurs at Muckalee.
- That the storage, sorting, bagging and wholesale distribution of coal continues on site along with the storage sorting, bagging and distribution of other fuels such as cut timber, turf and briquettes as well as animal and household products such as animal bedding, animal feed and water tanks for feeding animals.
- It is not known whether the cutting of timber formed a part of the operation of the Muckalee Co-op creamery fuel operation is not known. It is however a very minor element of the current business and only tends to occur following storms and other events where timber becomes available.
- It should be noted that some of the buildings within the existing complex lie idle while others used for fuel stores are only partially in use. It is assumed that these buildings were fully occupied at the time of operation by the Muckalee Creamery.
- That part of the external rear yard is the same as that used by Glanbia and there is an additional area that is currently not used.
- That the hours of business are currently 08.30 to 16.30 which is consistent with the previous Glanbia hours. The site is not open for deliveries at 07.00 hrs as referenced in the Planning Authority submission.
- That the volume of deliveries and collections of fuels fluctuates with the seasons with the most in winter. The coal deliveries to site comprise between 5 and 6 no. loose 30 tonne loads per year, all in the winter. There is one pallet of briquettes per month (6 total per annum).

- It is submitted that the volume of traffic previously associated with the Muckalee Creamery would have generated as much or more traffic than the current operation on site. Neither the planning authority nor the third party complainant are saying that the current activity generates additional traffic.
- That the statements of the Planning Authority regarding dust are noted but the previous operation of the site brought in loose coal and bagged it on site in the same way as currently.
- In terms of noise, the Planning Authority make reference to a more industrial related noise environment however the same type of machinery was used on site and the same type of vehicles were coming and going to and from the site. The previous activity at the site related to agricultural materials and loose feeds would have generated significant noise that no longer occurs at the site.
- Regarding references to a firewood splitter machine. There is no record in the site visits undertaken of this machine being in operation.
- That the comment regarding an occasion when activity went on late into the evening is noted however the site owner does not know when this could have occurred.
- That the nature of the business undertaken at the site is almost exactly the same as that undertaken at the former Ballyneale creamery site where the Board determined that no material change of use had occurred.
- Stated that the applicant wishes to be neighbourly and will do all that he can to reduce any adverse impacts on his neighbours. He will meet with the planning authority with a view to applying for planning permission to relocate the external storage area to the opposite end of the external space and erect a series of block walls to mitigate dust.
- The submission is accompanied by extracts from Facebook regarding the history of the activity at the site and the co-op.

- The submission is also accompanied by an Affidavit from Edward Cody who worked on the site between 1964 and 2008. This states that loose coal was delivered to the external yard on site and was bagged on site. Stated that bagged coal was delivered to local residents as well as to members of the public at the site. Wholesale loads were sold in open hundredweight bags. Stated that towards end of his time larger coal loads were delivered and that these would then be broken down for delivery to other local creamery sites including Coon and Castlewarren.

6.3. Further Responses

The response of the first party was referred to the Planning Authority and to the third party, Con and Mary O'Mahony. The following is a summary of the main issues that have been raised in these submissions:

6.3.1. Third Party - Con and Mary O'Mahony (Residents of the dwelling located immediately to the south of the site)

- That Kilkenny County Council failed to follow through with enforcement action in this case in accordance with their obligations under the Planning Acts. The Planning Authority came to the conclusion that a change of use had occurred. There is no option under s.153 to refer the case to the board for a determination.
- That the current use of the site is entirely unrelated to the established creamery use of the site by Glanbia. The site serves no creamery function and therefore this use has been extinguished.
- The operation includes new industrial processes with two new external hopper, bagging machinery and bulk storage of coal and anthracite. The PA have estimated that there was c.200 tonnes of coal stockpiles on the site and 5 of the buildings were used for the storage of coal.

- Schedule 2, Part I, class 22 is not applicable as it only applies to works within an industrial building. The established use at the site does not comprise industrial buildings in connection with the industrial process carried on in the buildings. The buildings were developed to house an agricultural rather than industrial process.
- That the submission by Peter Thomson Planning that a minor use can de facto become the main use of a site which fundamentally changes its character, nature and impact on the environment is incorrect. This implies that a warehouse building with ancillary office could be converted to entirely office use which is absurd.
- That the referral case relating to the Ballyneale site (Ref. RL2701) is clearly not a precedent in this case.
- That there is no evidence that the bulk storage of coal did occur in the sheds or on the premises. There is also no evidence that the coal was processed using industrial scale machinery which have been introduced by Jarrow Fuels.
- That the two sites are not comparable, the Ballyneale site is only about a third of the size of Muckalee and the coal and fuel activity comprise only a very small part of the overall operation. The precedent case indicates that a change of use has occurred and it is submitted that this change is material as it has resulted in a fundamental change in the character of the site which by default means that there has been a material intensification in use which is therefore development.
- That the intensification and material change of use has had a significant impact on the residential amenity of Con and Mary O'Mahony's home due to noise and dust.
- They are also very concerned that the run off from the storage of coal on hard surfaces that are not fitted with appropriate silt traps is having a negative impact on local watercourses. Jarrow fuels have not presented any evidence or information to show that there are any form of environmental controls in place.

- That contrary to the statement of the site owner, there have been complaints between the 2011 and 2016 period. These were verbal complaints to the operator of the site rather than going direct to the council.
- That the complaints have allowed Jarrow Fuels access to a water supply and allowed the removal of a hedge along the NE of their property (complainants property) and the construction of a wall in this location as well as the piping of an open watercourse that runs in this area.
- That the objector has resided beside the Muckalee creamery site for over 50 years. There were no issues arising prior to the purchase of the site by Jarrow Fuels.
- That the level of dust generated is such as to have a significant adverse impact on amenity and the condition of the complainants home. Windows cannot be opened and Mrs O'Mahony has been diagnosed with asthma. The value of the property has been significantly reduced.
- That the complainant stores old cars on the site and these and vehicles outside are impacted by dust.
- That the owner of Jarrow Fuels has blocked with plastic a window that serves the outbuilding where the old cars are stored.
- That there is a vulnerable watercourse that runs through the Jarrow Fuels site and the complainant's property and which feeds into the Muckalee Reservoir that is a water source for Kilkenny City. During rainfall events there is ponding of black water on the third party lands and Jarrow Fuels site.
- That the Castlecomer to Kilkenny Road is seriously damaged by the number and weight of lorries accessing the site.
- That the nature of the activity on the site has fundamentally changed with the use by Jarrow Fuels. Noted that the company's website states that it is one of Irelands leading coal importers and distributors. The fuel supplies when it was a creamery was very much a small part of the overall agricultural activity on the site.

- When Muckalee and other Glanbia sites were closed the activity transferred to Castlecomer. The products sold at Castlecomer mirror those that were available at Muckalee and photographs of these are submitted including animal feeds, hardware, agriculture feeding equipment, fencing stakes and gates.
- Stated that the overall quantity of coal and briquettes sold at Muckalee Creamery was insignificant in the context of the overall operation.
- As indicated in Figure 13 of the submission only one of the 8 no. sheds on site was used for coal storage when it was Muckalee Creamery and this shed is small. The coal was tipped at the front of the shed and was bagged by hand. Coal was weighed using a small scale scales and not a weighbridge as stated by Jarrow Fuels. This is against the current operation where all 8 sheds are in use in connection with the storage of fuel and coal is bagged by machine and hoppers, teleporters and forklifts used.
- That there was no loose coal delivered to the site from the early 1990s onwards. It was all bagged. See affidavit of John Shore.
- That, contrary to the statement of Jarrow Fuels, none of the external rear yard stated to have partially been used for storage by Muckalee Creamery / Glanbia was used for the storage of loose coal. This is stated by John Shores Affidavit. He states that the rear yard was used for the storage of fertilizer, gates, feeders etc.
- That the figures cited by Jarrow Fuels for deliveries are a very significant underestimation. The complainant has observed 8-10 30 tonne loose coal deliveries a month between September and April which equates to 1,920 – 2,400 tonnes per annum and not the 180 tonnes per annum cited by Jarrow Fuels.
- That the statement of local deliveries by Jarrow is contradicted by the sales figures included in the Jarrow submission which indicates deliveries to Mooncoin which is c.75km from Muckalee and sales to Woodpecker in Waterford which is 81km away.

- The submission is accompanied by affidavit from three former employees of the creamery operation on the site including Edward Cody who has provided an updated affidavit to that previously submitted on behalf of the site occupier. The main points raised in these affidavits can be summarised as follows:

Redmond Bergin (employee 1987 to 1999)

- That the quantity of coal and other fuels sold on the site was insignificant compared to the other activity on the site.
- That coal was stored on pallets in the shed in the front yard.
- That the yard to the rear was mainly used for the storage of fertilisers and other agricultural equipment.

John Shore (employee 1991 onwards)

- That during his time working at Muckalee bagged coal was delivered in trucks only. There was no loose coal delivered. Approximately one truck load of coal was delivered per month. Bagged coal was stored in the shed at the rear of the site.
- That the weighbridge on the site was used for weighing of grain and other feed and not for coal.

Edward Cody (employee 1964 – 2008)

- Affidavit supplemental to that of 5th January 2018.
- That loose coal was delivered to the site. This amounted to approximately one lorry load per month during the winter of approx., 15 tonne. This coal was tipped in the coal shed in the front yard.
- That there was no rear yard at this time.
- That the bagging and weighing of coal was all done by hand.
- Coal and slag heaps never occurred due to the small nature of the operation.
- That the bagged coal was sold to one retailer only which was Millers shop in Coolcullen.

- That the coal business was a very small part of the overall operation of the creamery. .
- That from around 1990 onwards the coal was never delivered in loose format and was only delivered in sealed bags and stored in the yard.

6.3.2. Planning Authority

The following is a summary of the main points raised in the submission received from the Planning Authority:

- That the original planners report on file covers the concerns of the planning authority regarding the operations on site.
- Whilst it is accepted that loose coal was a part of the former creamery sales, the volume of coal was significantly less than what is now on site. The council are of the opinion that the due to the intensification and different planning considerations now associated with this type of business that a material change of use has occurred.
- The planning Authority together with the roads and environment sections of the council are concerned that with no current parameters in place there is scope to further intensify the business on site with no control over hours of operation, noise, dust and creating a risk to amenity, human health and groundwater.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1) states that '*In this Act, except where the context otherwise requires, - development has the meaning assigned to it by section 3...*'

Section 3(1) states that: '*In this Act, 'development' means, except where the context otherwise requires, the carrying out of works on, in , over or under land or the making of any material change of use of any structures or other land*'.

In Section 2(1) of the Act '*works*' are interpreted as including '*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 materials to or from surfaces of the interior or exterior of a structure*'.

Section 4 of the Act refers to '*exempted development*' and 4(1) sets out categories of development for the purposes of the Act.

Section 4(2) provides that the Minister may, by regulations, provide for any class of development to be exempted development.

7.2. Planning and Development Regulations, 2001

Art. 10 deals to changes of use and Art 10(2)(a) states that '*A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use and incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.*'

Art. 10(2)(b) states that '*nothing in any class in Part 4 of the Second Schedule shall include any use –*

(vi) for the storage or distribution of minerals'.

Art. 11 provides for a saver for certain classes of development, namely that which commenced prior to the coming into operation of this Part and which was exempted development for the purposes of the Act of 1963 or the 1994 Regulations.

Class 22 of Part I of the Second Schedule states that the following shall be exempted development:

Storage within the curtilage of an industrial building, in connection with the industrial process carried on in the building, of raw materials, products, packing materials or fuel, or the deposition of waste arising from the industrial process.

Part 4 of the Second Schedule sets out classes of development within which a change of use shall be deemed to be exempted development.

8.0 Assessment

9.0 Is or is not development

- 9.1.1. As per Section 3(1) of the Planning and Development Act, 2000 (as amended) *'development' means, except where the context otherwise requires, the carrying out of works on, in , over or under land or the making of any material change of use of any structures or other land'*.
- 9.1.2. In the case of the subject site and referral, there is no evidence that any physical works have been undertaken which would constitute development. Specifically, no new buildings or structures appear to have been erected and none of the existing buildings appear to have been the subject of modification or extension such as would comprise works and there has not been any signage erected on the site or buildings.
- 9.1.3. With regard to the second part of the definition of development as set out in section 3(1) of the Act, it must first be determined if a change of use has occurred and secondly, in the event that a change of use is deemed to have taken place, to determine if this change of use is material in planning terms.
- 9.1.4. The planning history of the appeal site indicates that it was in use as a creamery / co-op use from the early part of the 20th century. This use was agricultural in nature and involved agricultural supplies, feeds, agricultural related machinery and equipment and also a fuel sales element. Glanbia was the last business to operate from the site, and the site was sold in 2011.
- 9.1.5. The existing operator on the site contends that use of the site was never abandoned and that the original use pre dates 1964. From the information presented, it is clear that the use of the site for the sale of fuel does pre date 1964 and the requirement to obtain planning permission. It would further appear from the information presented to be likely that there was not a break in the use of the site for fuel sales while occupied by the co-op / Glanbia. With regard to abandonment or whether the original use of the site has been extinguished, on the basis of the information presented and on file it does not appear to me that the use of the site as a commercial premises that involved the sale of fuel (coal and other fuels) ceased for any significant period of time or that there was any intention that the use of the site was to be abandoned. From the information presented, it appears that the purchase

of the site by Jarrow Fuels and its use as a fuel depot commenced within a reasonably limited period after Glanbia had left the site. It is also apparent to me from the information presented that the site provided fuel sales up until the time that Glanbia ceased to trade from the site.

9.1.6. In the case of the subject site it is apparent that the established primary use of the site prior to its acquisition by Jarrow Fuels was as a multi purpose agricultural related business involving grain and feed supplies, agricultural equipment and machinery and with fuel including coal as a part of the overall offer on the site. Fuel sales was however only a small part of the overall operation, and this has been confirmed by the affidavits submitted by various former employees at the site. The current use of the site as a fuel depot primarily involved in the sale of fuels is therefore in my opinion clearly a change in the use of the site.

9.1.7. I note the case made by the agent for the third party complainants, Future Analytics that a minor use cannot de facto become the main use of a site which fundamentally changes its character, nature and impact on the environment. An example is cited of a situation where, using the same logic, a warehouse building with ancillary office could be converted to entirely office use. The fact that the site at Muckalee is three times the size of that at Ballyneale is also referenced as supporting the view that RL 2701 should not be used as a precedent in the subject case. I note the point being made, however at issue is not the change of a use that formed part of the previous use of the site to being the sole or overwhelming primary use of a site, but rather the materiality of this new use in planning terms and whether any significant intensification of this retained use has occurred. In this determination, the scale of the site or operation is not the key issue but rather the degree to which the use has or has not intensified. What was determined in the case of Ref. RL2701 was that, on the basis of the information available to the Board, it was not considered that an intensification in the use of the site for the purposes of fuel sales had occurred such as would give rise to new material planning considerations. Development was not therefore considered to have occurred. It is not therefore a situation whereby what was a secondary use can automatically be expanded to become the sole use of a site as in the example put forward by agent for the complainants. What is now required in this case is to determine if the change in the use of the site is material in

terms of its planning impacts and whether development has or has not therefore occurred.

9.1.8. The case made by Jarrow Fuels is that the scale and intensity of the use of the site for fuel sales is not any greater now than was the case when the site was operated as Muckalee Creamery or was under the ownership of Glanbia. Specifically, it is contended that while the operation has spread out across the bulk of the site, the utilisation of the sheds and external storage areas is limited and the overall intensity of the use of the site for fuel sales has not increased. On this issue of the extent of the buildings and the outside storage areas that are in use it is difficult to make an accurate assessment. I would accept in principle the case made that the bulk of the buildings are currently used at a relatively low intensity and this is supported by my observations at the time of inspection of the site where only 5 of the sheds were in use for storage purposes and of these none was particularly intensively used or occupied. Externally, there was no evidence of significant storage of materials at the time of inspection. It has however to be noted that my inspection was undertaken in May and therefore at a time when demand for fuel would be low and activity at the site scaled back. It is also noted that the reports on file from the Planning Authority indicate that at the times of their inspections significant external storage of materials was observed.

9.1.9. In terms of the volume of material passing through the site and the volume of sales there are significant differences in the information presented by the parties. The agent for Jarrow Fuels states that the volume of deliveries and collections of fuels fluctuates with the seasons with the most in winter. Deliveries of coal to site are stated by Jarrow Fuels to comprise between 5 and 6 no. loose 30 tonne loads per year, all in the winter, plus one pallet of briquettes per month (6 total per annum). Against this, the third party complainants state that the figures cited by Jarrow Fuels for deliveries are a very significant underestimation. The third party states that he has observed 8-10 30 tonne loose coal deliveries a month between September and April which equates to 1,920 – 2,400 tonnes per annum and not the 180 tonnes per annum cited by Jarrow Fuels. One hundred and eighty tonnes does seem to be a very small volume of coal to comprise the main fuel sold from the site and the site operator has not provided any clear documentary evidence such as invoices from suppliers to support this figure. I would also note the estimate made by the Planning

Authority at the time of one of their inspections of the site that there was c.200 tonnes of coal present on the site.

- 9.1.10. The situation with regard to the previous volume of fuel retailed from the site is not completely apparent from the available information. Affidavits from previous employees indicate that the fuel sales business was only a very small part of the overall operation although this does not provide an indication of quantity. The second affidavit from Mr Edward Cody states that the volume of loose coal delivered to the site amounted to approximately one lorry load per month of approx., or 15 tonne during the winter. This coal was tipped in the coal shed in the front yard. It would appear that there was additional bagged coal delivered although it is not clear if it was at this time. It is however notable that the volumes of coal deliveries referenced in the affidavit of Mr Cody are very significantly less than the current volumes.
- 9.1.11. I also note that, as indicated in Figure 13 of the submission from the third party, only one of the 8 no. sheds on site was used for coal storage when it was Muckalee Creamery and that this shed is relatively small. Submitted affidavits indicate that the coal was tipped at the front of the shed and was bagged by hand. I also note that submitted affidavits state that there was no loose coal delivered to the site from the early 1990s onwards and that what was delivered was all bagged, (see affidavit of John Shore).
- 9.1.12. Other issues noted from the submitted affidavits are that loose coal is stated to be weighed and bagged by hand and not weighed using a weighbridge as stated by Jarrow Fuels. This is contrary to the current operation where coal is bagged by machine and hoppers and forklifts are used on the site. While my inspection of the site indicated that the hopper and bagging equipment appeared to be relatively old pieces of machinery, there is evidence that the equipment being used to move fuel around the site is more industrial in character. I also note the content of the letter from the third party Mr Con O'Mahony to the Planning Authority dated 6.6.2017 stating that the coal filling machinery was installed on the site on 17.1.2011 and that activity commenced shortly after this date.

- 9.1.13. Similarly, I note the information presented regarding the extent of the catchment served by the site. The submitted affidavits state that when operated as the co-op sales of fuel were to the local area. As noted by the agent for the third party, however the extent of the catchment is now larger with information submitted on behalf of Jarrow Fuels showing deliveries up to 80km from the site. This increased catchment area would, in my opinion lend further support to the indications of increased volumes and activity generally at the site.
- 9.1.14. With regard to traffic, it is submitted by agents for Jarrow Fuels that the volume of traffic previously associated with the Muckalee Creamery would have generated as much or more traffic than the current operation on site. I would agree that this is likely the case, however the coal deliveries to and from the site are potentially in larger, more heavily laden vehicles that would have a greater impact on the condition of the local road network in the vicinity of the site. This local road network is narrow and there is a significant distance on such local road before reaching the N78 (c.4 km to the west) or Castlecomer (c.5km to the north). Notwithstanding reference in the third party submission to late deliveries to the site, the hours of operation would appear to be within normal working hours and not be excessively late.
- 9.1.15. Finally, I note the evidence submitted by the third party regarding the deposition of coal dust on their property and the comments regarding the potential contamination of the surface water stream that runs between the subject site and the third party lands. The existing on site storage areas are not fitted with drainage system that would mitigate potential pollution or run off from the external storage of loose coal in particular.
- 9.1.16. In conclusion, as set out above, a change of use of the site has clearly occurred since Jarrow Fuels purchased the site in 2011 and the previously mixed agricultural supplies use changed to a fuel supplies business, albeit also with a small element of agricultural feed supplies as well. The question therefore is whether intensification of this fuel supplies use has occurred such that new material planning issues arise. The situation with regard to the intensification of use and specifically the volume and method of handling of fuel on the site is not entirely clear, however for a number of reasons I consider that a conclusion can be drawn that such an intensification has occurred. In particular I note the limited, though not exactly quantified, volume of fuel supplies associated with the previous use and the limited geographical extent of

the area served as against the current volume of material and area served. Against this, the current volumes of fuel as evidenced by the observations of the Planning Authority staff and the observations of the long standing resident to the south of the site indicate that coal volumes on the site are potentially greater than the 180 tonnes referenced by the first party. In this assessment, I note the lack of documentary evidence to support the contention of the current site operator that coal only comprises a total of 180 tonnes per annum.

9.1.17. Regarding the processing and storage of fuel on site, while there is an indication from my site inspection that the hopper and bagging equipment currently present is not recently added pieces of equipment, the evidence from the submitted affidavits of former employees and the statement of the third party who has resided beside the site for 50 years indicates that the nature of the activity has significantly altered since Jarrow Fuels took over the operation of the site. In particular, I note the references in submitted affidavits to coal only being delivered on site in bagged form since approximately 1990 until the transfer of the site in 2011 and the references to the manual filling of coal sacks rather than using machines. Similarly, with regard to timber, the situation is not clear however there is no clear evidence that timber was sold from the site prior to Jarrow Fuels occupation of the site. The Jarrow Fuels state that timber sales essentially only relates to the sale of felled trees that become available periodically during storm conditions, however the timber splitting machine on site would indicate that the processing and sale of this fuel is potentially more significant.

9.1.18. For the above reasons it is considered that the change of use which has occurred on the site is material and such that development has occurred.

9.2. **Is or is not exempted development**

9.2.1. The question therefore arises as to whether the development of the site for the purposes of the storage and sale of a coal and timber processing and fuel distribution site is or is not exempted development.

- 9.2.2. I do not consider that there are any provisions within the Planning and Development Act, 2000 that provides for such a development to constitute exempted development for the purposes of the Act. Specifically, the development does not comprise the use of lands for the purposes of agriculture as provided for in s.4(1)(a).
- 9.2.3. With regard to the classes of development which are exempt by virtue of the exemptions provided for under Art.6 of the Planning and Development Regulations, 2001, I do not consider that any of the provisions of the Second Schedule are applicable in the case of the development undertaken.
- 9.2.4. I note reference in the third party submission to Class 22 of Part I of the Second Schedule which provides for the storage of raw materials including fuel within the curtilage of an industrial building which are in connection with the industrial process carried on in the building. The third party state that this exemption is not applicable as it only applies to works within an industrial building and the buildings on the subject site were developed to house an agricultural rather than industrial process. I would be in general agreement with this assessment and note that storage in the case of the subject site is the main activity on the site and is not required in connection with any industrial activity undertaken at the site.

10.0 Recommendation

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

WHEREAS a question has arisen as to whether the use of lands at the former Glanbia site in Muckalee County Kilkenny as a coal and timber processing and fuel distribution site is or is not development and is or is not exempted development.

AND WHEREAS Kilkenny County Council referred this declaration for review to

An Bord Pleanála on the 29th day of November, 2017:

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

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) articles 10 and 11 of the Planning and Development Regulations, 2001, as amended,
- (c) Part 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (d) the submissions made during the course of the appeal:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) Historically, the creamery operated as an agri-business enterprise, producing, storing, distributing and selling agricultural products and other products, including fuels, related to its hinterland,
- (b) the storage and wholesale distribution of coal is an established use associated with the overall operation of the creamery site,
- (c) the storage and wholesale distribution of coal, continues on site, along with the storage, distribution and sales of other fuels,
- (d) there is evidence presented of negative impacts on the amenity of adjoining residential property in terms of noise and dust and the potential for adverse impacts on water quality in the vicinity of the site arising from the external surface storage and movement of loose fuels,
- (e) the submitted statements of former employees at the site indicates a level of fuel sales and storage that is small in scale and processes that were not significantly mechanised and did not, in later years involve the storage of loose coal, and
- (f) it has not been demonstrated to the satisfaction of the Board that an

intensification in the use of the site for the wholesale distribution of coal has not occurred that would bring about new material planning impacts.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the use of lands at the former Glanbia site in Muckalee County Kilkenny as a coal and timber processing and fuel distribution site is development and is not exempted development.

Stephen Kay
Planning Inspector

26th October, 2018