



An
Bord
Pleanála

Inspector's Report ABP-310385-21

Question

Whether the proposed use of part of a golf course as a GAA playing pitch is or is not development and is or is not exempted development

Location

St. Mary's Park Road, Moneyatta Commons, Saggart, Co. Dublin

Declaration

Planning Authority

South Dublin County Council

Planning Authority Reg. Ref.

ED21/0031

Applicant for Declaration

Burnella Cottages Ltd.

Planning Authority Decision

Is exempted development

Referral

Referred by

Burnella Cottages Ltd.

Owner/Occupier

Cape Wrath Hotel Unlimited Company

Observer(s)

None

Date of Site Inspection

23.12.2021

Inspector

Anthony Kelly

1.0 Introduction

- 1.1. This is a referral by Burnella Cottages Ltd. The referral relates to whether the proposed use of part of a golf course as a GAA playing pitch is or is not exempted development at St. Mary's Park Road, Moneyatta Commons, Saggart, Co. Dublin. South Dublin County Council issued a declaration under ED21/0031 stating the development is exempted development.
- 1.2. The purpose of this referral is not to determine the acceptability or otherwise of the proposed use 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.
- 1.3. Burnella Cottages Ltd. is the owner management company for the 45 no. houses located on the disused golf course. Cape Wrath Hotel Unlimited Company is the landowner. St. Mary's GAA Club is the prospective user of the proposed GAA pitch.

2.0 Site Location and Description

- 2.1. The subject site is located approx. 200 metres south of St. Mary's GAA Club in Saggart, south west Dublin.
- 2.2. The site is a grassed area within a disused golf course. The site is located within a gated residential community area with some houses to the north and south of the proposed pitch. A housing development of two storey detached houses, Fairgreen, is to the north west and other areas of the golf course are to the east and west. There is also an internal vehicular circular road to the east. St. Mary's GAA Club and St. Mary's National School are located further to the north of the houses to the north of the site.

3.0 The Question

- 3.1. Item 4 (Description of Proposed Development) in the applicant's section 5 application form states 'Proposed use of part of a golf course as a proposed GAA playing pitch'. This is also the wording used in the planning authority's decision. The cover letter

submitted by Burnella Cottages Ltd. in the referral refers to whether the proposed use of part of a golf course as a proposed GAA playing pitch at St. Mary's Park Road, Moneyatta Commons, Saggart, Co. Dublin is or is not exempted development.

- 3.2. I consider that the wording used in Item 4 and the planning authority's decision is generally appropriate, subject to a minor amendment. The specific question considered is, therefore,

'Whether the proposed use of part of a golf course as a GAA playing pitch is or is not development and is or is not exempted development'.

4.0 Planning Authority Declaration

4.1. Declaration

The short declaration issued by South Dublin County Council states that 'the proposed development of Proposed use of part of a golf course as a proposed GAA playing pitch' [sic] is exempt and will not require planning permission.

4.2. Planning Authority Reports

- 4.2.1. The Planning Report forms the basis of the planning authority declaration. The report considers that the proposed development of a temporary playing pitch constitutes works and is therefore development. The planning authority identifies that the development could fall into Schedule 2 Part 1 Class 33(c) of the Planning & Development Regulations 2001 (as amended). The provision of goal posts were also considered to fall under this class. Each restriction of article 9 of the Regulations was considered. No element of the proposed development was considered to be a restriction on exemption.
- 4.2.2. The section 5 application specifically referred to several aspects of the proposed development. The following were considered in the planning authority's Planning Report: the distance from the GAA Club and the absence of a direct link, the biodiversity value of the disused golf course, the amount of cut and fill involved,

provision of goal posts, vehicular access, and car parking, loss of trees, and the requirement for appropriate assessment (AA) screening and a bat survey.

- 4.2.3. The report concludes that the proposal constitutes development which is exempted development.

5.0 Planning History

- 5.1.1. P.A. Reg. Ref. ED21/0004 – On 08.02.2021 the planning authority declared that ‘the proposed development of Provision of temporary playing pitch at St. Mary’s Park Road, Moneyatta Commons, Saggart, Co. Dublin’ [sic] was exempt and would not require planning permission. The section 5 applicant was Cape Wrath Hotel ULC and the pitch was to be used by St. Mary’s GAA Club. The site/pitch location is the same as that outlined in the current section 5 application.

P.A. Reg. Ref. ED18/0036 – In 2018 the planning authority declared that provision of a temporary playing pitch at lands at St. Mary’s Park Road, Moneyatta Commons, Saggart was exempt and would not require planning permission. The section 5 applicant was Cape Wrath Hotel Ltd. and the pitch was to be used by St. Mary’s GAA Club. The site/pitch location was immediately west of that outlined in the current section 5 application.

6.0 Policy Context

6.1. South Dublin County Council Development Plan 2016-2022

- 6.1.1. The site is in an area zoned ‘Objective OS – To preserve and provide for open space and recreational amenities’.

6.2. Natural Heritage Designations

- 6.2.1. The closest Natura 2000 site is Glenasmole Valley SAC approx. 4.9km to the south east. The closest heritage area is Slade of Saggart and Crooksling Glen pNHA approx. 1.4km to the south.

7.0 The Referral

7.1. Referrer's Case

The main points made by the referrer, Burnella Cottages Ltd., can be summarised as follows:

- The referrer does not believe the proposed development constitutes exempted development. There is no objection to a GAA pitch, but rather the principle of it being considered exempted development. The referrer does not agree with the decision under ED21/0004. As there is no third-party appeal against a section 5 declaration, the referrer lodged its own declaration request.
- The planning authority's letter of 13.05.2021 relating to ED21/0031 cites a Chief Executive's Order dated 06.05.2021. The referrer questions the validity of the notice dated seven days after the decision was made.
- The referrer does not believe the full extent of works was declared by the applicant and therefore the full extent of the impacts of the works was not assessed by the planning authority. The referrer does not believe Class 33(c) applies in this instance.
- Cut and fill – The planning authority assessment ignores the fact that soils would have to be imported from the adjoining golf course to create a level surface, impacting on land other than the pitch.
- Goal posts/fencing – Goal posts are works, and no reference is made to the 200 metres of fencing and gates erected on site. There is no exemption under Class 33(c) for such structures and the class specifically relates to the laying out and use of land.
- Access and car parking – It is clear from the drawings that a new access road is being provided that requires planning permission. At the very least it will be required for emergency vehicles.
- Loss of trees – The impact of the loss of trees has not been assessed as would be required for a normal planning application. The loss of trees and biodiversity will have an unacceptable impact on the character of the area to such an extent

the exempted status does not apply. Article 9(iv) of the Planning & Development Regulations 2001 (as amended) is referenced.

- Appropriate assessment (AA) and bat survey – As an AA Screening Report has not been undertaken the planning authority is not in a position to state the development would not be likely to have a significant effect on the integrity of a European site, as per article 9(viiB) of the Regulations. An AA Screening Report and bat survey should be undertaken prior to any determination as to exempted development status.

7.2. Planning Authority Response

None.

7.3. Owner/Occupier's Response

The landowner is Cape Wrath Hotel Unlimited Company. The main points made in its response can be summarised as follows:

- The provision of a playing pitch as exempted development has already been established under two previous referrals and the facts of these have not changed. It is not open to the Board to revisit these decisions. This referral is an attempt to override the earlier declarations.
- *Narconon Trust v An Bord Pleanála* [2020] IEHC 25 relates to a declaration by the Board that the change of use of a nursing home to a drug rehabilitation facility required planning permission after Meath Co. Co. had two years earlier confirmed it was exempted development. The judge ruled the Board did not have the power to make decisions in what was in reality an attempt by a community group to question the validity of the Council's earlier decision regarding the same circumstances. Inter alia, the judge stated it would wholly undermine the concept of legal certainty. Having regard to this judgement and the fact the circumstances are exactly the same as when the planning authority made the previous declarations, the Board cannot make a different declaration to that previously made. It is clear the referrer relies upon the details previously submitted in ED21/0004 as no new information or drawings have been submitted to support this referral.

- Cross section drawings were submitted under ED18/0036 showing alterations. Therefore this was considered as part of that determination. The Board cannot consider this element again and come to a different conclusion. As the applicant has provided no details on this matter the Board could not actually assess the position here in any event.
- The installed fence is in connection with the carrying out of works to implement the playing pitch and is exempted development under Class 16. It will be removed when the works have been completed.
- The playing pitches as deemed exempt expressly did not provide for any new works associated with vehicular access or car parking. There is an existing gated access and access road to the site from Boherboy Road in the landowner's ownership, but pedestrian access only will be facilitated. The changing rooms and car parking associated with the GAA Club at their existing clubhouse will be used.
- There is no loss of trees and very limited loss of vegetation. All trees on the pitch location were relocated, not felled, some time ago. There is no information provided about impacts on Natura 2000 sites. The planning authority did not consider AA was required.
- The entire referral should be disregarded due to the lack of any new information provided. The assessment of the Board of the referral, determined on three separate occasions, would totally undermine the clear and consistent decisions made by the planning authority and undermine legal certainty. These decisions should not be revisited. The Board must reinforce the decisions made by the planning authority and dismiss the referral entirely as there are no grounds to be considered.

7.4. Further Responses

None.

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000 (as amended)

8.1.1. Section 2(1)

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving ...

8.1.2. Section 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’.

8.2. Planning and Development Regulations, 2001 (as amended)

8.2.1. Schedule 2 Part 1 (Exempted Development – General) Classes 16 and 33(c) of the Regulations have been referenced. These are:

Column 1 Description of Development	Column 2 Conditions and Limitations
<i>Temporary structures and uses</i> CLASS 16 The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant or machinery needed temporarily in connection with	Such structures, works, plant or machinery shall be removed at the expiration of the period and the land shall be reinstated save to such extent as may be authorised or required by a permission under the Act.

that development during the period in which it is being carried out.	
<p><i>Development for amenity or recreational purposes</i></p> <p>CLASS 33</p> <p>Development consisting of the laying out and use of land –</p> <p>(c) for athletics or sports (other than golf or pitch and putt or sports involving the use of motor vehicles, aircraft or firearms), where no charge is made for admission of the public to the land.</p>	

8.3. Court Judgements

- 8.3.1. Narconon – The Narconon Trust received a declaration from Meath Co. Co. in 2016 that the proposed change of use from a nursing home to a residential drug rehabilitation facility was exempted development. In 2018, Ballivor Community Group and Trim Municipal District Council sought declarations from Meath Co. Co. concerning whether the proposed development was exempt development. The planning authority referred the question to the Board which declared in November 2018 that planning permission was required. In a judicial review (*Narconon Trust v An Bord Pleanála* [2020] IEHC 25), the High Court upheld Narconon’s argument that the board was precluded from deciding the referrals in circumstances where the county council had already made such a determination and where there had been no change in the situation when the matter came before the Board. The High Court certified a question for appeal to the Court of Appeal of whether it was outside the power of the Board to determine a referral to it in circumstances where a council had previously determined the same or substantially the same question and where there had been no change in the planning facts. In November 2021, the Court of Appeal found the board was precluded from determining a referral in those circumstances. This practice

amounted to questioning the validity of the council declaration other than by the way provided for under the Planning and Development Act 2000. The Court of Appeal considered for the board to proceed further to determine the referral on the merits amounted to facilitating a breach of section 50(2) of that Act and was, accordingly, outside its power.

8.3.2. Spectre – Another recent relevant court decision (*Spectre (Shelbourne) Ltd. v An Bord Pleanála* [2021] IEHC 745) also relates to section 5 declarations. In *Spectre* this related to declarations relating to the change of use of offices to embassy offices on the fifth floor of an office building where the planning authority declared, on three separate occasions to *Spectre* (the building owner), Finance Ireland (an existing occupant of the building), and Transaction Network Services Ltd (another tenant of the building), that the development was exempted development. The Finance Ireland declaration was referred to the Board.

8.3.3. In its judgement the court noted two particular points from the *Narconon* judgement. First, that the Board was not automatically precluded in all circumstances from entertaining a section 5 reference by the existence of a prior unappealed declaration where, for example, facts and circumstances had changed. Second, the court had made the point that it would be impermissible for a party to raise the same question at some later point. In the *Spectre* case, when Finance Ireland made its referral to the planning authority it commenced the process at a time when they were not aware of the result of the initial, *Spectre*, application (the first declaration was issued on the same day the second/Finance Ireland section 5 application was made). The judge considered this to be different from *Narconon* in that the parties to that knew of the declaration for over a year, had taken no action, and then sought a different answer to the same question. The judge found in *Spectre* that Finance Ireland had used the section 5 process appropriately.

9.0 **Assessment**

9.1. In a normal section 5 referral there are three issues to be assessed; whether the proposal is or is not development, whether it is or is not exempted development, and, if exempted development, whether or not there are restrictions on the exemption.

However, given the facts of this particular referral, and given recent court judgements, I am of the opinion that the circumstances of this referral should be considered before considering the question subject of the referral, if relevant.

- 9.2. I am satisfied that there is no material difference in facts or circumstances between the provision of a playing pitch as declared exempt by South Dublin County Council under ED21/0004 on 08.02.2021 where Cape Wrath Hotel ULC was the applicant, and the development declared exempt by South Dublin County Council on 06.05.2021 under the current application ED21/0031 where Burnella Cottages Ltd. is the applicant. The separate cover letters submitted with the applications, to both the Council and the Board, do not contain any materially different facts or circumstances in terms of what is proposed. The current referral clearly appears to be an attempt to revisit the earlier decision of the planning authority, ED21/0004. The cover letter in the referral to the Board states that 'Burnella Cottages Limited do not agree with the planning authority decision, and as there is no third party appeal against a section 5 Declaration, lodged their own Declaration request to South Dublin County Council dated 7th April 2021'.
- 9.3. There is no evidence that Burnella Cottages Ltd. was unaware of the making of the Council's Declaration under ED21/0004 at the time it was made. Burnella Cottages Ltd. did not challenge that declaration by way of an application for judicial review in accordance with section 50 of the Planning & Development Act, 2000 (as amended). There are no material differences between both declarations i.e. the same question, with the same circumstances and facts, are common to both section 5 applications. The difference is that Burnella Cottages Ltd. wants a different answer to the original declaration. ED21/0004 answers the question raised in the current referral.
- 9.4. Section 50(2) of the Planning & Development Act, 2000 (as amended) states that 'A person shall not question the validity of any decision made or other act done by — (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act ... otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order').' This indicates the route of questioning the validity of a Council's decision is by way of judicial review. The court, in Narconon, took the view that this means that, 'when performing its functions in accordance with Section 5, the Board lacks the power to decide a question if that question is in fact, an attempt to question the validity of a prior decision by a local authority made by same in the performance

of a function under the 2000 Act, other than in accordance with the mandatory requirements of s. 50 of the same Act, including s. 50 (2)'. Extrapolating the court's decision is so far as it would apply to the current referral, by deciding on this referral the Board would be facilitating Burnella Cottages Ltd. to question the validity of the Council's decision under ED21/0004, 'regarding the same question, in respect of the same property, in the absence of any change in relevant facts or planning circumstances', notwithstanding the referrer's failure to comply with the statutory regime.

- 9.5. The Spectre judgement raises the issue of at what point the Burnella Cottages Ltd. section 5 application was made. In Spectre, it was considered that, as the section 5 process was commenced by Finance Ireland prior to a decision on the first declaration being known, it was not a 'collateral challenge'.
- 9.6. The declaration on ED21/0004 was made on 08.02.2021. The section 5 application was made by Burnella Cottages Ltd. under ED21/0031 on 08.04.2021. Section 50(6) of the Planning & Development Act, 2000 (as amended) provides an eight-week period for an application for leave to apply for judicial review to which subsection 2(a) applies 'beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate'. As the initial declaration was made on 08.02.2021, the Burnella Cottages Ltd. section 5 application was made outside the time period where it could have sought leave to apply for judicial review. In the context of the Narconon and Spectre judgements, it is my view that the ED21/0004 section 5 declaration process had finished i.e. the process, including judicial review timelines, had run its course. Once the process had finished the applicant is entitled to consider that the declaration can be relied upon. To revisit this question at this stage on foot of the Burnella Cottages Ltd. referral would, in my view, contravene section 50(2) of the Act, and would be inconsistent with the Narconon judgement.
- 9.7. There is some inconsistency in whether the proposed playing pitch is a temporary pitch or a permanent pitch. The application form and cover letter submitted with ED21/0004 refers to it as a temporary pitch, but the planning authority's declaration does not specify that it is temporary. The current section 5 application also refers to it as a temporary use e.g. Sections 1.0 and 5.0 of the cover letters to both the Council and the Board, but the application form and the Council's declaration do not specify

that it is temporary. I do not consider that this is a significant issue. If the development is exempt on a temporary basis, it is exempted development on a permanent basis.

- 9.8. The development of a GAA pitch on this part of a disused golf course has been deemed exempt development. Should development other than that be provided as part of the development, that would be a matter for the planning authority to address as it deems appropriate.
- 9.9. Having regard to the foregoing, I consider it would be appropriate for the Board to dismiss the referral as provided for in section 138(1)(b)(i) of the Planning & Development Act 2000 (as amended).

10.0 Recommendation

- 10.1. I recommend that the Board should dismiss the referral as provided for in section 138(1)(b)(i) of the Planning & Development Act, 2000 (as amended). As per section 138(2) the main reasons and considerations on which the decision is based are as follows:

South Dublin County Council made a declaration on 08.02.2021 under P.A. Reg. Ref. ED21/0004 that provision of a temporary playing pitch at St. Mary's Park Road, Moneyatta Commons, Saggart, was exempted development. There is no evidence that Burnella Cottages Ltd. was not aware of this declaration. No application for leave to apply for judicial review of this declaration was made as provided for in section 50(2) of the Planning & Development Act, 2000 (as amended). Once the section 5 process has run its course the applicant is entitled to consider that the declaration can be relied upon. This section 5 application was made by Burnella Cottages Ltd. to the planning authority after the timeframe for judicial review of ED21/0004 expired and it is an attempt to question the validity of that declaration. By deciding on this referral the Board would be facilitating Burnella Cottages Ltd. to question the validity of the Council's decision regarding the same question, in respect of the same property, in the absence of any change in relevant facts or planning circumstances. In ED21/0004, the planning authority has answered the question raised in the current referral.

Anthony Kelly

Planning Inspector

06.01.2022