



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 Pleanala 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 Pleanála 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