



An
Bord
Pleanála

Inspector's Report ABP-306111-19

Question

Whether the temporary provision and operation of a wake park on Kilrush Marina, Kilrush, Co. Clare, along with the use of the ground floor of Creek Lodge for reception/changing facilities, is or is not development and is or is not exempted development.

Location

Creek Lodge & Kilrush Marina,
Cappagh Road, Kilrush, Co. Clare

Declaration

Planning Authority

Clare County Council

Planning Authority Reg. Ref.

R1953

Applicant for Declaration

Clare County Council

Referral

Referred by

Clare County Council

Owner/ Occupier

Cruzo Adventure Ltd.

Observer(s)

None

Date of Site Inspection

20th March 2020

Inspector

Irené McCormack

1.0 Site Location and Description

- 1.1. The subject site is located at Cappagh Road, Kilrush. The site consists of part of the water within Kilrush Marina and a former activity centre located on the ground floor of the two-storey detached building know as Creek Lodge located to the south of Kilrush Creek. The wake park runs along a portion of Kilrush Creek.
- 1.2. The wake park consists of two legs positioned in the water which are temporarily anchored. A cable line runs between the two legs which pulls a rider on a wakeboard along the surface of the water. The wake line measures 181m between the two cables. The pylons measure 9.85m high (7.85m above water)
- 1.3. Kilrush marina is located to the west of the site. The marina is located in Kilrush Creek and is situated behind lock gates which protect and isolate the marina from the tidal influence of the Shannon Estuary.
- 1.3.1. Residential uses predominate to the north and south and give way to commercial uses associated with the town centre to the east. There are substantial areas of undeveloped ground and vacant buildings in the vicinity of the marina.

2.0 The Question

- 2.1. Clare County Council received a Section 5 declaration from Cruzco Adventures Ltd. on 11th October 2019. In accordance with Section 5 (4) of the Planning and Development Act 2000 (as amended) Clare County Council requests a declaration from the Board.
- 2.2. The question to the Board is:

Whether the temporary provision and operation of a wake park on Kilrush Marina, Kilrush, Co. Clare, along with the use of the ground floor of Creek Lodge for reception/changing facilities, is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

- 3.1. **Planning Authority Reports**
 - 3.1.1. **Planning Reports**
 - 3.1.2. The report of the Planning Officer is the basis for the referral. See section 6.1 below.

3.1.3. Other Technical Reports

None

4.0 Planning History

The site is located within the waters of the marina. However, there is no planning history associated with the water element of the site.

Relevant Planning History

Referral Ref. CCC R18-63 - Clare County Council determined the temporary provision and operation of an inflatable aqua park in Kilrush Marina to be exempted development.

ABP PL03 .244297 / CCC Reg. Ref. 14/3514– Permission granted in 2015 for a new marina pavilion building and associated infrastructure and works.

CCC Reg. Ref. 04/31028 – Permission granted for the change of use of first floor of Creek Lodge from holiday hostel granted to eight two storey town houses with entrances at first floor level.

CCC Reg. Ref. 95/1277 – Permission granted for a new building comprising restaurant, sail training activity centre, hostel. The permission amended 94/1228.

5.0 Policy Context

5.1. Development Plan

5.1.1. The relevant development plan is the Clare County Development Plan 2017-2023, Volume 3D West Clare Municipal District.

5.1.2. The site is located within the urban settlement of Kilrush.

The site is identified as opportunity site OP6 Former Harbour Restaurant.

OP6: Former Harbour Restaurant states:

This site lies at the mouth of the Wood River in Kilrush Creek Marina. The mixed use zoning on the site facilitates a wide range of uses and, in the context of its location, would favour various uses within the hospitality sector (including a restaurant), hostel-style development to facilitate school tours, water based activity centre and marine-related development that would add to the tourism product. Any proposals regarding this site must be accompanied by a Flood Risk Assessment (FRA) and

screening for appropriate assessment. The Council will seek to facilitate the future development of the marina in a comprehensive manner, in a form which complements the mixed use facilities in the town centre. The Council will actively pursue the re-use of the subject site during the lifetime of the Plan.

5.2. **Natural Heritage Designations**

The site is located 0.8km east of the Lower Shannon SAC (Site Code 002165) and River Shannon Estuaries SAP (Site Code 004077)

6.0 **The Referral**

6.1. **Referrer's Case (Clare County Council)**

The planning authority's submission dated the 6th November 2019 outlines the following:

- The report notes the relevant zoning provision as set out in the Kilrush Settlement Plan (Clare County Development Plan 2017-2023, Volume 3D West Clare Municipal District).
- The report sets out the planning history of the site and notes the referral history namely R18-63 whereby Clare County Council determined the temporary provision and operation of an inflatable aqua park in Kilrush Marina to be exempted development.
- The report states that a letter has been submitted from the owner of the marina water body (Kilrush Maritime Ltd.) stating they have no objection to the introduction of the wake park, and that it would not obstruct other users of the harbour.
- The report sets out the relevant statutory provisions reviewed and outlines details of the wake park and the associated use of the Creek Lodge building. The planning authority is generally satisfied that the use of Creek Lodge would not constitute development having regard to the established use.

Basis of Referral

- Notwithstanding, that a declaration has previously issued by the Planning Authority for an inflatable park, a declaration from the Board with regard the wake park is now being sought. Of particular relevance is the definition in the

Act of “land” and whether the works to the wake park, fall within “any land covered with water (whether inland or coastal)”, and whether in turn the works constitute development within the meaning of the Act.

6.2. **Owner/ occupier’s Case (as presented to Clare County Council)**

The owner/occupier’s submission dated 9th October 2019 outlines the following:

- The submission sets out the site location and a description of the development and notes that the site is not located in or adjoining a Natura 2000 site.
- It is set out that the site is firmly established for recreational use, primarily sailing but also canoeing, paddle boarding etc.
- It is set out that the Marina water and lands are privately owned and as such the works do not require a foreshore licence.
- The planning history is set out including declaration ref. R18-63 regarding aqua park.
- It is set out that the location of the wake part has been given careful consideration to ensure that the development will not disrupt any existing activities or infrastructure such as water access, slipways etc. The submission includes a letter from Kilrush Marina.
- The submission refers to the definition of “development”, “works” and “Land” as set out in the Planning and Development Act 2000 (as amended). It is set out that the wake park does not constitute development as defined in the planning act.
- Reference is made to exempted development under Class 37 - *Recreation of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended)*. For clarity, it is set out that the period of the wake park would exceed 15 days. It is further stated however that the development is not located on land and as such this exemption cannot be availed of.
- It is set out that the issues of a change of use only applies to the use of land in its ordinary sense and does not arise in relation to the use of water. It is set out that the established use of Kilrush marina is for recreational activity and

the proposed activity is consistent with the established use. It is submitted that no development occurs.

- In relation to the reception/changing facilities located in the ground floor of Creek Lodge. It is set out that this building has planning permission for a sail training activity centre and this activity centre includes a reception and changing facilities and the Council has previously determined in respect of the aqua park that no development occurs.

6.3. Further Responses

None

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. Section 2(1) of the 2000 Act states the following:

In this Act, except where the context otherwise requires –

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

“use”, in relation to land, does not include the use of the land by the carrying out of works thereon.

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...;

“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 this context so admits, includes the land on, in or under which the structure is situate...”.

7.1.2. Section 3(1):

In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land.

7.1.3. Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act. Section 4 (2) provides for the making of the Regulations.

Section 4 (1) (h) states - 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.

7.1.4. Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations 2001-2019.

7.1.1. Under section 32 of the Act there is a general obligation to obtain permission in respect of any development of land not being exempted development and in the case of development which is unauthorised for the retention of that unauthorised development.

7.1.2. Part XV of the Planning and Development Act 2000 relates to Development on the Foreshore and “foreshore” in section 224 has “the meaning assigned to it by the Foreshore Act 1933 but includes land between the line of high water of ordinary or medium tides and land within the functional area of the planning authority concerned that adjoins the first-mentioned land”.

7.1.3. Section 225 relates to the obligation to obtain permission in respect of development on foreshore and subsection (1) indicates,

“permission shall be required under Part III in respect of development on the foreshore not being exempted development, in circumstances where, were such development carried out, it would adjoin –

(a) the functional area of a planning authority, or

(b) any reclaimed land adjoining such functional area,

and accordingly, that part of the foreshore on which it is proposed to carry out the development shall for the purposes of making an application for permission in respect of such development be deemed to be within the functional area of that planning authority”.

7.2. **Planning and Development Regulations, 2001**

7.2.1. Article 6(1) of the Planning and Development Regulations 2001(as amended) (hereinafter ‘the 2001 Regulations’) provide 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'.

7.2.2. As provided for in Article 9(1)(a), the following development to which article 6 relates, shall not be exempted development, if the carrying out of such development would, inter alia:

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

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan

7.2.3. Article (10)

(1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not –

(a) involve the carrying out of any works other than works which are exempted development,

(b) contravene a condition attached to a permission under the Act,

(c) be inconsistent with any use specified or included in such a permission, or

(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised, and which has not been abandoned.

7.2.4. **Class 37 of Part 1 of Schedule 2 of the Planning and Development Regulations reads as follows –**

Column 1 Description of Development

Development consisting of the use of land for any fair, funfair, bazaar or circus or any local event of a religious, cultural, educational, political, social, recreational or sporting character and the placing or maintenance of tents, vans or other temporary or movable structures or objects on the land in connection with such use.

Conditions and Limitations

1. The land shall not be used for any such purposes either continuously for a period exceeding 15 days or occasionally for periods exceeding in aggregate 30 days in any year.
2. On the discontinuance of such use the land shall be reinstated save to such extent as may be authorised or required by a permission under the Act.

7.3. Other

Foreshore Act 1933

The foreshore of Ireland is classed as the land and seabed between the high water of ordinary or medium tides (shown HWM on Ordnance Survey Maps) and the twelve-mile limit (12 nautical miles equals approx. 22.24 Kilometres). Foreshore also covers tidal areas of rivers particularly estuaries.

Development on state or private foreshore adjoining the functional area of a Planning Authority require planning permission in addition to a foreshore consent.

7.4. Relevant Precedents

- 7.4.1. I have checked the Board database of referral files and I can find no previous referral decision relating directly to wake boarding facilities.

8.0 Assessment

Introduction

- 8.1.1. The issues central to the evaluation and recommendation to the Board in determining decision, having regard to the relevant legislative provisions and considered below are:

- Whether the development is within the functional area of a planning authority and/or requires a foreshore license.
- Whether the development is development and,

- Whether the development is or is not exempted development

8.1.2. It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the wake park at this location in respect to 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.

8.1.3. The question posed is whether ‘the provision and operation of a wake park on Kilrush Marina, Kilrush, Co. Clare, along with the use of the ground floor of Creek Lodge for reception/changing facilities, is or is not development and is or is not exempted development within the meaning of the Planning and Development Act, 2000 (as amended)’.

8.1.4. I note the need or otherwise for a foreshore licence is a separate process to the planning process.

8.2. **Whether the development is within the functional area of a planning authority and/or requires a foreshore license.**

8.2.1. The basis of the referral from the planning authority relates to the definition in the Act of “land” and whether the works to the wake park, fall within “any land covered with water (whether inland or coastal)”, and whether in turn the works constitute development within the meaning of the Act.

8.2.2. In defining whether the current proposal is within the functional area of the planning authority I note the following. In section 2 of the 2000 Act a “planning authority” means in the case of a county, exclusive of any borough or urban district therein, the council of the county and its “functional area” means, in relation to a planning authority in the case of the council of a county, its administrative county, excluding any borough or urban district. Foreshore in section 225 of the 2000 Act has the meaning assigned to it by the Foreshore Act, 1933, but includes land between the line of high water of ordinary or medium tides and land within the functional area of the planning authority concerned that adjoins the first-mentioned land.

8.2.3. Section 2(1) of the 2000 Act states “land” includes any structure and any land covered with water (whether inland or coastal).

8.2.4. Ireland's Marine Renewable Energy Atlas identifies the site hydrography between the Low-Water Mark (LWM) and the High-Water Mark (HWM). The functional area of the planning authority is above the high water of ordinary or medium tides. However, section 225 of the Act assigns the functional area land relating to development on the foreshore not being exempted development, in circumstances where, were such development carried out, would adjoin the functional area of a planning authority and for an obligation to obtain planning permission on such adjoining land which by the definition of land can be covered by water.

8.3. **Is or is not development**

8.3.1. The initial question that arises is, whether the operation of a wake park on Kilrush Marina, Kilrush, Co. Clare is or is not development. The second question relates to the whether the use of the ground floor of Creek Lodge for reception/changing facilities, is or is not development.

8.3.2. According to the owner/occupier the development is not located on land and the established use of the Kilrush Marina is for recreational activity and the activity is consistent with the established use and as such no change of use occurs as the development does not comprise "development" as defined in section 3 (1) of the act as no "works" as defined in section 2 (1) of the Act will be carried out.

8.3.3. The site has been determined to be within the foreshore area and Section 244 of the Act extends the functional area of the planning authority in relation to an area of the foreshore defined as 'foreshore' under the Foreshore Act 1933.

8.3.4. Accordingly, the construction of two 9.85m high (7.85m above water) pylons anchored in the water with ropes and weights and a motor powered cable line of 181m between the two pylons constitutes "development" within the meaning of Section 3 (1) of the 2000 Act, where 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.

8.3.5. In considering this I also have regard to the definitions in section 2(1) of the 2000 Act, where,

- “structure” means any building, structure, excavation or other thing constructed or made on, in or under land and includes the land on, in or under which the structure is situate.
- “works” includes any act or operation of construction and excavation and
- “land” includes any structure and any land covered with water (whether inland or coastal).

8.3.6. In this instance the fact that the proposal is located in an area currently covered with water does not remove any requirement within the definition of development. The proposed construction of two 9.85m high (7.85m above water) pylons anchored in the water and a cable line of 181m between the two pylons constitutes development.

8.3.7. The second question relates to whether the use of the ground floor of Creek Lodge for reception/changing facilities, is or is not development.

8.3.8. The permitted use of the ground floor of Creek Lodge includes a sail training activity centre with associated reception area and changing facilities (CCC Reg. Ref. 95/1277). The changing facilities and reception area proposed as part of the development relate the permitted sail training centre element of Creek Lodge only. No additional works are proposed. I further note that the planning authority previously considered the use of Creek Lodge for reception and changing facilities to be exempted development associated referral ref. Clare County Council R18-63 whereby Clare County Council determined the temporary provision and operation of an inflatable aqua park in Kilrush Marina to be exempted development.

8.3.9. I am satisfied that the use of Creek Lodge does not constitute “development” or “works” as defined in section 3 (1) and 2 (1) of the 2000 Act and the use is in accordance with the permitted use. This would not appear to be an issue, as the Planning Authority is in agreement with same.

8.3.10. Having regard to the above, it is my opinion that the use of the ground floor of Creek Lodge for reception/changing facilities does not constitute a material change in the use of this structure such that it would comprise development.

8.4. Is or is not exempted development

- 8.4.1. The main issue that arises is whether the wake park is or is not exempted development.
- 8.4.2. Class 37 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended) provides for development consisting of the use of land for any fair, funfair, bazaar or circus or any local event of a religious, cultural, educational, political, social, recreational or sporting character and the placing or maintenance of tents, vans or other temporary or movable structures or objects on the land in connection with such use subject to the following conditions and limitations.
1. The land shall not be used for any such purposes either continuously for a period exceeding 15 days or occasionally for periods exceeding in aggregate 30 days in any year.
 2. On the discontinuance of such use the land shall be reinstated save to such extent as may be authorised or required by a permission under the Act.
- 8.4.3. The owner/occupier in their submission state that the wake park would operate from 1st May- 31st September (five months) annually and the wake park will be removed for the months of Oct- April. Notwithstanding the temporary and demountable nature of the development the period of the wake park would exceed 15 days.
- 8.4.4. It is argued that the development is consistent with the established water based recreational use as a marina. In my opinion, the development will introduce an additional activity and will intensify the use at this location.
- 8.4.5. Accordingly, I conclude that the wake park is development and is not exempted development

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 temporary provision and operation of a wake park and the use of the ground floor of Creek Lodge for reception/changing

facilities, is or is not development and is or is not exempted development at Kilrush Marina, Kilrush, Co. Clare.

AND WHEREAS Clare County Council referred the question for decision to An Bord Pleanála on the 10th December 2019.

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

- (a) Sections 2, 3 and 4 and, Section 224 of the Planning and Development Act, 2000;
- (b) Articles 6 and 9 (1) (a) of the Planning and Development Regulations, 2001, and,
- (c) Class 37 of Part 1 of Schedule 2 to the said Regulations and the Conditions and Limitations to this Class.
- (d) the planning history of the site and the documentation submitted with the referral

AND WHEREAS An Bord Pleanála has concluded that –

- (a) The development is located within the area of the planning authority having regard to the provisions of Section 224 of Planning and Development Act, 2000.
- (b) The wake park constitutes works which would come within the scope of Section 3(1) of the Planning and Development Act, 2000 and Neither the Planning and Development Act, 2000, as amended, nor the Planning and Development Regulations, 2001, as amended, provide for the said use for a temporary period of five months to be exempted development.
- (c) The use of portion of Creek Lodge for reception and changing facilities does not come within the scope of the definition of “development” or “works” as defined in section 3 (1) and 2 (1) of the Planning and Development 2000 (as amended) as it was considered that the use of Creek Lodge does not constitute development as no material change of use is involved which would require a grant of planning permission.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Act (as amended), hereby decides that;

- (a) The wake park at Kilrush Marian, Kilrush, Co. Clare constitutes development that is not exempted development.
- (b) The use of a portion of Creek Lodge, Kilrush, Co. Clare for reception and changing facilities does not constitute development, accordingly, the issue of exempted development does not arise.

Irené McCormack
Planning Inspector

3rd April 2020