



An
Bord
Pleanála

Inspector's Report ABP301319-18

Question

Whether (i) The surrounding soft area (i.e. grassed area) and (ii) concrete area, taken together with the surrounding soft surface (i.e. the grassed area) is or is not development and is or is not exempted development.

Address

Baylin, Athlone, County Westmeath.

Planning Authority

Westmeath County Council.

Referrer

Caroline Ganley.

Owner/Occupier

Declan and Caroline Ganley.

Type of Application

Section 5 Referral.

Date of Site Inspection

25th July, 2018.

Inspector

Paul Caprani.

Contents

1.0 Introduction.....	3
2.0 Site Location and Description	3
3.0 Planning History.....	4
4.0 Planning Authority's Decision	9
5.0 Assessment.....	13

1.0 Introduction

A declaration was sought from An Bord Pleanála pursuant to Section 5 of the Planning and Development Act 2000, in respect of two questions:

- (i) Whether the surrounding soft area (i.e. grassed area) and
- (ii) the concrete area taken together with the surrounding soft surface (i.e. the grassed area) is or is not development and if it is development whether or not such development is exempted development at a site in Twyford, Baylin, County Westmeath.

The declaration is sought from the owner/occupier of the lands in question. The subject site has been the subject of numerous referrals questions under RL3510, RL3559 and RL3814.

2.0 Site Location and Description

- 2.1. A site inspection was carried out specifically in respect of the questions currently before the Board. The subject site is located approximately five kilometres east of Athlone Town. The site is located in the northern periphery of the small settlement of Bealin (or Baylin). The settlement of Baylin comprises of agglomeration of one-off houses set around various intersections in the local road network. The settlement is served by a local national school. The subject site is located in the northern environs of the settlement and comprises of a single large field approximately 1.89 hectares in size. The north-eastern part of the field accommodates a large agricultural type shed with a gross floor area of 425 square metres. The remainder of the site comprises of a large field which is under grass and is used for occasional grazing particularly horses. The shed is set back approximately 110 metres from the western boundary of the site where the local access road is located and serves the subject site and a number of dwellinghouses to the south and south-east.
- 2.2. The shed is approximately 36.5 metres in length and 12.2 metres in width. It is set within a large area of hardstanding and is located on a finished floor level approximately two to three metres above the ground level of the remainder of the

field. The shed rises to a ridge height of approximately 6.3 metres and incorporates a nap plaster finish along the lower portion of the building with an olive green kingspan cladding on the upper portion and roof of the building. Two large roller shutters are located to the front (south-western) elevation of the building. The building is surrounded by an area of hardstanding which extends outwards from the south-western elevation of the shed. The nearest dwellinghouse is located to the south-west and at its closest point is just under 100 metres from the subject building. The building is used for the housing of horses as well as general storage purposes including agricultural equipment and a number of vintage cars.

3.0 Planning History

3.1. Under PL25A.246083 retention of planning permission was sought for the construction of the shed, concrete yard and the proposed erection of a dungstead together with the completion of a wastewater treatment plant along with landscaping for equine/agricultural purposes on the subject site. Westmeath County Council issued notification to refuse planning permission for six reasons relating to:

- The application for which retention of planning permission is sought is contrary to Policy P-EQ2 of the development plan.
- The development for which retention of planning permission is sought is contrary to Policy P-NH1 of the development plan which relates to the preservation of views.
- The development for which retention of planning permission is sought is contrary to Policy P-LLM1 of the county development plan.
- The development for which retention of planning permission is sought is contrary to Policy P-AB1 of the county development plan in that the new farmyard would not be ancillary to the landholding.
- The new farmyard would access onto a deficient road network where there are deficiencies in sightlines serving the access.
- The appellant has not demonstrated that the site is suitable for a proprietary wastewater treatment system.

3.2. The decision of Westmeath County Council was the subject of a first party appeal. The Board upheld the decision of the Planning Authority for two reasons which are set out below.

- The agricultural need for the scale and extent of the shed structure and the ancillary works has not been demonstrated in terms of serving the agricultural holding. The size, scale and height of the shed would interfere with the character of the landscape and would therefore be contrary to P-NH1 and P-LLM1 of the county development plan.
- A second reason for refusal stated that the establishment of a new farmyard is considered inappropriate due to the deficiencies in the road network and the deficiencies in the sightline and accessing the public road. This decision was dated 25th May, 2016.

3.3. Subsequent to this Board decision a number of referral cases were submitted to the Board seeking declarations as to whether or not certain works were classed as development which required planning permission. Details of these referrals are briefly summarised below:

3.4. **RL 3510**

1. Whether the use of lands measuring 1.84 hectares at Twyford, Baylin, Athlone for agriculture is development or is or is not exempted development.

The Board concluded that the use of the subject lands for agriculture and parts of the lands for market garden would constitute development and would be exempted development under Section 4(1)(a) of the Act.

2. Whether use of parts of the lands at the subject site for the purposes of market gardening is or is not development or is or is not exempted development.

The Board concluded that the use of parts of the land for market gardening would constitute development and would be exempted development.

3. The provision of a building of 298.48 square metres at Twyford, Baylin is or is not development or is or is not exempted development.

And the Board concluded that the construction of a new building following the demolition and removal of the existing building on site would constitute

development and would come within the scope of Class 9, Part 3 of the Exempted Development Regulations provided that it complies with the conditions and limitations to which Class 9 is subject and in such hypothetical circumstances would be exempted development but not otherwise.

4. Whether the provision of an all-weather surface with a drainage bed for the training of horses at Twyford, Baylin, County Westmeath is or is not development or is or is not exempted development.

In respect of this question, the Board concluded that the provision of an all-weather surface with a drainage bed for the training of horses would constitute development if such an area was provided following the removal of the existing concrete hardstanding on the lands in question, it would come within the scope of Class 10, part 3 of the Second Schedule of the Regulations provided that it complies with the conditions and limitations to which Class 10 is subject. But if it used the existing concrete hardstanding on the lands for this purpose it would not come within the scope of Class 10 or any other provisions for this purpose it would not come within the scope of Class 10 or any other provisions and therefore would not be exempted development.

5. Whether the repair and improvement of a pre-existing private paved lane within the lands is or is not development or is or is not exempted development.

The Board concluded that the repair and improvement of pre-existing private lane within the lands in question would be development and provided that it does not involve works to the access from the lane onto the public road along the western boundary of the subject site would be exempted development but not otherwise.

6. Whether the provision of an internal wall within the new building would constitute development.

The Board concluded that the construction of an internal wall within the new building erected under the provisions of Class 9 of Part 3 of the Second Schedule of the Planning and Development Regulations 2001, with a gross

floor area of 298.48 square metres would be development and if this new building was itself exempted development and had been previously constructed and completed prior to the erection of such an internal wall would be exempted development but not otherwise.

1. **RL3559**

Whether the provision as part of a heating system for an agricultural building of a biomass boiler including a boiler house, flues on the boiler and over ground storage stand is or is not development or is or is not exempted development.

In respect of this question the Board concluded that the provision as part of a heating system for an agricultural building of a biomass boiler including boiler house flues on the boiler and an over ground storage tank on the lands in question would constitute development. Such a heating system would generally come within the scope of Class 18(e) of Part 3 of the Second Schedule of the Planning and Development Regulations. However, it is noted that there is no agricultural building in place on site other than the existing unauthorised building, in respect of which such a development would part of the heating system and as it has not been established that any future agricultural building, to which the proposed development would relate, would in itself be exempted development, the development in question would not be exempted development. Furthermore, in the basis of the documentation submitted it cannot be established that the various conditions and limitations can be complied with.

2. That the erection of a wall is or is not development or is or is not exempted development.

The Board declared that the erection of a wall would be development. If a new wall is proposed in this instance following the demolition and removal of the existing unauthorised building on site, then this would come within the scope of Class 11, Part 3 of the Second Schedule of the Planning and Development Regulations 2001 and therefore would be exempted development. However, if the wall involves removal of part of the existing structure on site leaving the

remaining structure as a wall then this would not come within the scope of Class 11 or any other provision and would not be exempted development.

3. The installation or erection on a wall, within the curtilage of an agricultural holding of photovoltaic solar panels is or is not development or is or is not exempted development.

The Board determined that the installation or erection of a wall of photovoltaic solar panels would constitute development. If these panels were installed or erected on a new wall referred to in the previous question and if this wall is itself exempted development then the installation or erection of solar panels would come within the scope of Class 18(c) of Part 3 of the Second Schedule of the Planning and Development Regulations 2001 and would therefore be exempted development. If the wall on which the solar panels are proposed to be installed or erected is not in itself exempted development, then the installation or erection of the solar panels would not be exempted development by reason of the restrictions on exemptions set out in Article 9(1)(a) of the Planning and Development Regulations 2001, as amended.

4. Whether or not the erection of a new 300 square metre structure for the purposes of housing a fully enclosed combined heat and power system would be development and would be exempted development.

The Board determined that the erection of a 300 square metre structure for the purposes of housing a full enclosed combined heat and power system would be development. Such development would come within the scope of Class 18(a) of Part B of the Second Schedule of the Planning and Development Regulations 2001 on the basis of the documentation submitted with the referral, it cannot be established that all the conditions and limitations to which the class is subject can be complied with and having regard to case law the onus for establishing that a development is exempted development is on the person claiming or seeking to avail of such exemption and therefore the development in question would not be exempted development.

The Board's decision was dated 24th July, 2018.

3.5. **RL3814**

A declaration was sought from the Board as to whether or not a development comprising of what the applicants assert are Class 6 Agricultural Shed and Class 9 Agricultural Shed at the subject site are or are not exempted development.

The Board determined in relation to this question that development comprising of what the applicants assert are a Class 6 Agricultural Shed and a Class 9 Agricultural Shed is development and is not exempted development.

4.0 **Planning Authority's Decision**

4.1. The referral was submitted to Westmeath County Council by the current owner/occupier Caroline Ganley on the 20th February, 2018 seeking a declaration on the following questions:

(i) Whether the surrounding soft area (ie grassed area) is or is not development.

(ii) Whether the hard surface area (ie the concrete yard) taken together with the soft area (ie grassed area) is or is not exempted development)

4.2. A report prepared by Westmeath County Council sets out the planning history as it relates to the site and the relevant planning legislation as it relates to the questions posed. Westmeath County Council in considering the questions before it, had particular regard to:

4.3. (a) the planning history of the site.

4.4. (b) Section 4(1) of the Planning and Development Act concluded that

4.5. (c) The High Court Decision of *The Irish Wild Bird Conservancy and the Commissioners of the Office of Public Works v Clonakilty Golf and Country Club*

4.6. And concluded that proposals 1-2 described above constitutes development which is not exempted development. Westmeath County Council decision was dated 16th March, 2018.

5.0 Current Referral

The Section 5 Referral was submitted by Liam Madden on behalf of the owner/occupier of the lands.

The submission states that the referral was submitted on foot of a number of enforcement notices and warning notices issued by the Council in respect of “a large shed” and “a concrete yard”.

It is the owner/occupier’s intention that what the Council calls a “concrete yard” be declared exempt development based on arguments set out in the referral. It is also requested that the presence or existence of soft areas (i.e. the grassed areas) declared not to constitute development it is argued that any land for the purposes of agriculture is enshrined as exempted development under Section 4(1)(a) of the 2000 Act without any conditions or limitations. It is stated that no works proprietary or otherwise are proposed for the grass area.

The hard surface “concrete yard” is exempted under Class 10 of Part 3 of the Planning and Development Regulation and complies with the four attached conditions and limitations under this Class. It is stated that the hard surface must be understood as part of a combination of hard and soft surface necessary for the rearing and training of the referrer’s race horses as well as being exempted under Section 4(1)(h).

The submission goes on to comment on the previous questions put to the Board under Referral RL3510 (the Board will note at the time of their owner/occupier submitting the current referral that the questions posed under Referral RL3510, RL3559 and RL3814 were not determined by the Board).

The referral goes on to set out a timeline in relation to the lands in question and reference is made to the fact that in 1993 a golf course project was proposed for the site. It was noted that in 1993 An Bord Pleanála determined that the golf course in question is not exempted development. The referral goes on to revisit questions that were put to the Board under previous referrals in relation to the proximity of houses etc. It is suggested that the Council has invented every possible obstruction to perfectly legal exempted development.

In relation to the first question before the Board it is stated that an open field with grass does not constitute works and therefore does not constitute development.

It is stated that the hard surface concrete area is an extension to the private lane and is exempted under Section 4(1)(h) and this view is supported by the Supreme Court finding in *Cairnduff versus O'Connell*. It is stated that the hard surface concrete area taken together with the surrounding soft area (i.e. the grassed area) obviously falls within Class 10 as it is used for the training of horses. The concrete area is accessed from the private lane and this is to allow for horses to disembark from the horse boxes to be trained. The concrete area is not an extension of the building on site and therefore it cannot be argued that the concrete area is an extension of the unauthorised development.

The referral goes on to comment on *Cronin (Readymix) Limited versus An Bord Pleanála* (2007) No. 144JR, and to *Cairnduff versus O'Connell* which assesses the definitions of "alteration" and "extension" as interpreted in the judgements. Details of both judgements are attached to the grounds of referral.

6.0 Relevant Legislation

6.1. Planning and Development Act 2000 (as amended).

Section 2 Definitions –

Agriculture "includes horticulture, food growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skin or fur or for the purposes of its use in the farming of land, the training of horses, the rearing of bloodstock, the use of the land as grazing lands, meadow land, osier land, market gardens and nursery grounds and agriculture shall be construed accordingly".

"Use" – In relation to land does not include the use of land for the carrying out of any works thereon.

Section 3 –

“*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 land of structures or other land.

“*Works*” – Works include any Act or operation, construction, excavation, demolition, extension, alteration, repair or renewal.

Section 4 Exempted Development

Section 4 states that the following shall be exempted development for the purposes of the Act.

- (a) Development consisting of the use of any land for the purposes of agriculture and development consisting of the use for that purpose of any building occupied together with the land so used.

6.2. **Planning and Development Regulations 2001 (as amended).**

Article 6(1) states that 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.

Class 10 – the erection of an unroofed fenced area for the exercising or training of horses or ponies, together with a drainage bed or soft surface material to provide an all-weather surface. The condition and limitation associated with this class of exempted development include:

1. No such structure shall be used for any purpose other than the exercising and training of horses and ponies.
2. No such area shall be used for the staging of public events.
3. No such structure shall be situated within 10 metres of any public road and no entrance to such an area shall be directly off any public road.
4. The height of any such structure shall not exceed 2 metres.

Article 9 – Restriction on Exemptions.

Article 9(1)(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.

7.0 Assessment

I recommend that the Board should dismiss the current referral before it on the following grounds:

The first question before the Board concerns a hypothetical question as to whether or not a grassed area (the size and location of which is not defined in the referral submitted) is or is not development. The presence of a grassed area does not involve any “works” as defined under the Act nor does it involve any change of use and therefore does not constitute development. If the Board agree that the presence of a grassed area does not constitute development the question is to whether or not exempted development classes apply is irrelevant. The referrer makes the point that no works, proprietary or otherwise are proposed for the grassed area. It is not appropriate in my view that where no defined works or change of use has taken place, that the Board should issue former declarations for such theoretical questions under the provision of Section 5 of the Act. Retaining a grassed area as is, does not come under the remit of the Planning and Development Acts.

In respect of the second question before the Board, this question relates to whether or not the concrete area taken in conjunction with the soft surface (i.e. the grassed area surrounding it) which is neither indicated or delineated on the drawings submitted, is development and if it is development whether or not it constitutes exempted development.

The current referral and in fact the previous referral under RL3510 argue that the concrete hardstanding area (together with the grassed area) would fall within Class 10, Part 3 of Schedule 2 of the Regulations, being an area used for the training of horses. My initial report produced on foot of the original site inspection under RL3510 stated that “currently the area comprises of a concrete apron and cannot be described as a drainage bed or soft surface material to provide an all-weather surface as required under Class 10, Schedule 2, Part 3 of the Exempted Development Regulations”.

On foot of my assessment of this particular question under RL3510, the Board conclude that the existing concrete hardstanding does not come within the scope of Class 10 or any other provision that therefore would not be exempted development. I have revisited the site for the purposes of the current referral and would reach the same conclusion with regard to the concrete apron. No works had been undertaken which would render the concrete apron and adjoining area as being classed as an area suitable for the training of horses that would come within the scope of Class 10. The applicant in the case of the current referral continues to argue that at the hard surface yard taken together with the surrounding soft area falls within Class 10 as it is used for the training of horses. Having regard to the fact that there has been no material change in circumstances I consider that the Board have already determined the question before it under RL3510.

On this basis, any reference to either *Cronin (Readymix) Limited versus An Bord Pleanála* or the *Cairnduff versus O'Connell* judgement is not relevant as it does not constitute a primary basis on which to determine the said question before the Board.

8.0 Appropriate Assessment

Having regard to the nature and scale of the proposed development and nature of the receiving environment together with the proximity to the nearest European site, no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

9.0 EIAR Screening Determination

On the basis of the information on the file, which I consider adequate in order to issue a screening determination, it is reasonable to conclude that there is no real likelihood of significant effects on the environment arising from the proposed development and an environmental impact assessment is not required.

10.0 Conclusions and Recommendations

Based on my arguments set out above therefore, I consider that the Board could dismiss the questions put before it in the referral for the arguments set out above. However, if the Board decide otherwise I recommend that the Board issue a determination as follows:

WHEREAS questions have arisen as to:

- (1) whether or not a grassed area surrounding a concrete apron adjacent to as said is or is not development and
- (2) whether the concrete area taken together with the surrounding soft surface (i.e. the grass area is or is not exempted development).

AND WHEREAS Caroline Ganley care of Liam Madden of Vitruvius Hibernicus, Convent Road, Longford requested a declaration on these questions from Westmeath County Council and the Council issued a declaration on the 16th day of March, 2018 deciding that both questions constitute development which is not exempted development.

AND WHEREAS Liam Madden on behalf of Caroline Ganley referred these questions for determination to An Bord Pleanála on 28th day of March, 2018.

AND WHEREAS An Bord Pleanála in considering the referral had regard to:

- (a) Sections 2 and 3 of the Planning and Development Act 2000, as amended.
- (b) Article 6 of the Planning and Development Regulations 2001, and in particular Class 10, Part 3 of the Second Schedule to the Planning and Development Regulations 2001, as amended.
- (c) The planning history associated with the site and in particular Question 4 of RL3510.

AND WHEREAS An Bord Pleanála in considering this referral in respect of Questions 1 and 2 has concluded that:

- (a) The grassed area surrounding the concrete apron does not constitute works under Section 2 of the Planning and Development Act and therefore does not constitute development.
- (b) The provision of an all-weather surface with a drainage bed for the training of horses would constitute development. If such an area was provided following the removal of the existing concrete hardstanding on the lands in question, it would come within the scope of Class 10 of Part 3 of the Second Schedule of the Planning and Development Regulations 2001, as amended, provided that it complies with the conditions and limitations to which Class 10 is subject. But if it used the existing concrete hardstanding on the lands for this purpose, it would not come within the scope of Class 10, or any other provisions and would therefore not be exempted 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:

- (a) The grassed area surrounding the concrete area does not constitute works and therefore does not constitute development.
- (b) The concrete area for the exercising and training of horses or ponies constitutes development which is not exempted development on the ground that it does not come within the scope of Class 10 or any other exempted development provisions under the Planning and Development Regulations 2000 as amended.

Paul Caprani,
Senior Planning Inspector.

17th September, 2018.