



An  
Bord  
Pleanála

## Inspector's Report ABP-309893-21

### Question

Whether the relocation of ESB Substation is or is not development or is or is not exempted development.

### Location

The Dean Hotel, No 80 Prospect Hill,  
No 82,84 & 86 Bohermore Galway  
City.

### Declaration

Planning Authority

Galway City Council

Planning Authority Reg. Ref.

P/DC/3/3/21

Applicant for Declaration

Advance Vision Ltd

Planning Authority Decision

Is not exempted development

### Referral

Referred by

Advance Vision Ltd

Owner/ Occupier

Advance Vision Ltd

Observer(s)

Francis O'Brien & Others

Date of Site Inspection

10<sup>th</sup> September 2021

**Inspector**

Colin McBride

## **1.0 Site Location and Description**

- 1.1. The appeal site is located a short distance north east of Eyre Square and on the eastern side of Prospect Hill. The appeal site is occupied by a Hotel Structure currently under construction. Adjoining structures to the north include two-storey terraced dwellings and to the south a two-storey structure with retail at ground floor and residential above. To the south east of the site is a housing development, Forster Court consisting of single-storey dwellings.

## **2.0 The Question**

- 2.1. Whether the relocation of ESB Substation is or is not development or is or is not exempted development.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

- 3.2. Galway City Council were requested to determine whether work to relocate a substation is or is not development or is or is not exempted development. The City Council determined on the 11<sup>th</sup> March 2021 that relocation of the substation would constitute development and is not exempted development.

### **3.3. Planning Authority Reports**

#### **3.3.1. Planning Reports**

Planning report (11/03/21): The alterations in question result in re-arranging parking spaces and omission of tree planting and would contravene condition no. 1 of permission reference no. 17/41. In relation to Class 41(e) of the Planning and Development regulations relating to carrying out of development in compliance with a condition attached to a fire safety certificate it is noted that these works have been carried out in advance of determination of the fire safety certificate and this exemption would not apply retrospectively. The relocation of the substation to a location on site where there is potential for an overbearing impact on the adjoining

dwelling. It was determined the works in question are development and are not exempted development.

## **4.0 Planning History**

4.1 17/41: Permission granted for construction of a hotel.

## **5.0 Policy Context**

### **5.1. Development Plan**

The relevant Development plan is the Galway City development Plan, 2017-2023.

### **5.2. Natural Heritage Designations**

None in the vicinity.

## **6.0 The Referral**

### **6.1. Referrer's Case**

A referral was submitted by Advanced Vision Limited.

- It was discovered that the permitted location of the substation could interfere with fire tender emergency access and such necessitates a relocation of such. The relocation of substation for this purpose can be considered under Class 41(e) of the Planning and Development Regulations. On the basis that a new fire cert is granted the relocation of substation can avail of the Class 41(e) exemption.
- The minor nature of relocation of the ESB substation which is itself a minor ancillary structure can be considered de minimis. It is considered that minor deviation between the permitted and existing location of the substation is de minimis.
- The associated revisions to the site layout along the south-eastern boundary of the site are not a material change to the established permission on site. In

response to Planning Authority concerns the referrer has submitted an updated layout providing for boundary screening.

## **6.2. Planning Authority Response**

### **6.2.1 Response by Galway City Council**

- The response reiterates the Council's position and notes that at the time of the response no revised fire safety certificate has been approved and Class 41 cannot apply retrospectively.
- The Council do not accept that the works in question are de minimis with potential physical impact on adjoining property in Forster Court.
- The Council reiterate their position that works in question constitute development and is not exempted development.

## **6.3. Further Responses**

### **6.3.1 Observation from Francis O'Brien & Others, Forster Court, Galway.**

- The observation is from 8 residents of the housing of Forster Court located to the west of the site.
- The works in question contravene condition no. 1 of ref no. 17/41 as its relocation of the substation structure and a reduction in the number of parking spaces from 13 to 8 as a result of the alteration. The works in question are contravention of a condition and is not exempted development under the provisions of Article 9(1) of the Planning and Development regulations. There were a number of other requiring agreement and submission of plans and all plans submitted to comply with these conditions (5, 9, 13 and 15) show the substation in its permitted location.
- The observation questions the relevancy of Class 41(e) in regards to the works in question and notes that Class 29 (relocation of substation) does not apply as the size is much greater than the limitation of the exemption.

- The observers refer to a different case, *Horne v Freeny* to argue the works cannot be deemed to be exempt. The observers refer to a referral case concerning relocation of a house that was deemed to be development and not exempted development (RL2632) as well as appeal case ref no. ABP-302356-18.

#### 6.3.2 Response by the referrer to the observation.

- The provision of Condition no. 1 are broad and generic and not designed to prevent exempted development with the example given of the exertion to a house under the provisions of the exemptions for such.
- Condition no. 14 of ref no. 17/41 relates to car parking and that the parking provision on site can be agreed in writing with the Planning Authority prior to the commencement of development.
- The referrer reiterates that the *Marry v Connaughton* Case is relevant in this case.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

#### Section 2(1)

“Works” includes any act or operation of construction, excavation, demolition, extension, alterations, repair or renewal and .....

Section 3 provides definition of Development. 3(1) In this Act “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

Section 4 provides for Exempted Development 4(1) The following shall be exempted developments for the purposes of this act (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.

4(2) (a) The minister may by regulations provide for any class of development to be exempted development for the purposes of this Act

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

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.

Article 9(1) states that development to which article 6 relates shall not be exempted development for the purposes of the Act— (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,

### Schedule 2 Part 1 Exempted Development General

#### CLASS 41

Works consisting of or incidental to—

(e) the carrying out of development in compliance with a condition or conditions attached to a fire safety certificate granted in accordance with Part III of the Building Control Regulations, 1997 other than the construction or erection of an external fire escape or water tank, or

## **8.0 Assessment**

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

- 8.1.1. Firstly the question is whether the works in question constitute development. The definition of works under Section 2 of the Act includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. The definition of 'development' under Section 3 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. The proposal entails relocation of an ESB substation from its permitted location. The structure in question has an area of 34sqm and a height of 3.214m. The substation is relocated 6.576m south east from its permitted location. The relocation of substation has impact on the permitted car parking layout. The list of works that are entailed would require a level of construction on land and I would conclude that this is development in accordance with Section 3 of the Planning and Development Act, 2000 (as amended)

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

- 8.2.1 The referrer indicates that the works in question are exempted development based on two factors. That the works in question is the carrying out of development in compliance with a condition or conditions attached to a fire safety certificate granted in accordance with Part III of the Building Control Regulations, 1997 other than the construction or erection of an external fire escape or water tank" and that works are required to facilitate fire access. The Planning Authority are of the view that the works are not exempted development in this regard as they have been carried out in advance of a fire safety certificate being granted and the exemption does not apply retrospectively. The referrer is of the view that now the fire safety certificate is granted they can avail of this exemption. Based on the information on file a fire safety certificate was granted for the development on the 13<sup>th</sup> of December 2020 and such did not include a condition that required relocation of the substation. The relocation of the substation appears to be prompted by concerns that the permitted



location of the substation could obstruct fire tender access. The works were carried out and a new fire cert was applied for after the fact.

8.2.2 I would note that the referrer did not supply a copy of the fire safety certificate (referral was submitted prior to applying for such) so it can't be determined what condition the works in question comply with and I do not have access to copy of such. The works in question were carried out on site at the time of the determination of the declaration and prior to the granting of a fire safety certificate including a condition that required to works in question. As noted earlier the original fire safety certificate granted did not have a condition requiring this change based on the information provided on file. I would be of the view that Class 41 does not apply as the works in question were carried out prior to the granting of a fire certificate or provision of a condition to be complied with. As noted above the Board have not been furnished with a fire safety certificate or details of the condition to which this change refers.

8.2.3 The referrer also notes that the works in question could be considered de minimis. There is no clear definition what constitutes de minimis works. In this the case the works in question involve relocation of a structure on site, which has a physical scale consisting of a 34sqm structure with a height of 3.414m. The referrers cite a legal case (Marry v Connaughton) in which alterations were considered de minimis as the development enacted substantially complied with the permission granted. The issue with determining what is de minimis or what is not is there is no clear definition of standard and that this essentially is a discretionary approach. In this case the proposal entails relocation of a physical structure on site from its permitted location. I would consider that change is a material change and given its location within in a built up area and on site with neighbouring properties including residential development the works in question could not be determined to be de minimis.

8.2.4 I would note that the referrer states that revised landscaping and boundary proposals are included to compensate for its relocation closer to existing residential development. This aspect cannot be taken into account as it appears to be

measures to compensate for the altered physical impact of the works in question. I would consider that works in question are material alterations and that such cannot be determined to be a de minimis alteration. Under the provision of Article 9(1) it states that development to which article 6 relates shall not be exempted development for the purposes of the Act— (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. Condition no. 1 of ref no. 17/41 requires works to be carried out in accordance with the permitted plans. The proposal does contravene this condition and the works as in question do not fall into a class of exemption as set out under the Planning and Development Regulations, 2001 (as amended).

## 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 relocation of ESB Substation is or is not development or is or is not exempted development.

**AND WHEREAS** Advanced Vision Ltd requested a declaration on this question from Galway City Council and the Council issued a declaration on the 11<sup>th</sup> day of March, 2021 stating that the matter was development and was not exempted development:

**AND WHEREAS** Advanced Vision Ltd referred this declaration for review to An Bord Pleanála on the 07<sup>th</sup> day of April, 2021:

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

Section 2(1) of the Planning and Development Act, 2000, as amended,

Section 3(1) of the Planning and Development Act, 2000,

Section 4(1)(a) of the Planning and Development Act, 2000, as amended,  
Article 6(1) and Article 9(1) of the Planning and Development Regulations,  
2001, as amended,  
Parts 1 and 3 of Schedule 2 to the Planning and Development  
Regulations, 2001, as amended,  
the planning history of the site,  
the pattern of development in the area:

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

- (a) The relocation of ESB Substation is development as defined under Section 3 of the Planning and Development Act, 2000 (as amended).
- (b) The works in question constitute a material change would not be exempted development under Article 9(1)(a)(i) of the Planning and Development Regulations, 2001 (as amended) as the works in question contravene condition no. 1 of ref no. 17/41.
- (c) The works in question do not fall under Schedule 2, Part 1, Class 41 Planning and Development Regulations, 2001 (as amended).

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the relocation of ESB Substation is development and is not exempted development.

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Colin McBride  
Planning Inspector

15<sup>th</sup> September 2021