



An
Bord
Pleanála

Inspector's Report ABP-309922-21

Question

Whether works for the completion of apartments to be used for the care of protected persons and all related services/facilities is or is not development or is or is not exempted development.

Location

The Rock Centre, Ballinamore, Co. Leitrim.

Declaration

Planning Authority

Leitrim County Council

Planning Authority Reg. Ref.

ED 21-03

Applicant for Declaration

Liam Madden on behalf of Ciaran Smyth.

Planning Authority Decision

Is not development

Referral

Referred by

Liam Madden on behalf of Ciaran Smyth.

Owner/ Occupier

Remcoll 2 Limited.

Observer(s)

None.

Date of Site Inspection

10th of March 2022.

Inspector

Stephanie Farrington

1.0 Site Location and Description

- 1.1. The referral site is located to the southeast side of Ballinamore town centre in Co. Leitrim. The site currently comprises a two-three storey mixed-use development, including upper-level residential use and ground-floor retail and commercial uses.
- 1.2. The development is currently served by two surface-level car parks on the northeast side and the rear of the main building, as well as a basement car park. The upper-floor residences are accessed via a gated stairs off the Ballinamore Bypass and served by a management and security suite. The apartments are own door units and served by a central courtyard amenity area.

2.0 The Question

- 2.1. The following questions are raised
 - (i) Whether works to complete the then incomplete apartments for use as mere apartments;
 - (ii) Whether works to complete the then incomplete apartments for the reception and care of those seeking international protection i.e. protected persons;
 - (iii) Whether the use of the completed apartments for the reception and care of protected persons i.e. a material change of use from typical apartments and;
 - (iv) The use of the now complete apartments for non-paying tenants together with relates facilities e.g security office, doctors/nurses' station, pharmacy, food store, the ordering of tenants' food by way of food coupons, provision of mental health services and therapy rooms for tenants, transport to/from the Centre acknowledged by the developer to be an Asylum Centre for the reception and care of those seeking International Protection (ors. Protected persons) instead of use as a typical apartment block at The Rock Centre, Ballinamore, Co. Leitrim.

Is or is not development and/or is or is not exempted development

3.0 Planning Authority Declaration

3.1. Declaration

Leitrim County Council issued a declaration on the 31st of March 2021 stating that:

- (i) Works to complete the then incomplete apartments for use as mere apartments, come within the scope of Section 40 of the Planning and Development Act 2000, as amended and do not come within the scope of Section 5 of the Planning and Development Act as amended. Nonetheless, the subject works are considered to constitute development but are exempted development within the provisions of Section 4 (i) (h) of the Planning and Development Act 2000 as amended.
- (ii) Works to complete the then incomplete apartments for the reception and care of those seeking international protection i.e protected persons, come within the scope of Section 40 of the Planning and Development Act 2000 as amended and do not come within the scope of Section 5 of the Planning and Development Act 2000, as amended. Nonetheless, the subject works are considered to constitute development but are exempted development within the provisions of Section 4 (i) (h) of the Planning and Development Act 2000 as amended.
- (iii) The use of the completed apartments for the reception and care of protected persons i.e. a material change of use from use as typical apartments does not constitute a change of use in the manner provided for at The Rock Centre, Ballinamore and therefore does not constitute development.
- (iv) The use of the now complete apartments for non-paying tenants together with related facilities e.g. security office, doctor's/nurses station, pharmacy, food store, the ordering/provision of tenants' food by way of food coupons, provision of mental health services and therapy rooms for tenants, transport to/from the Centre acknowledged by the developer to be an Asylum Centre for the reception and care of those seeking international protection (ors. Protected persons) instead of use as a typical apartment block, at the Rock Centre Ballinamore, Co. Leitrim in the manner provided

for at the Rock Centre, Ballinamore does not constitute a change of use from the permitted use of the 25 no. apartment units and therefore does not constitute development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

Senior Executive Planner's Report (21/02/2021)

The initial planner's report recommends that a request is issued to the owner of the development seeking clarification in relation to the use of the apartment building and adjoining commercial units. The following provides a summary of the key points raised:

- The report refers to the planning history of the site and the Section 5 Declaration issued under PA Ref 19.31, ABP Reference 307077-20.
- Reference is made to the High Court Judicial Review (2019/16 JR) between Narconon Trust and An Bord Pleanala and the Judgement issued in respect of same.
- The planner's report addresses the questions being asked within the subject declaration in the context of those which have previously been asked. The report seeks to identify if there are any new or changed planning facts or circumstances, which will identify whether Leitrim County Council are being asked the self-same question at a later point than the first.
- In terms of the questions posed within Questions 1,2, and 3 the planner's report concludes that there are no new or changed planning facts or circumstances in respect of the question posed under PA Ref ED19.31, ABP 307077-20. LCC therefore consider that the same question is being asked.
- In terms of Question 4, the planner's report outlines that while this question makes reference to the use of the development as addressed under the previous declaration, the question and submitted documentation introduces new or changed alleged planning facts and circumstances which require to be addressed before the question is answered.

- Question 4 makes reference to non-fee paying tenants – this is considered wholly irrelevant to the use of the apartments. The referral also makes reference to an acknowledgement by the developer of the use of the development as an Asylum Centre for the reception and care of those seeking International Protection- (ors. “protected persons”). This matter has been covered in Part (i) of ED 19.31 where it was determined that this use was development and exempted development and that a change of use has not taken place. Any transport to and from the centre is a matter outside of the remit of the Planning Authority and one which is solely for the operator.
- Question 4 makes reference to related facilities including: a security office, doctor’s/nurse’s station, pharmacy, food store, the ordering/provision of tenant’s food by way of food coupons, provision of mental health services and therapy rooms for tenants.
- The rewording of the original questions by ABP posed by Mr. Madden under PA Ref: ED 19.31, ABP- 307077-20 is a matter for An Bord Pleanala and not Leitrim County Council.
- The requester makes reference to an Affidavit to the High Court which he has submitted. The PA sought advice from the High Court as to whether or not it is appropriate to have the contents of High Court Affidavit. The responses received confirmed the following:
 - Only parties to a case before the High Court can obtain copies of documentation filed in said manner.
 - Affidavits are not publicly available, and the office (High Court) could not make them available to LCC.
- The Planning Authority is satisfied that giving consideration to such documents is not advisable in this instance and will not form part of the assessment. The PA acknowledges that the apartments are being used as a Centre for the Reception and Care for those seeking international protection. This has been accepted in ED 19.31. The planning authority is satisfied that

no change in use has occurred and therefore does not constitute development.

- An expanded use of residential apartments for other uses may constitute a change of use. The Planning Authority must establish that an ancillary use has not taken place. It is noted that the apartments are within a complex which has planning permission for other uses, some of which are part of the list of related facilities. However clarity is required in this regard. As the referrer is not in ownership of the property, clarity would be required from the property owner.
- The report recommends that additional information is requested from the registered owner of the property. The report recommends that the owner is requested to submit a detailed submission to the Planning Authority, to include a comprehensive statement as to whether there are ancillary services being provided which are directly associated with the accommodation being provided in the residential units subject to the Section 5.

Senior Planner's Report

The following provides a summary of the points raised within the planner's report dated the 31st of March 2021:

- Reference is made to the initial planner's report. Clarification in relation to the use was required in order to determine whether any change of use had occurred or is occurring in a residential unit.
- The Planning Authority wrote to Remcoll 2 Limited on the 22nd of February requesting the following information:
 - Clarification if ancillary services are being provided which are directly associated with the accommodation.
 - Clarification if ancillary or associated services are being carried out in the residential units or in any other commercial unit in the premises.
- The PA requested a response from Remcoll 2 Limited by the 17th of March 2021. No response was received within this timeframe. The planners report cross refers to email correspondence received from the Remcoll 2 Limited on the 29th of March 2021. The following response was provided:

- The ancillary services that are provided by Townbe Unlimited Company for the accommodation centre include a dedicated food store for exclusive use by residents of the accommodation centre. Residents are given food tokens by IPAS (International Protection of Asylum Seekers) that allows them to exchange tokens for domestic consumables and personal hygiene.
- There are no ancillary or associated services being carried out in the residential units 1 to 25. The sole purpose of the residential units are for living accommodation by those who are here on international protection within the state. Unit 26 is used as an office and security services hub for the operators of the provision centre.
- Other services provided within the building based on the ground floor include a supermarket, an independent greengrocer and hairdresser. There is a pharmacy and café which received planning and will be opened in due course. These are used by both those in international protection and the public.
- A site inspection of the premises was carried out by an Executive Technician in LCC on the 25th of March 2021 and a comprehensive report was prepared. The report prepares confirms that no apartment is in use for anything other than residential purposes. The use of unit 26 is in accordance with that permitted under PA Ref: 07/585. The issue of the ground floor unit being used for a storage area in which goods are being provided to residents of the apartment in exchange for vouchers is not of relevance to the questions asked to the PA. The use of the ground floor unit for commercial purposes as a food store would require planning permission as the unit has been sub-divided. It does not form part of the residential component of the development. The use of the commercial unit will be referred to the Enforcement section to pursue.
- The planner's report concludes the following in respect of the questions posed:
 - Question 1 and Question 2: works are exempted development

- Question 3: No change of use has occurred. The use does not therefore constitute development within the meaning of the Act.
- Question 4: The Planning Authority has established that the use of Unit 26 was permitted as an office/business use. The use of this unit as an office/security hub is considered to comply with the permitted use. The PA are satisfied that the 25 no. apartments which are permitted for residential use are being used only for residential use. No change of use has therefore taken place which would require planning permission.

3.2.2. Other Technical Reports

Enforcement Officer (25th of March 2021)

The report includes details of a site inspection carried out on the 24th of March 2021 in respect of Item 4 (the use of the apartments). The report confirms the following:

- A unit on the first floor is being used as an administrative office for the apartments to provide various supports to the residents of the apartments. Permission was granted for the use of this unit as an office/business unit under PA Ref.04/1546. Support services including medical and therapeutical services are provided from this unit as and when necessary. This would be considered consistent with the permitted office use.
- There is no pharmacy operating at the property. A pharmacy has recently been granted planning permission under PA Ref:19/255 (ABP Ref. 306621-20). Works associated with this permission have not commenced.
- A small food store is operating in one of the units to the rear of the centre. This serves the residents of the apartments and does not trade with the general public. The unit was originally permitted as an office/business unit under PA Ref. 04/1546. The shop does not encompass the entirety of the unit and constitutes sub-division of the permitted unit. The parent permission for the unit includes a condition which restricts the change of any authorised uses without the written agreement of the Planning Authority or grant of permission as may be appropriate. It is considered that the sub-division of the unit constitutes a material alteration and would require planning permission.

- The provision of a medical/health facility where the provision of such facility is by means of the sub-division of a larger unit constitutes development and is not exempted development.
- The report refers to the requirements for Fire Safety and Disability Access Certificates for the shop and medical/health facility.

4.0 Planning History

4.1. Referral Site

The following planning history relates to the referral site:

- Leitrim County Council (LCC) Ref. P04/1546 – a ten-year permission was granted by LCC in June 2005 for a supermarket with a service yard, five retail units, two office units, 21 residential units, a crèche and play area, 141 parking spaces and a car showroom.
- LCC Ref. P05/544 – permission was granted in November 2005 by the Planning Authority for revisions to the parent permission LCC Ref. P04/1546 primarily comprising revised elevations and floor areas to the retail and commercial units, as well as revisions to provide for 22 residential units in total.
- LCC Ref. P07/585 – permission was granted in January 2008 by the Planning Authority for revisions to the parent permission LCC Ref. P04/1546 primarily providing for an increased ground floor area, six additional retail and four additional office units at first floor, a total of 25 residential units, change of use of crèche to residential unit and an increased ground-floor area.
- ABP Ref. 306621-20 (LCC ref. P19/255) – permission was granted by ABP in June 2020 for a change of use of a retail unit to a pharmacy.
- ABP Ref. 306577-20 (LCC ref. P19/254) – permission was granted by ABP in June 2020 for a café and alterations to the entrance area.

- ABP Ref. 306549-20 (LCC ref. P19/243) – permission was granted by ABP in June 2020 for a three-storey office building over the existing basement structure on the northeast end of the site.

Referral History:

ABP Ref: 307077-20 (LCC Ref: ED 19-31)

Whereas a question arose as to whether -

- (a) the use of previously incomplete and abandoned apartments, as apartments,
- (b) the change of use of previously incomplete and abandoned apartments to use for the reception and care of protected persons, and
- (c) the works to complete the previously incomplete and abandoned apartments, in order to use the apartments for the reception and care of protected persons,

at The Rock Centre, Ballinamore, County Leitrim, is or is not development or is or is not exempted development. The Board issued a decision by order dated 4th of January 2021 in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, that the use of the premises at The Rock Centre, Ballinamore, County Leitrim as apartments, including residential accommodation for protected persons, is not development.

4.2. Relevant Referrals

The following decisions are also of relevance:

- ABP Ref. 301688 – in February 2019 the Board decided that the conversion of the premises at Nos.57, 59 & 61 Cabra Road (Protected Structure), Dublin 7 to a supported homeless accommodation facility is development and is exempted development;
- ABP Ref. PL68.RL2685 – in May 2010 the Board decided that the change of use of the first and second floors of a hotel at Nos.58 & 59 Main Street, Longford, to a hostel to accommodate refugees is development and is not exempted development;

- ABP Ref. PL79.RL2503 – in August 2008 the Board decided that the refurbishment and change of use of a residential unit at 56 Mitchel Street, Thurles, County Tipperary, for use as emergency accommodation for not more than six persons deemed to be homeless is development and is exempted development;
- ABP Ref. PL11.RF0969 – in April 2001 the Board decided that the change of use of a convent in Stradbally, County Laois, to accommodate refugees and/or asylum seekers is development and is not exempted development.
- ABP–301055–18 and ABP–301064-18 - Ballivor County Meath: These applications relate to the same site and the same subject matter, whether the change of use of a permitted Nursing Home (permitted under TA/140621) to a residential drug rehabilitation facility is or is not development or is and is not exempted development. Following the Board’s determination on both referrals the site owner, Norconon Trust, brought judicial review proceedings against the Board’s determinations (2020, IEHC25 and 2021, IECA307).

Of relevance to the current referral, the Court of Appeal ruled that, ‘in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority’s determination’ the Board is precluded from determining a Section 5 referral.

5.0 Policy Context

5.1. Development Plan

The site is located within the administrative boundary of Leitrim County Council. The Leitrim County Development Plan 2015-2021 (as varied and extended) is the statutory plan for this area.

Ballinamore is identified as a tier 2A settlement within the CDP. The site is zoned for ‘Mixed-use’ purposes.

Objective OBJ 7 of the Plan seeks the development of lands zoned 'Mixed Use' for commercial residential, health, community, educational, cultural, retail and related uses. The site and surrounding area does not have any conservation status.

The Housing Strategy appended to the County Development Plan outlines that Leitrim County Council will work with voluntary organisations and other government agencies, in ensuring accommodation is available to all. The Development Plan also notes that persons continue to move to the County for housing, economic and refugee purposes.

5.2. **Natural Heritage Designations**

The nearest designated sites to the referral site is the Cuilcagh - Anierin Uplands Special Area of Conservation (SAC) (Site Code: 000584), which is located approximately 6.9km to the northwest of the development site.

6.0 **The Referral**

6.1. **Referrer's Case**

The referral is made by Liam Madden on behalf of Ciaran Smyth, High Street, Ballinamore, Co. Leitrim. The following provides a summary of the key points raised.

- Cross reference is made to a copy of the development company's Director's Affidavit to the High Court in which the development is fully explained.
- Reference is made to the Inspectors Report in a previous referral under ABP Ref: 307077-20 in which the development was described as being no different to a typical block of apartments. This conclusion is stated as being absurd. The wording of the questions has been modified.
- The original parent permission PA Ref: 04/1546 as amended by PA Ref: 07/858 authorised in total 25 no. apartments. It did not authorise security office, doctor's/nurse's station, pharmacy, food store, the ordering of tenant's food by way of food coupons, provision of mental health services and therapy rooms for tenants.

- Any exemption cannot not apply to change of use of the apartments authorised by parent permission 04/1546 by virtue of Condition 1 of that permission. Articles 9 and 10 of the Planning and Development Regulations expressly provide that change of use, material or otherwise, from use as apartments to any other use would “contravene a Condition attached to the permission under the Act” or “be inconsistent with any use specified in a permission under the Act”. Reference is made to Condition no. 1 of 04/1546 in this regard.
- Reference is made to Article 9 (a) (vii) which refers to “a structure the use of which is an unauthorised use”. In this regard reference is made to a Warning Letter of 2008 citing non-compliance with Conditions 2-12 of parent permission 04/1546.
- The developer formally acknowledged and conceded to the High Court that the apartments were in use as an Asylum Centre for “protected persons”.

6.2. Planning Authority Response

Leitrim County Council submitted a response to the Referral. The following provides a summary of the key points raised:

- The contents of the submission raises no new issues from that submitted and considered under ED 21-03. The Planning Authority wishes to reiterate the following points further to the reports from the Senior Executive Planner (21/02/2021) and Senior Planner (31/03/2021) as they relate to support the decision.
- Question 1: The Planning Authority note that An Bord Pleanala have already determined that the provision of these works do not come under Section 5 of the Act. LCC is not satisfied that any new information or arguments have been presented which requires a reconsideration of this determination by the Board. Had the submitter not being satisfied with the decision of the Board they had recourse to seek a Judicial Review of this decision. The PA is satisfied that the works are considered exempted development within the provisions of Section 4(i)(h) of the Planning and Development Act (2000) as amended.

- Question 2: The question posed is not a hypothetical or generic question. It is a specific question in relation to the operation of the residential apartments within the Rock Centre in Ballinamore and to the manner in which residential accommodation is being provided to applicants seeking international protection within the state. The Planning Authority reiterates that they rely on the response from the Department of Justice and Equality in March 2020 under ED 19.31 stating that it is intended that the apartments “will provide residential accommodation to applicants seeking international protection within the state”. The PA reiterates that they do not consider that the occupation and use of the 25 no. residential units is for any other purpose than residential use. There is no material difference in the question being posed in Question no. 1 and Question no. 2. The opinion of the Planning Authority is the same to both questions as a result. The works constitute development but are classified as exempted development.
- Question 3: The Planning Authority reiterates that the apartments are being used for residential purposes. There is no requirement under Planning Legislation to consider the tenure of such residential use with the exception of short stay accommodation within defined Rent Pressure Zones, of which there are none in Co. Leitrim. The Planning Authority remain to consider that no change in use has occurred. The use does not therefore constitute development within the meaning of the Act.
- Question 4: The Planning Authority has established that the authorised use of unit 26 at first floor level was permitted as an office/business use. The use of this unit as an office/security services hub by the company who operates the provision of residential accommodation to applicants seeking international protection within the state is considered to comply with the permitted use of this unit. The use of part of the ground floor commercial unit as a food store would be considered to require a separate planning application as the unit has been subdivided. However, this is not within the residential component of the Rock development. The planning authority remain to be satisfied that the 25 no. apartments which are permitted for residential use are being used only for residential use. No change of use has therefore occurred which would require planning permission. In this regard it is stated that it does not constitute

development. The question raises a number of issues which are not relevant to the consideration of a Section 5 Declaration of Exemption application. The use of the commercial unit has been referred to the Enforcement Section in Leitrim County Council.

- The Planning Authority restate the conclusions of the Section 5 Declaration issued.

6.3. Owner/ occupier's response

- None received.

6.4. Further Responses

Department of Justice:

Correspondence from the Department of Justice outlines that a number of functions have been transferred from the Department of Justice to the Department of Children, Equality, Disability, Integration and Youth in October 2020. The transfer of functions includes the International Protection Accommodation Services (IPAS) and the International Protection Procurement Service (IPPS) which offers and procures accommodation and related services to persons seeking international protection in the State. The responsibility of the issues raised rests with the Minister for Children, Equality, Disability, Integration and Youth. The correspondence has been issued to this department.

Department of Children, Equality, Disability, Integration and Youth

No correspondence received.

Referrer's Response to Leitrim County Council's submission

Liam Madden provided a response to Leitrim County Council's submission on behalf of the referrer. The following provides a summary of the key points raised:

- The submission refers to Leitrim County Council's reference to the previous Section 5 referral ED-19-31 and outlines that any person may request a determination where a question arises as to whether a proposal comprises development.

- The referrer in ED-19-31 is not the same person as the current referrer.
- The questions posed in the subject referral are not the same as those posed in ED-19-31.
- It is stated that Leitrim County Council is wrong in asserting that the referrer in ED-19-31 could have sought a High Court Judicial Review of the decision. The JR does not address aesthetics or the planning determination/per se.
- The submission outlines that the Planning Authority cannot legally determine its own determination. The submission outlines that the case is a referral and not an appeal as referred to in Leitrim County Council's correspondence.
- The submission cites the differences between Question 1 and Question 2.
- The determination by An Bord Pleanála under ED 19-31 is incorrect as the Inspector stated that the apartments were no different from a typical apartment block.
- Leitrim County Council's submission acknowledges the difference between short stay apartments and long-term apartments. Asylum seekers are short stay and care assisted.
- It is clear that the centre is not used as a typical apartment block.
- The submission refers to unauthorised development within the complex which is acknowledged by the planning authority.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000, as amended

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

- 'development' has the meaning assigned to it by Section 3;
- 'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal

7.1.2. Section 3(1) 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’.*

7.1.3. Section 4(1) of the Act sets out various forms and circumstances in which development is exempted development for the purposes of the Act, including Section 4(1)(h) providing for the carrying out of works for the maintenance, improvement or alteration of any structure that only affect the interior of the structure, or which do not materially affect the external appearance so as to render it inconsistent with the character 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 2001-2020.

7.1.5. Section 40 of the Act places limits on the duration of a permission and these limits shall not apply following the expiration of the appropriate period, under subsection (2)(a)(iii):

- in the case of a house, shop, office or other building which itself has been completed, in relation to the provision of any structure or works included in the relevant permission and which are either necessary for or ancillary or incidental to the use of the building in accordance with that permission.

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

7.2.1. Part 2 EXEMPTED DEVELOPMENT Article 5 provides the following interpretations for this Part-

“business premises” means—

(a) any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons,

(b) a hotel, hostel (other than a hostel where care is provided) or public house,

(c) any structure or other land used for the purposes of, or in connection with, the functions of a State authority;

“excluded premises” means—

- (a) any premises used for purposes of a religious, educational, cultural, recreational or medical character,*
- (b) any guest house or other premises (not being a hotel or a hostel) providing overnight guest accommodation, block of flats or apartments, club, or boarding house, or,*
- (c) any structure which was designed for use as one or more dwellings, except such a structure which was used as business premises immediately before 1 October, 1964 or is so used with permission under the Act;*
 - ‘care’ means personal care, including help with physical, intellectual or social needs.*

“house” does not, as regards development of classes 1,2,3,4,6,(b) (ii), 7 or 8 specified in column 1 of Part 1 of Schedule 2, or development to which articles 10(4) or 10(5) refer, include a building designed for use or used as 2 or more dwellings or a flat, an apartment or other dwelling within such a building.

‘protected person’ –

- (a) a person who has made an application to the Minister for Justice and Equality under the Refugee Act of 1996 or the Subsidiary Protection Regulations 2013 (S.I. No. 426 of 2013),*
- (b) a person who falls to be considered or has been considered under section 3 of the Immigration Act of 1999, or*
- (c) a programme refugee within the meaning of section 24 of the Refugee Act of 1996.*

7.2.2. Article 6(1) of the Planning and Development Regulations 2001-2020 (hereinafter referred to as ‘the 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’.

7.2.3. Schedule 2 of Part 1 to the Regulations relates to “Exempted Development – General” and sets out the classes of exempted development, including ‘Class 14’ allowing for ‘development consisting of a change of use’:

- (h) from use as a hotel, motel, hostel, guesthouse, holiday accommodation, convent, monastery, Defence Forces barracks or other premises or residential institution providing overnight accommodation, or part thereof, or from the change of use specified in paragraph (i) of the said premises or institution, or part thereof, to use as accommodation for protected persons,
- (i) from use as a hotel, motel, hostel, guesthouse, holiday accommodation, convent, monastery, Defence Forces barracks or other premises or residential institution providing overnight accommodation, or part thereof, or from the change of use specified in paragraph (h) of the said premises or institution, or part thereof, to use as an emergency reception and orientation centre for protected persons’.

7.2.4. Article 9(1)(a) relates to “Restrictions on Exemption”. This outlines that 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;
- (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.

7.2.5. Article 10 relates to Changes of Use. This outlines that: *“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”.*
(2) (a) A use which is ordinarily incidental to any use specified in Part 4 of Schedule

2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.

7.2.6. Part 4 of the Second Schedule to the Planning and Development Regulations, 2001, as amended, “*Exempted development – Classes of Use*” includes the following definitions:

Class 2 includes for:

Use for the provision of –

(a) Financial services

(b) Professional services (other than health or medical services)

(c) Any other services (including use as a betting office)

Where the services are provided principally to visiting members of the public.

Class 3:

Use as an office, other than a use to which class 2 of this Part of the Schedule applies.

Class 8:

Use

(a) as a health centre or clinic or for the provision of any medical or health services (but not the use of the house of a consultant or practitioner, or any building attached to the house or within the curtilage thereof, for that purpose),

(b) as a crèche,

(c) as a day nursery,

(d) as a day centre.

7.3. Other Legislative Definitions

A person who has made an application to the Minister for Justice and Equality for a declaration under Section 8 of the Refugee Act, 1996 is defined as ‘a person who arrives at the frontiers of the State seeking asylum in the State or seeking the

protection of the State against persecution or requesting not to be returned or removed to a particular country or otherwise indicating an unwillingness to leave the State for fear of persecution'. Section 3 of the Immigration Act, 1999, includes those 'persons whom the Minister proposes to make a deportation order in relation to or whom has been notified of same'. A 'programme refugee' is defined in the Refugee Act, 1996, as 'a person to whom leave to enter and remain in the State for temporary protection or resettlement as part of a group of persons has been given by the Government and whose name is entered in a register established and maintained by the Minister for Foreign Affairs, whether or not such person is a refugee within the meaning of the definition of refugee'.

8.0 Assessment

8.1. Introduction

8.1.1. The purpose of this referral is to determine whether or not the matters in question constitute development, and if so fall within the scope of exempted development within the meaning of the relevant legislation.

8.1.2. The referral to the planning authority is accompanied by a range of information including:

- A cover letter which addressed the recent planning and development history of the referral site,
- Completed Section 5 Referral form,
- Details relating to a High Court Case pertaining to the referral site including affidavits,
- Memorandum of Agreement relating to contracts for using part of the referral site,
- A copy of An Bord Pleanála Order and Inspectors Report issued under ABP Ref: 307077-20,
- A map with the landholding identified.

8.2. **Background- The Board's Jurisdiction to Determine Items (i), (ii) and (iii) of this Referral**

8.2.1. At the outset in considering the subject matter of the referral, I refer to the planning and referral history pertaining to the site as summarised in Section 4. The declaration issued by An Bord Pleanala under ABP Ref: 307077-20 is of particular relevance to the subject matter of the referral particularly in respect of questions (i) to (iii) which are detailed below.

- (i) Whether works to complete the then incomplete apartments for use as mere apartments
- (ii) Whether works to complete the then incomplete apartments for the reception and care of those seeking international protection i.e. protected persons
- (iii) Whether the use of the completed apartments for the reception and care of protected persons i.e. a material change of use from typical apartments

8.2.2. Each of the questions raised relate to the completion and use of the 25 own-door apartments accessed at first-floor level in the subject development. These residential units were initially the subject of a grant of planning permission in 2005 under LCC ref. P04/1546 and were subject of revisions that were permitted under LCC ref. P05/544 in 2005 and LCC ref. P07/585 in 2008.

8.2.3. Having reviewed the documentation submitted in support of the referral and also the site's referral history, it is my view that a key issue to be addressed at the outset is the Board's jurisdiction to make a decision on this referral, with reference to the *Narconon Trust v An Bord Pleanala* judgement, where An Bord Pleanala made a determination on a similarly worded Section 5 Referral under PA Ref: 307077-20 in January 2021.

8.2.4. In *Narconon Trust v An Board Pleanala* (2021, IECA 307), the Court of Appeal granted an order of *Certeorari*, quashing two decisions made by the Board under Section 5 of the Act, whereby the Board decided that a change of use from a nursing home development to a residential drug rehabilitation facility is development and is not exempted development. In its conclusion, the Court stated as follows: -

“The Board was precluded from determining a section 5 referral in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority’s determination. It had jurisdiction to receive the referral and to commence its determination. Once it became apparent that the question referred was the same, or substantially the same, and in respect of the same land, and that there was no evidence of any change in the planning facts or circumstances, it ought to have concluded that: the referral by the notice parties amounted to an impermissible attack on the 2016 declaration, which, in substance, amounted to questioning the validity of the section 5 declaration other than by way of s. 50; that such a challenge is prohibited by s. 50(2); and that for the Board to proceed further to determine the referral on the merits amounted to facilitating a breach of s. 50(2) and was, accordingly, ultra vires.”

8.2.5. This judgement is important to the subject referral as it requires two issues to be addressed by the Board prior to a determination being made: (1) Is the question referred the same, or substantially the same, and in respect of the same land and (2) Has there been any change in the planning facts or circumstances since the previous determination was made.

(1) Is the question referred the same, or substantially the same, and in respect of the same land:

8.2.6. At the outset I confirm that the referral relates to the same landholding i.e. apartment development at The Rock, Ballinamore, Co. Leitrim. The Cover Letter sets out the basis for the Referral. This alleges that the An Bord Pleanala conclusions and order issued under ABP Ref: 307077-20 are flawed. It is stated that the purpose of the request is to eliminate the uncertainties and procedural irregularities in the Order (307077-20) without the necessity of a High Court Judicial Review. The referrer identifies the following flaws in the decision:

- The referrers three questions were re-worded and there was a slight nuance in meaning;
- There was an error in the assessment viz. Section 40 of the Act;
- The Board reached only 2 conclusions where 3 questions were posed;
- The Board made an order in only one of 3 questions posed;
- Contradiction between the second conclusion and the order;

8.2.7. The cover letter outlines that the pivotal issue under 307077-20 is that the Inspector held that the apartments in The Rock, Ballinamore were no different from a typical block of apartments. The referrer asserts that this conclusion is irrational and not based on the evidence submitted in support of the referral.

8.2.8. On foot of the Board's assessment under ABP Ref. 307077-20, reworded questions are posed. In terms of the differences between the previously determined referral and the subject referral it is stated that all reference to abandonment of the parent permission (PA Ref: 04/1546) is omitted. The rationale stated for this amendment is that if there has been no material change of use abandonment doesn't arise. If there has been a material change of use then the development is unauthorised.

8.2.9. In my view, the questions posed within the referral relate to the completion of the apartments and their use for protected persons. In my view, the questions posed are substantially the same as those adjudicated under ABP Ref: 307077-20.

(2) Has there been any change in the planning facts or circumstances since the previous determination was made;

8.2.10. Having reviewed the contents of the file submitted under ABP Ref: 307077-20 and the subject referral file it is my view that there has been no change in information submitted to the Board. There have been no changes to the planning facts or circumstances in the interim period since the previous determination was made.

8.2.11. Therefore, in the context of the Narconon Trust v An Bord Pleanala judgement, it is my opinion that the Board is precluded from making a determination on items (i) to (iii) of this referral. The Board has previously made a determination that the development is exempted development and it is not within the Board's jurisdiction to

revisit this decision, where there has been no material change in the planning facts or circumstances.

Item (iv)

- 8.2.12. Item 4 relates to the use of the now complete apartments for related facilities including security office, doctors/nurses' station, pharmacy, food store, the ordering of tenants' food by way of food coupons, provision of mental health services and therapy rooms for tenants, transport to/from the Centre acknowledged by the developer instead of use as a typical apartment block at The Rock Centre, Ballinamore, Co. Leitrim.
- 8.2.13. At the outset, I note that the use of the completed apartment units has been determined. The reference to provision of a pharmacy, foodstore and transport are outside of the apartment complex.
- 8.2.14. I note the reference to security hub/doctors' nurses' station and mental health services within the referral. Unit 26 has a permitted office/business use under the parent permission pertaining to the unit PA Ref: P04/1546. The applicant's response to Leitrim County Council's request for further information outlines that Unit 26 is used as an office and security services hub. The survey of uses on site carried out by Leitrim County Council outlines that Unit 26 is in use as an administrative office for the apartments and support services including medical and therapeutical services are provided from this unit as and when necessary.
- 8.2.15. Having regard to the above and for the purposes of clarity, I propose to recast the question posed in Item (iv) as follows:
- (a) Whether the use of Unit 26 at The Rock Centre, Ballinamore as an office/security hub is development or is not development or is or is not exempted development;
 - (b) Whether the use of Unit 26 at The Rock Centre, Ballinamore as a medical services station is or is not development or is or is not exempted development;

8.3. Is or is not development

8.3.1. The question is raised as to whether the use of Unit 26 The Rock Centre, Ballinamore as (a) an office/security hub and (b) a medical services station is or is not development. Unit 26 has a permitted office/business use under the parent permission pertaining to the unit PA Ref: P04/1546.

8.3.2. Article 5 provides the following definition of “Business premises”—

(a) any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons,

(b) a hotel, hostel (other than a hostel where care is provided) or public house,

(c) any structure or other land used for the purposes of, or in connection with, the functions of a State authority;

“excluded premises” means—

(a) any premises used for purposes of a religious, educational, cultural, recreational or medical character,

(b) any guest house or other premises (not being a hotel or a hostel) providing overnight guest accommodation, block of flats or apartments, club, or boarding house, or,

(c) any structure which was designed for use as one or more dwellings, except such a structure which was used as business premises immediately before 1 October 1964 or is so used with permission under the Act;

8.3.3. For the purpose of Part 4 of the Second Schedule to the Planning and Development Regulations, 2001, as amended, “*Exempted development – Classes of Use*” an office can fall into either a Class 2 or Class 3 use. Health or medical services fall within a Class 8 use.

Class 2 includes for:

Use for the provision of –

(a) Financial services

(b) Professional services (other than health or medical services)

(c) Any other services (including use as a betting office)

Where the services are provided principally to visiting members of the public.

Class 3:

Use as an office, other than a use to which class 2 of this Part of the Schedule applies.

Class 8:

Use— (a) as a health centre or clinic or for the provision of any medical or health services (but not the use of the house of a consultant or practitioner, or any building attached to the house or within the curtilage thereof, for that purpose),

(b) as a crèche,

(c) as a day nursery,

(d) as a day centre.

8.3.4. I consider that the use of a permitted office/business premises as a security office / administration purposes would be a Class 3 use. It is my view that the use of the unit for such services does not amount to a change of use from the permitted office/business use of the unit. On this basis no change of use has taken place and therefore no development has occurred.

8.3.5. Uses for medical purposes are specifically listed as uses which are “excluded premises” in the definition of business premises. The provision of medical/health related services would be categorised as a Class 8 use rather than a Class 3 use as asserted by the Planning Authority. I consider the use of Unit 26 for medical related services is not in accordance with the permitted office/business use and would constitute development by virtue of constituting a material change of use.

8.4. Is or is not exempted development

8.4.1. “Development” can be exempted from the requirement from planning permission by virtue of either section 4 (1) and 4 (2) of the Act. I am satisfied that the matters raised in the subject referral do not fall within any of the Exempted Development provisions

of section 4 (1) of the Act. Section 4 (2) of the Act provides for the making of regulations for certain exemptions.

- 8.4.2. Article 10 of the Planning and Development Regulations relates to Changes of Use. This outlines that 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. As earlier detailed, I consider that the provision of medical related services would be a Class 8 use and the permitted use of Units 26 is Class 3. Article 10 (2) (a) outlines that a use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.
- 8.4.3. However, in the current instance I consider that the use of Unit 26 for medical related services would constitute a material change of use to the permitted development. I consider that this change of use is not exempted development by reference to the Planning and Development Act and Planning and Development Regulations.

9.0 Recommendation

I recommend that the Board notify the parties to the referral as follows: -

Items (i), (ii) and (iii) of the subject referral is the same, or substantially the same, and in respect of the same land as a Referral issued under ABP Reference 307077-20 on the 4th day of January 2021, and there is no evidence of any change in the planning facts or circumstances underpinning the application. In these circumstances, the Board is precluded under Section 50(2) of the Planning and Development Act, 2000, as amended, from making a determination on Items (i), (ii) and (iii).

In terms of Item no. (iv) 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 Unit 26 at The Rock Centre, Ballinamore, Co. Leitrim as whether:

(a) an office/security hub is development or is not development or is or is not exempted development;

(b) a medical services station is or is not development or is or is not exempted development;

AND WHEREAS Liam Madden requested a declaration on this question from Leitrim County Council and the Council issued a declaration on the 31st day of March 2021 stating that:

(a) the use of Unit 26 as an office/security services hub complies with the permitted use of the unit and does not constitute development.

AND WHEREAS Liam Madden referred this declaration for review to An Bord Pleanála on the 9th day of April 2021.

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

(a) Section 2(1), 3(1), 4 of the Planning and Development Act, 2000, as amended,

(b) Article 5, Article 6(1) Article 10 and Part 4 of the Planning and Development Regulations, 2001, as amended,

(c) the planning history of the site,

(d) the pattern of development in the area,

(e) the nature of the current use of the site,

(f) the submissions of the Referrer,

(g) the report of the Planning Inspector,

AND WHEREAS An Bord Pleanála has concluded that:

(a) the use of Unit 26 at The Rock Centre, Ballinamore, Co. Leitrim as an office/security services hub does not amount to a change of use

from the permitted office/business use of the unit and does not constitute development.

(b) the use of Unit 26 at The Rock Centre, Ballinamore, Co. Leitrim as a medical services station constitutes a material change of use from the permitted office/business use, is development and is not exempted development.

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:

(a) the use of Unit 26 at The Rock Centre, Ballinamore, Co. Leitrim as an office/security services hub does not amount to a change of use from the permitted office/business use of the unit and does not constitute development.

(b) the use of Unit 26 at The Rock Centre, Ballinamore, Co. Leitrim as a medical services station constitutes a material change of use from the permitted office/business use, is development and is not exempted development.

Stephanie Farrington
Planning Inspector

15th of February 2023