



An  
Bord  
Pleanála

## Inspector's Report ABP-307834-20

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<b>Question</b>	Whether the use of an existing breakwater is or is not development or is or is not exempted development
<b>Location</b>	Lough Allen Lodge, Tawlaght townland, Lough Allen, County Roscommon
<b>Declaration</b>	
Planning Authority	Roscommon County Council
Planning Authority Reg. Ref.	DED 402
Applicant for Declaration	Roscommon County Council
Planning Authority Decision	Refer to Board
<b>Referral</b>	
<b>Referred by</b>	Saskia de Jong
<b>Owner / Occupier</b>	Juergen Blomenkamp
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	30 <sup>th</sup> November 2020
<b>Inspector</b>	Colm McLoughlin

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## **1.0 Site Location and Description**

**1.1.** The referral site is located in a rural area of northeast County Roscommon along the shores of Lough Allen. The surrounding area is primarily characterised by lake waters and agricultural fields that are bordered by mature hedgerows and trees, interspersed with rural housing and farmsteads. The referral site accommodates a residential property, including a two-storey house, a single-storey garage, a screen wall and a refurbished stone boathouse. Fronting the boathouse is a private breakwater extending into the lake and a slipway alongside this leading into a boating access channel. The breakwater measures approximately 20m in length from the high-water mark, and is primarily formed by a line of large flat boulders placed on top of each other, hemmed against five round timber poles on the northern side and an armour rubble bank on the southern side. The breakwater structure connects into a low lakeside boundary retaining wall to the residential property. Vehicular access to the residential property is off the R280 regional road.

## **2.0 The Question**

**2.1.** In relation to this site, the following question of the referrer was put to the planning authority:

- 'is the existing breakwater development and if so, is it exempted development'.

**2.2.** Following a review of the submitted information and in the interest of clarity, it is considered appropriate that the question referred to the Board be reworded and addressed by the following question:

- whether the use of an existing breakwater, is or is not development or is or is not exempted development.

**2.3.** I intend to proceed with my assessment on the basis of the reworded question.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

- 3.1.1. Pursuant to subsection 5(3)(a) of the Planning and Development Act 2000, as amended (hereinafter referred to as 'the Act'), on the 4<sup>th</sup> day of August, 2020, the planning authority referred the question of the referrer for a decision by the Board.

### **3.2. Planning Authority Reports**

#### 3.2.1. Planning Reports

- None received.

#### 3.2.2. Other Technical Reports

- None received.

## **4.0 Planning History**

### **4.1. Referral Site**

- 4.1.1. The planning history associated with the referral site, includes the following planning applications:

- ABP ref. 306641-20 (planning reg. ref. PD/19/584) – permission granted by the Board in August 2020 for a private breakwater with floating jetty, the extension of an existing breakwater and the deepening of a boating channel;
- planning reg. ref. PD/14/401 – permission granted by the planning authority in February 2015 for amendments to the house extensions previously permitted under planning reg. ref. PD/14/78;
- planning reg. ref. PD/14/78 – permission granted by the planning authority in June 2014 for amendments and extensions to the house on site, the construction of a garage and a front porch, removal of an outbuilding, refurbishment of a boathouse building, a replacement wastewater treatment system and upgrading of the vehicular access.

## **4.2. Relevant Referrals**

4.2.1. The following referrals are considered relevant to this case:

- ABP Ref. PL10.RL3240 – in January 2015 the Board declared that the use of Kilkenny Airfield for sponsored parachute jumps is development and is not exempted development, as the activity gave rise to increased frequency of take-off and landing of aircraft, resulting in an intensification of use and noise impacts on residential property that might not have been anticipated in the original permission;
- ABP Ref. PL27.RL2970 – in December 2012 the Board declared that the use of agricultural lands by light aircraft (72 flight movements in 12 months) comprised a material change of use of the land and was not exempted development;
- ABP Ref. PL12.RL.2531 – in November 2008 the Board declared that an alteration of a jetty from three to four bays and the addition of a jetty to the south of an approved marina at Jamestown, County Leitrim, is development and is not exempt development;
- ABP Ref. PL09.RL.2175 – in November 2004 the Board declared that a manmade lake to be used for landscape and amenity purposes, including boating, at Ballinure, Rathangan, County Kildare, is development and is not exempt development.

## **5.0 Policy & Context**

### **5.1. Roscommon County Development Plan 2014-2020**

5.1.1. Section 7.4 of the Plan identifies Lough Allen as part of the Shannon inland waterway and includes objective 7.30 to preserve the appearance of such waterways and objective 7.32 to enhance public access to waterways. Chapter 9 of the Development Plan outlines development management guidelines and standards, including section 9.24.4, which addresses 'private harbours and jetties'. This section outlines that the planning authority will look to limit development of private harbours and jetties solely to appropriately-scaled refurbishment and the improvement of existing authorised works or works that have been historically in place since 1963.

## **5.2. Natural Heritage Designations**

- 5.2.1. The nearest designated European site to the referral site is the Cuilcagh-Anierin Uplands Special Area of Conservation (SAC) (Site Code: 000584), which is located approximately 4.1km to the east of the referral site. The nearest designated sites downstream from the referral site are the Lough Forbes Complex SAC (Site Code: 001818) and the Ballykenny-Fisherstown Bog Special Protection Area (SPA) (Site Code: 004101), which are both located approximately 35km to the south of the referral site, near Roosky village on the river Shannon.
- 5.2.2. Lough Allen South End and Parts proposed Natural Heritage Area (pNHA) (Site Code: 000427), includes four lakeside areas, the closest of which is approximately 2km to the east of the referral site on the opposite side of the lake.

## **6.0 Statutory Provisions**

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

- 6.1.1. Section 2(1) of the Act states the following:
- 'use', in relation to land, does not include the use of the land by the carrying out of any works thereon;
  - 'land' includes any structure and any land covered with water (whether inland or coastal);
  - 'development' has the meaning assigned to it by Section 3;
  - 'structure' means any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined;
  - 'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ....'
- 6.1.2. Section 3(1) of the Act states that:
- 'development' means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land'.

- 6.1.3. Section 4(1) of the Act sets out various forms of development that are exempted development. Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development.
- 6.1.4. Section 4(4) of the Act states that notwithstanding paragraphs (a), (i), (ia) and (l) of subsection 4(1) and any regulations under subsection 4(2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

## **6.2. Planning and Development Regulations 2001-2020**

- 6.2.1. Subject to restrictions under Article 9 of the Planning and Development Regulations 2001-2020 (hereinafter referred to as 'the Regulations'), Article 6(1) states that development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1. Part 1 of Schedule 2 to the Regulations specifies the following classes of exempted development of relevance to this referral:

- Class 35

Development consisting of—

(a) the carrying out by or on behalf of a statutory undertaker of any works for the maintenance, improvement, reconstruction or restoration of any watercourse, canal, river, lake or other inland waterway, or any lock, quay, mooring, harbour, pier, dry-dock or other structure forming part of the inland waterway or associated therewith, and any development incidental thereto,

(b) the erection or construction by or on behalf of a statutory undertaker of facilities required in connection with the operation, use or management of a watercourse, canal, river, lake or other inland waterway.

- Class 54

Reclamation of an area, not exceeding 100 square metres, of foreshore for the purpose of protecting a pier, slipway or other structure on the foreshore.

- 6.2.2. Relevant restrictions to development under Article 9 include those that:

- (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;
- (viiB) in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site;
- (viiC) would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000;
- (x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility
- (xi) obstruct any public right of way.

6.2.3. Article 10(1) of the Regulations states that development, which consists of a change of use within one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, subject to specific restrictions.

## **7.0 The Referral**

### **7.1. Referrer's Case**

7.1.1. The referrer's submission was received by the planning authority on the 6<sup>th</sup> day of July, 2020, and was accompanied by a site location map and a Section 5 Declaration Form. The submission can be summarised as follows:

- the referrer and others have a right to hunt fauna over the foreshore area of Lough Allen;



- the existing breakwater was not in situ when the owner of the adjacent residence, known as Lough Allen Lodge, purchased this property;
- any person is entitled to ask a referral question of the planning authority under Section 5 of the Act.

## **7.2. Owner / Occupier's Response**

7.2.1. The owner / occupier's response to the referrer's submission can be summarised as follows:

- Juergen Blomenkamp is the owner of the referral site;
- an extension of the existing breakwater has been recently permitted by the Board under ABP ref. 306641-20, which addressed many of the issues raised by the referrer, including rights to carry out the development and the historical existence of a breakwater and an associated boathouse in this location;
- the slipway and original breakwater formed part of the original mooring attached to the immediately adjoining boathouse dating from the mid-19<sup>th</sup> century, which was rebuilt in 2013;
- the referrer has failed to provide any evidence to substantiate their claims regarding the breakwater or the restriction of access to the lands/foreshore;
- the breakwater amounts to a private and established mooring facility.

## **7.3. Observations**

7.3.1. None received.

## **7.4. Further Submissions**

7.4.1. Following consultation by An Bord Pleanála with Waterways Ireland, no response was received.

## **8.0 Assessment**

### **8.1. Introduction**

- 8.1.1. The purpose of this referral is not to determine the acceptability or otherwise of the matters raised 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 within the meaning of the relevant legislation.

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

- 8.2.1. The referrer asserts that the subject breakwater did not exist prior to the acquisition by the present owner / occupier of the adjacent residential property in 2012 and that there is no planning permission for this breakwater. The referrer appears to be claiming that works were undertaken to construct the breakwater after 2012 and that this would conform to development. From the outset, I have not been made aware of an enforcement notice or unauthorised development relating to this breakwater.
- 8.2.2. Following submission of the subject referral on the 4<sup>th</sup> day of August, 2020, planning permission was granted by An Bord Pleanála on the 24<sup>th</sup> day of August 2020 under ABP ref. 306641-20 (planning reg. ref. PD/19/584) for an extension of the subject breakwater, as well as an additional private breakwater with a floating jetty and the deepening of a boating channel. I visited the site in November 2020 and these permitted works had commenced. Within this previous application and appeal, details submitted by the owner / occupier of the adjacent residence stated that the subject breakwater was in existence in 2013, although it had been in need of repair at this time, as it had not been used in the preceding years. As referenced in the Inspector's report for this previous appeal, Ordnance Survey Ireland (OSi) aerial photography identifies a physical feature situated in the same location as the present breakwater between 2013 and 2015. OSi maps dating back to the mid-19<sup>th</sup> century, identifies various 'piers', 'quays' and 'landing places' along the lakeshore, including a 'coal quay' at the referral site location. Historically there appears to have been a quay in this location, which may or may not have included a breakwater structure. The evidence available suggests that a breakwater has been in existence since

between 2013 and 2015 and in the same location as the subject breakwater. While I am not aware of planning permission for the existing breakwater, the referrer has not provided any substantive evidence of when works took place to construct the existing breakwater, including whether or not this took place before or after the enactment of the Local Government (Planning and Development) Act 1963. Consequently, I am not aware of any works having taken place to this breakwater feature within the meaning of the Act.

- 8.2.3. The definition of 'development' in the Act includes the 'making of any material change of use of any structures or land' and it would appear to me that the referrer is primarily concerned with the use of the existing of the breakwater, and whether or not this use would require planning permission. In this situation, the onus of proof is on the referral party to prove that a material change of use of the breakwater has occurred and in this regard there is a need to consider whether there has been a substantive change from the established use of the subject breakwater and its existing use. Case law has dictated that various tests can be applied to determine whether or not a change of use is material in planning terms, including whether the character of the uses are patently different, whether issues raised by the change of use would raise matters that would normally be considered by a planning authority if it were dealing with an application for planning permission, including whether different effects would arise.
- 8.2.4. The breakwater is of modest scale and would appear to be primarily suitable for limited recreational use, possibly involving the mooring of boats. As highlighted above, substantial works between 2013 and 2015 and the present do not appear to have taken place to enable a substantive increase in the use of the breakwater, such as the additional mooring of boats, an extended timeframe for usage of the facility, the mooring of larger boats or the use of the breakwater for other reasons ancillary to the enjoyment of the adjacent residence. I am satisfied that evidence of a material change of use of the breakwater from its previous use and its present use has not been provided or identified, and as a result 'development', within the meaning of Section 3 of the Act, does not arise.

### **8.3. Is or is not exempt development?**

- 8.3.1. While I am satisfied that development does not arise based on the question presented and my assessment above, for comprehensiveness and should the Board consider otherwise, I also consider whether 'exempted development' would or would not arise, particularly based on the provisions set out within Articles 5, 6, 9 and 10 of the Regulations. There is no class of development in Part 1 of Schedule 2 of the Regulations that would exempt the construction of a breakwater, other than when this is undertaken by or on behalf of a statutory undertaker. Waterways Ireland was engaged with respect to this referral and they have not outlined whether or not the breakwater was constructed by them or on their behalf. Furthermore, no other parties to this referral have stated that works were undertaken by or on behalf of a statutory undertaker. Consequently, if it had not been proven to be development, I am satisfied that there is no provision in the Act or the Regulations, by which the existing breakwater would have constituted exempted development.

## **9.0 Appropriate Assessment**

- 9.1.1. Having regard to the absence of development on 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 have a significant effect individually or in combination with other plans or projects on a European site.

## **10.0 Recommendation**

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

**WHEREAS** a question has arisen as to whether the use of an existing breakwater at Lough Allen Lodge, Tawlaght townland, Lough Allen, County Roscommon, is or is not development or is or is not exempted development:

**AND WHEREAS** Saskia de Jong requested a declaration on this question from Roscommon County Council on the 6<sup>th</sup> day of July, 2020:

**AND WHEREAS** Roscommon County Council referred this declaration for review to An Bord Pleanála on the 4<sup>th</sup> day of August, 2020:

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

- (a) Sections 2, 3 and 4 of the Planning and Development Act 2000, as amended,
- (b) the planning history of the site,
- (c) the pattern of development in the area,
- (d) the submissions on file from the referrer and the stated owner / occupier of the subject residential property:

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) historical mapping of the site indicates the existence of a quay and associated infrastructure in this location during the mid-19<sup>th</sup> century, while there is also evidence of a physical feature existing in the same position as the subject breakwater since 2013-2015 and;
- (b) substantive evidence of works to this breakwater or a material change of use of this breakwater conforming to development within the meaning of Section 3 of the Planning and Development Act 2000, as amended, has not been provided or identified.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the Planning and Development Act 2000, as amended, hereby decides that the use of the existing breakwater at Lough

Allen Lodge, Tawlaght townland, Lough Allen, County Roscommon, is not development.

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Colm McLoughlin  
Planning Inspector

22<sup>nd</sup> December 2020