



An  
Bord  
Pleanála

## Inspector's Report ABP-303958-19 RL

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<b>Question</b>	Whether the provision of a landscaped amphitheatre space is or is not development or is or is not exempted development.
<b>Location</b>	The garden area of Powerscourt House Hotel, Powerscourt, Co. Wicklow.
<b>Declaration</b>	
<b>Planning Authority</b>	Wicklow County Council
<b>Planning Authority Reg. Ref.</b>	EX03/19
<b>Planning Authority Decision</b>	Is development and is not exempted development.
<b>Referral</b>	
<b>Referred by</b>	Sugarloaf Investment Property Holdings Limited.
<b>Owner/ Occupier</b>	Sugarloaf Investment Property Holdings Limited.

**Observer**

Ken Rohan

**Date of Site Inspection**

14<sup>th</sup> January 2021

**Inspector**

Paul O'Brien

## **1.0 Site Location and Description**

- 1.1.1. The site comprises an area described as an amphitheatre, located to the south east of the Powerscourt Hotel within Powerscourt Demesne, Enniskerry, Co. Wicklow. The Powerscourt Hotel is located to the southern side of the main avenue which connects Powerscourt House to the public entrance onto the R760 regional road.
- 1.1.2. As stated, the subject site is located to the south east of the hotel and access is limited to the site by either going through the hotel or around the side of the hotel. The site is located adjacent to a large, landscaped garden, a key feature of the hotel. A footpath provides a direct link from the hotel and its grounds and the amphitheatre.
- 1.1.3. The amphitheatre consists of a square area of artificial grass with a three step/terrace area to the north east section. The area measures 30 m by 30 m, providing for a total site area of 900 sq m. A small electricity power box is located to the eastern side of the site. The site is on a north east to south west orientation and looks out over an area of land that falls quickly away from the southern edge of the site. Surrounding lands primarily consist of mature forested areas that form part of the Powerscourt Lands.

## **2.0 The Question**

- 2.1.1. A question has arisen pursuant of Section 5 of the Planning and Development Act 2000 as amended as to 'Whether the provision of a landscaped amphitheatre space is or is not development or is or is not exempted development'.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

Wicklow County Council considered a question put to them as 'Whether works carried out to provide a landscaped amphitheatre space constitute exempted development' and considered that the works are development and are not exempted development within the meaning of the Planning and Development Act 2000 as amended.

### 3.2. Planning Report

The Planning Report refers to the development as a helipad/ amphitheatre and the development includes the provision of hardstanding/ artificial grass, terrace walls, pathway, and drainage. The development is for the holding of events and insufficient information has been provided in relation to the provision of surface water drainage works to facilitate this development.

The Planning Authority considered the declaration in accordance with the following legislation:

- Sections 2, 3 and 4 of the Planning and Development Act 2000 as amended
- Section 4(1)(h) of the Planning and Development Act 2000 as amended
- Article 6, 9 and 10 of the Planning and Development Regulations 2001 as amended
- Class 11, 13 and 33 of the Planning and Development Regulations 2001 as amended

The Planning Authority considered that the development took place on lands outside of the site boundary of the permitted hotel, on the site of a dense forest and was a material change of use, there is no exemption for such a development. It was then considered that the development did not come within the scope of Section 4(1)(h) of the Planning and Development Act as the stated works were not carried out to a structure. In addition, the Planning Authority considered that the development did not come within the scope of Class 33 of Part 1 of Schedule 2 of the Planning and Development Regulations as the development did not consist of the laying out or use of the original lands. The development of a terrace wall in excess of 1.2 m would not comply with Class 11 of the regulations. The filling and recontouring of lands to accommodate the development was also not exempt.

In conclusion, the Planning Authority decided that the works were development and were not exempted development.

## 4.0 Planning History

### 4.1. Site History

There is a long planning history associated with the development of the hotel and this information has been provided in the Planning Authority Report. The following are noted:

**P.A. Ref. 97/7282** refers to a June 1998 decision to grant permission for alterations to a previously approved 150-bedroom hotel, provision of foul drainage treatment works and all associated ancillary works.

**P.A. Ref. 05/4366** refers to a February 2006 decision to grant permission for 1695 sq m of new conference/ function area and other facilities at the permitted hotel.

Subsequent applications were for additional extensions and modifications to the hotel building and site. I note that the subject site lies outside of the development boundary of these applications.

**P.A. Ref. UD4891** refers to an Enforcement file in relation to unauthorised development that includes:

- The enlargement of the front garden area by circa 0.85 hectares and which includes the removal of trees and woodland.
- The provision of a raised platform area.
- The use of part of this extended garden area as a helicopter pad and 'amphitheatre' which is used for the holding of functions such as weddings, concerts, and outdoor cinema screenings.

## 5.0 Policy Context

### 5.1. Development Plan

5.1.1. Under the Wicklow County Development Plan 2016 – 2022, the subject site is not zoned and is located outside of the designated area of the Enniskerry Local Area Plan.

5.1.2. The Wicklow County Development Plan 2016 – 2022, designates the site as being located within an Area of Outstanding Natural Beauty (AONB).

## 5.2. Natural Heritage Designations

The site lies within Powerscourt Woods pNHA (Site Code 001768).

## 6.0 The Referral

### 6.1. Referrer's Case

The applicant, Sugarloaf Investment Property Holdings Ltd, have engaged the services of Tom Phillips + Associates to prepare this referral under Section 5 of the Planning and Development Act 2000 as amended.

The following points are made:

- The hotel and landscaped gardens were completed in 2007/ 2008. A square hardstanding area in the vicinity of the subject site, may have been used as a helipad but this use has not been used for such purposes since 2013 when ownership of the hotel passed to the applicant.
- The amphitheatre/ landscaping feature was developed to remove the eyesore of the redundant hardstanding area. The hardstanding was used for events and there is no intensification of use. The development of the amphitheatre consisted of a stone terraced area to the north of the hardstanding, the provision of planting along the boundaries and the resurfacing of the hardstanding to improve the overall look of this area. The resurfacing of the hardstanding is by way of artificial grass type material.
- No trees or planting were removed to provide the amphitheatre and it is used for events directly associated with the hotel and not for any independent use. It is also used as an open space/ ornamental garden associated with the hotel.
- The development is described as either an ornamental garden or landscaped garden throughout the referral report.
- The subject constitutes development as it involved the carrying out of works on this site.
- It is considered to be exempt under Schedule 2, Class 33(a) of the Planning and Development Regulations 2001 as amended. This class exempts development consisting of 'a park, **private open space or ornamental garden**,' from requiring

permission (applicant's emphasis highlighted in bold). Works were carried out to develop the landscaped space and for its use as a private open space and as an ornamental garden. The space is used for events associated with the hotel.

- It is also considered that the development is exempt under Section 4(1)(h) of the Planning and Development Act 2000 as amended as the works comprise the improvement of an existing hardstanding area and the external appearance has not changed to materially affect the structure, the character of the structure and does not impact on neighbouring structures.
- Appropriate Assessment is not required due to the nature, scale, and location of the site.
- Environmental Impact Assessment is not required as the development does not come within the threshold requiring EIA.
- Comment is made on the Wicklow County Council (WCC) declaration. WCC considered that the works do not come within the scope of Section 4(1)(h) as the works were not carried out to a structure. The applicant considers the gardens to be part of the structure. No levels were raised to create this development and the works do not affect the external appearance of the structure, the character of the structure and does not impact on neighbouring structures.
- The helipad was constructed at the same time as the hotel and its landscaped gardens and the site area has formed part of the hotel since then. The use of this site is associated with the hotel use.
- The loss of the woods to form this site took place during the development of the hotel. The applicant considers this open space/ landscaped area as part of the hotel gardens.
- Wicklow County Council reference to raising of grounds by more than 1 m contrary to Class 11 of the regulations is incorrect, as this only refers to such works within the curtilage of a house. Lands have not been raised or infilled as set out by WCC.

## 6.2. Planning Authority Comments

The Planning Authority have no further submission/ observation to make on the referral.

## 6.3. Observation

Ken Rohan of Charleville, Enniskerry has engaged the services of Future Analytics Consulting Limited (FAC) to prepare an observation on the referral prepared by Tom Phillips and Associates, and to support Wicklow County Council's declaration that the works are development and are not exempted development.

The following points are made in summary:

- The change in use from hard standing to amphitheatre will give rise to a material change in noise. Events in this location will give rise to such concerns.
- The site has been used as a helicopter pad, for the holding of functions including weddings, team building events, concerts and for outdoor cinema screenings.
- The holding of such events in this location will give rise to increased levels of noise in the valley and particularly evening time noise would impact on the residential amenity of the observer. The construction of the amphitheatre allows for an intensification of use of this area of land.
- The site is located outside of the site area of the approved hotel and did result in the loss of trees.
- Development outside of the hotel/ associated grounds would be unauthorised.
- The development is a separate structure to the hotel/ does not form part of the hotel structure, and therefore Section 4(1)(h) of the Act does not apply.
- The development has a negative impact on the Area of Outstanding Natural Beauty (AONB) and should not be considered as exempted development.
- Reference to an Irish Times article dated the 1<sup>st</sup> of February 2018 indicates that the use of this site is for more than just as an ornamental garden/ landscaped area. The development of the site allows for an intensification of use and would not come within the meaning of Class 33(a) of Schedule 2 of the Planning and Development Regulations 2001 as amended.



- The site has been fitted with high-speed broadband and a sound system is also available. The Irish Times article refers to the ability to hold a wedding here with seating for 240 people in the amphitheatre space.
- The observer reports that a tent/ marquee was in place on this site during the summer of 2018.
- The site has been raised in height – photograph from TripAdvisor indicates revisions to heights/ levels. The applicant refers to reprofiling of the site, this is considered by the observer to be similar to the changing of levels on the site.
- The terraced steps are not a wall and require planning permission.

In conclusion it is agreed with Wicklow County Council that the development is not exempt from requiring planning permission.

#### 6.4. **Planning Authority Comment on the Observation**

The Planning Authority have no comment to make on the received observation.

### 7.0 **Statutory Provisions**

#### 7.1. **Planning and Development Act, 2000 as amended**

**Section 2(1)**, the following are noted as relevant:

“land” includes any structure and any land covered with water (whether inland or coastal)

“structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and-

(a) where the context so admits, includes the land on, in or under which the structure is situate,

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal,

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

**Section 4 (1)** sets out development that is exempt from requiring planning permission and the following is relevant:

‘(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures’.

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

## 7.2. **Planning and Development Regulations, 2001 as amended**

**Article 6 (1)** states as follows:

‘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’.

### **Schedule 2**

#### **Part 1 – Exempted Development – General – Sundry Works**

##### **Development for amenity or recreational purposes**

##### **CLASS 33 –**

Description of Development

Development consisting of the laying out and use of land—

- (a) as a park, private open space or ornamental garden,
- (b) as a roadside shrine, or
- (c) for athletics or sports (other than golf or pitch and putt or sports involving the use of motor vehicles, aircraft or firearms), where no charge is made for admission of the public to the land.

## Conditions and Limitations

The area of any such shrine shall not exceed 2 square metres, the height shall not exceed 2 metres above the centre of the road opposite the structure and it shall not be illuminated.

**Article 9 (1)(a)** sets out the instances where development, to which Article 6 relates, shall not be exempted development for the purposes of the Act and the following are relevant:

‘(a) if the carrying out of such development would —

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,

### 7.3. **Previous Board References/ Referrals**

From an examination of the Board’s database of references/referrals, I cannot find any similar cases in relation to the provision of an amphitheatre.

RL2262 refers to a question as to ‘Whether the landing and taking off of a helicopter at the subject lands is or is not development’. This site was on the seaward side of Rock Road/Merrion Road, opposite Trimleston Avenue, Dublin 4. The Board decided that this was development and was not exempted development.

## 8.0 **Assessment**

### 8.1. **Background**

- 8.1.1. It should be stated at the outset of this assessment, that the purpose of the referral is not to determine the acceptability or otherwise of the landscaped amphitheatre in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development. Likewise, planning enforcement is a matter for the Planning Authority and does not fall within the jurisdiction of the Board.

8.1.2. From the planning history of the site and the information provided by the applicant, the Planning Authority and the observer, the following is the sequence of events:

- A hotel was granted permission on this site in the 1990s and a number of applications for modifications and alterations were lodged/ permitted.
- Sometime around 2007/ 2008, an area of land to the south east of the hotel was cleared and a square area of hardstanding provided. This was used as a helipad. This area of land was not within the red line boundary of the submitted planning applications made prior to this date.
- The applicant took control of the hotel in 2013 and confirms that the helipad was not used since this change in ownership.
- The hardstanding area was upgraded in 2017 to form an amphitheatre/ landscaped ornamental garden area.

## 8.2. **Is or is not development**

8.2.1. Having regard to Section 2(1) and Section 3(1) of the Planning and Development Act 2000 as amended, it is considered that the construction of an amphitheatre on this site, is development, within the meaning of the Act. Works on and over lands were required for the completion of the amphitheatre.

8.2.2. Consideration is given as to whether or not there has been a material change of use of the land. I cannot say with any certainty what the previous use of the land was prior to the provision of a hardstanding area/ helipad. From the available information, the only enforcement case refers to the development as a helipad/ amphitheatre and there appears to have been no enforcement case open in relation to the original development of the lands as a helipad/ hardstanding area. It is probable that the lands formed part of the open space/ grounds surrounding the hotel. The hotel is located within the grounds of Powerscourt and the overall lands have restricted access to members of the public.

8.2.3. From the available information, the change from hardstanding area to landscaped garden/ amphitheatre is a change of use. As a helipad, use would be limited to when helicopters were landing, taking off or parking on this site. The current use includes an amenity function, but the space is also used for events associated with the hotel that are not specific to an amenity use.

8.2.4. Following on from this change of use, it is clear that this development has resulted in a material change of use of the land. From the information submitted in support of the referral and the information provided in the letter of observation, it is clear that this amphitheatre is used for events that are specific to this location and provide for an intensification of use of this area of land. The newspaper article submitted in support of the observation indicates that this site can accommodate 240 people for wedding and other events. This is a specific use of the land which is not an amenity use. There is an intensification of use and which includes the use of sound equipment etc. and which is likely to impact on the character of the area.

### 8.3. Is or is not exempted development

- 8.3.1. The referral by the applicant includes reference to exempted development under Section 4(1)(h) of the Planning and Development Act 2000 as amended. I am satisfied that the development can be considered a structure in accordance with the definition under Section 2(1) of the Planning and Development Act 2000 as amended, as a structure is defined as a ‘..building, structure, excavation, or other thing constructed or made on, in or under any land’.
- 8.3.2. The development of the amphitheatre included the reprofiling of lands, the provision of a pathway around a square of land that is covered with artificial grass and the provision of a stepped/ terraced area. Section 4(1)(h) of the act allows for the ‘..improvement or other alteration of any structure..’.
- 8.3.3. The submitted referral by the applicant sets out the history of the site. The site was previously in use as a helipad by the previous owner of the hotel/ subject lands. Hardstanding was provided for this purpose and the current owner/ applicant confirms that it has not been used as a helipad since they took control of the hotel/ subject site in 2013. The development as described results in the hardstanding having been replaced with an area of artificial grass, surrounded by a pathway and a terraced area to the north east section. The previous use as a helipad did not have the benefit of planning permission. I note the decision on RL2262 with respect to the use of land for the landing and taking off, of helicopters.

- 8.3.4. Section 4(1)(h) only allows for development ‘..which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures’. The development of the amphitheatre, although described as a landscaped area, does take a different form to the rest of the gardens associated with the hotel. There is no doubt when on site, that the amphitheatre provides for a different use/ look to the rest of the amenity lands associated with the hotel.
- 8.3.5. The works carried out, have resulted in the alteration of the structure/ lands, for which no permission was received. As already reported, the use of this site is for more than purely amenity uses including for events/ functions and as such it does not come under Section 4(1)(h) of the Act as the works undertaken resulted in more than the ‘maintenance, improvement or other alteration of any structure..’. The development, and subsequent uses as an event space, is considered to be a development beyond what is exempt under Section 4(1)(h).

**8.4. Is or is not exempted development - Exemptions under Schedule 2 – Part 1 of the Planning and Development Regulations 2001, as amended:**

- 8.4.1. Article 6(1) of the Planning and Development Regulations 2001 as amended, provides for development that is exempt from requiring permission. These exempted developments are listed in Schedule 2 – Part 1 of the regulations. Included are limitations on the exempted development.
- 8.4.2. Reference is made to this development being exempt under Class 33 of the regulations – ‘ornamental garden..’. From the available information, this is more than an ornamental garden. The amphitheatre included the reprofiling of lands, the provision of a pathway around a square of land covered with artificial grass and the provision of a stepped/ terraced area. The information provided, from the observer in particular, indicates that this space is used for more intensive purposes than that outlined under Class 33. The permitted Class 33 uses are provided under the heading ‘Development for amenity or recreational purposes’; as described this development is for commercial uses that are not primarily associated with amenity or recreation purposes.

8.4.3. The development is therefore not exempt under Class 33 of the Regulations as the nature of the works and the subsequent uses on site exceed what is intended as an ornamental garden. There is a change of use of the land from an amenity function be that as a forest as described in the observation or as a section of the ornamental gardens associated with the hotel. The use of the site for events/ functions would result in a material change of use from amenity lands to uses that attract a significance attendance and which allow the hotel to extend the range/ variety of events that it can hold.

#### 8.5. **Consideration of EIA and AA under Section 4(4) of the Act**

8.5.1. The subject development does not come within the list of developments under Schedule 5 – Development for the purposes of Part 10 of the Planning and Development Regulations 2001 as amended, that would trigger a requirement for Environmental Impact Assessment.

8.5.2. Having regard to the nature and scale of the development and the location of the site and the separation distance to the nearest European site, no Appropriate Assessment issues arise, and it is not considered that the development would be likely to give rise to a significant effect individually or in combination with other plans or projects on an European site.

### 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 whether the provision of a landscaped amphitheatre space is or is not development or is or is not exempted development:

**AND WHEREAS** Sugarloaf Investment Property Holdings under Section 5 of the Planning and Development Act 2000, as amended, referred a declaration for review to An Bord Pleanála on the 15th day of March 2019:

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

- (a) Sections 2(1), 3(1) and 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (b) Article 6 and Class 33 of Schedule 1 of Class 1 of the Planning and Development Regulations, 2001 as amended and
- (c) the planning history of the site,
- (d) the pattern of development in the area:

**AND WHEREAS** An Bord Pleanála has concluded that the landscaped amphitheatre space,

- (a) Is development in accordance with Section 3(1), of the Planning and Development Act 2000 as amended,
- (b)** Does not fall within the scope of Section 4(1)(h), of the Planning and Development Act 2000 as amended, as the development comprised works that are not consistent with the site prior to the commencement of this development and constitutes a material change of use of the land,
- (c)** In, so far as the works element is concerned, does not fall with the scope of Class 33 of the Planning and Development Regulations 2001,
- (d)** as the development was carried out to an unauthorised development, which consisted of the provision of an area of hardstanding for use as a helipad, for which no permission was received.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Planning and Development Act as amended, hereby decides that the provision of a landscaped amphitheatre space on these lands, at the garden area of Powerscourt Hotel, is development and is not exempted development.



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Paul O'Brien  
Planning Inspector

18th February 2021