



An
Bord
Pleanála

Inspector's Report ABP-311139-21

Question

Whether carrying out of repairs to existing unoccupied piggery building, the re-opening of the pig farm and the removal of roof covering and associated structural supports and ventilation stacks is or is not development and is or is not exempted development

Location

Killaghy, Mullinahone, Co. Tipperary

Declaration

Planning Authority

Tipperary County Council

Planning Authority Reg. Ref.

S5/21/35

Applicant for Declaration

Mullinahone Piggery Action Group

Planning Authority Decision

Is not exempted development

Referral

Referred by

Mullinahone Piggery Action Group

Owner/ Occupier

Jim Foran

Observer(s)

None

Date of Site Inspection

1st November 2022

Inspector

Una O'Neill

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1.0 Site Location and Description

1.1. The referral site is located on the eastern side of the R690, c. 48m north of the development boundary relating to the settlement of Mullinahone village, in Co. Tipperary. The shed subject of this referral forms part of a farmyard comprising a number of existing sheds, most of which are in a state of disrepair. To the south of the piggery, c. 48m from the piggery building subject of the referral, is a public community park and playground. To the north of the piggery are three detached dwellings and a cemetery. The piggery is c. 10m from the boundary with the neighbouring property to the north, with a distance of c. 55m between the piggery building and the dwelling to the north. To the west/southwest of the piggery building is a drainage ditch, which (from site inspection) runs alongside an existing ditch and flows southwards and connects with the river running to the east of the piggery boundary, named on EPA mapping as 'Mullinahone Branch'. This river continues its flow in a southerly direction along the boundary of the community park and through Mullinahone.

2.0 The Question

1. Whether carrying out of repairs in 2020 to an existing unoccupied piggery building constructed to house pigs in 1982 and its re-use for housing pigs is development and if so whether it is exempted development.
2. Whether the re-opening of a pig farm in 2020 – last use as a pig farm in 2013 – is development and, if so, whether it is exempted development.
3. Whether (a) removing the roof covering and associated structural supports and ventilation stacks so as to reinstate an open-through bridge passageway between adjoining sheds and (b) Undertaking to alter the sheds such that the enclosed internal floor area of same do not exceed 200sqm individually, is development and, if so, whether it is exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

Tipperary County Council issued a Section 5 Declaration, ref. no. S5/21/35 on 21st July 2021. The declaration states the following:

1. Whether the carrying out of repairs in 2020 to an existing unoccupied piggery building constructed in 1982 and it's re-use for housing pigs is development and exempted development.

- The undertaking of the alterations is development and is not exempted development.

2. Whether the re-opening of the pig farm in 2020 last used as a pig farm in 2013 is development and exempted development

- The re-opening of the pig farm is not development.

3. Whether the removal of the roof covering and associated structural supports and ventilation stacks so as to reinstate an open-through bridge passageway between the adjoining sheds and undertaken to alter the sheds such that the enclosed internal floor area of same do no exceed 200sqm individually

- 'The works' are considered development and is not exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The planning officers report reflects the decision of the PA in relation to a Section 5 referral, received on 1st April 2021, ref. no. S5/21/35.

The PA requested further information from the referrer and from the owner of the site on 29th April 2021. Further information was received by Peter Thomson Planning Solutions on behalf of the referrer on 22nd June 2021 and included a legal opinion in relation to abandonment. Further information was received on 1st July 2021 from David Mulchahy Planning Consultants on behalf of the owner of the site, highlighting the exemption declaration issued by the Council in 1982, reference to the Narconon v ABP legal judgement, statement that farm was not abandoned with accompanying

letter by previous owner stating farm was not abandoned, timeline in relation to one building on the farm and associated invoice dated 1991.

4.0 Planning History

PA reg ref 21/266 – Application WITHDRAWN. Permission was sought for (i) demolition of existing old pig housing, (ii) construction of a pig fattening house, a covered geomembrane lined manure store, a domestic wastewater treatment system, and (iii) retention of roof covering enclosure for mechanical ventilation system on remaining stock house with associated works.

TUD-20-047 – Enforcement notice issued regarding the alteration and extension of a pig fattening house.

Two letters issued from South Tipperary County Council dating from 1973 and 1982 regarding development at the site and planning exemptions relating to two proposed structures. These letters are not accompanied by drawings and the Council indicate there are no drawings on file.

5.0 Policy Context

5.1. Tipperary County Development Plan 2022-2028

- 5.1.1. The site is shown as lying within a rural area to the north of Mullinahone, a service centre settlement. This area lies within the archetype known as The Plains and in the landscape character type described as the River Suir Central Plain, which is largely composed of lowland pasture and arable lands that are deemed to have a high capacity/low sensitivity to agricultural development.

5.2. Natural Heritage Designations

- 5.2.1. The site is not located within a designated European site. The River Barrow and River Nore SAC (002162) is located c. 2.5km upstream to the northeast of the site

and the Lower River Suir SAC (Site Code 002137) is c. 3.7km downstream to the south of the referral site.

6.0 The Referral

6.1. Referrer's Case

6.1.1. On 16th August 2021, Mullinahone Piggery Action Group referred the Section 5 Declaration issued by Tipperary County Council to An Bord Pleanala.

6.1.2. The grounds of the referral is as follows:

- Previous Section 5 declaration from 1982 is not valid as floor area constructed is above the exemptions allowed at the time. The owner refers to Narconon judgement against ABP from 2020. However, the original section 5 declaration is not written like a declaration, was not issued by the Minister and is not considered a valid Section 5 declaration.
- The Appropriate Assessment (AA) screening undertaken was flawed and incorrect. No development on the site could be screened out.
- PA incorrectly determined, in terms of Environmental Impact Assessment (EIA) Screening, that a piggery is not a development type that is subject to EIA.
- Enforcement file contains information that has been denied to the referrer.
- Abandonment – PA asked FI of the owner as part of Section 5 declaration, questions which the owner did not respond to. Council did not consider all the evidence presented and accepted previous owner's letter over the referrers evidence from two previous workers on the site.
- PA did not consider that the 1982 building was unauthorised. As the building is unauthorised, any repairs in 2020 were unauthorised.
- As building was unauthorised, the use of the piggery was unauthorised due to substantial intensification of unauthorised use over the years.
- PA did not consider adequately the extent of works to renovate the 1982 building.
- The claim by owner that only minor works were required to allow the building to house pigs is preposterous. Photographic evidence confirms this.

- The site owner/operator provided a letter from the previous site owner outlining the shed built in 1982 was developed with verbal agreement from the adjoining landowner. This letter was not on file or given to the referrer therefore must have been on the enforcement file. It should be on the Section 5 file and been made available to the Board and the referrer. If not, no weight should be given to the claim. A letter is submitted by referrer which is from son and daughter of the adjoining householder stating they were not aware of such a request and would have been aware if such a request had been made.
- No evidence in terms of timelines other than a suggestion a building was built in 1991 has been given by owner. Evidence of farm workers disputes the suggestion by David Mulcahy Consultants that the building referred to was constructed in 1991. The invoice submitted is not proof and it is not clear it relates to this site. Even if a building was erected, it was simply another unauthorised structure that potentially increased capacity of the piggery and intensified the existing unauthorised situation on the site.
- The Board is requested to review all information submitted by the referrer with the original Section 5 submission and determine that the restoration works were not exempted and that the use of the site and buildings as a piggery was abandoned. In any event, given the history of unauthorised development on the site, the owner would never have been able to avail of any exemption on the site which precluded the PA from carrying out the required AA.

6.1.3. The original submission by Mullinhone Action Group and all associated documents are attached to the referral submitted to the Board and the information is summarised as follows:

- The following timeline is set out within the documentation accompanying the referral.
- 1973 – Piggery business opened. Certificate of exemption dated May 1973 for the erection of a piggery building issued to J. O’Grady and M. Quirke, subject to conditions – exemption cert attached. [I note the exemption cert relates to the building to the west of the building subject of this referral]. The proposed development on the exemption cert states ‘application for permission for erection of piggery’, and it is further stated ‘It appears that as the proposed

development comes within the meaning of part 3, class 6, of the schedule of the exempted development regulations 1967, formal permission is not necessary. No such structure shall be used for any purposes other than the purpose of agriculture or forestry. No such structure for the housing of pigs or poultry or for the making of silage shall be situated within 100 feet of any dwelling house save with the consent of the owner and occupier thereof. No such structure within 100 yards of any public road shall exceed 21 feet in height above ground level.

- 1980 - Michael Quirke sold the farm in 1980, and a letter with map is submitted stating only two structures were there in 1980 when he sold the piggery, ie the exempted pig shed and slurry tank to the rear.
- It is stated that the slurry tank was built over in the 1990s.
- 1980 – Mr Liam O’Connor acquired the site.
- 1982 – Exemption letter from County Council to Liam O’Connor, attached to submission under PT4, dated 6th July 1982. The proposed development is stated to be for ‘extension to rear of existing piggery’, and it is further stated ‘It would appear that as the proposed development comes within the meaning of part 3, class 6, of the schedule of the exempted development regulations 1977, as set out below, formal permission is not necessary’. The class of development listed states that any such structure will have a floor area not exceeding 400 square metres (whether or not by extension of an existing structure). The conditions listed state No such structure shall be used for any purposes other than the purpose of agriculture or forestry; No such structure for the housing of pigs or poultry or for the making of silage shall be situated within 100 metre of any dwelling house save with the consent of the owner and occupier thereof; No such structure within 100 metres of any public road shall exceed 7 metres in height above ground level; No effluent from such structure shall be stored within 100 metres of any dwelling house save with eh consent of the owner and occupier thereof’. No drawings are available with this exemption cert/letter.
- [I note the building subject of this referral letter/declaration is the building which all parties indicate is the subject of this exemption cert – being the

building to the rear of the existing piggery building, which is the subject of this referral].

- Referrer disputes that the building subject of this referral and covered by the exemption cert issued in 1982, was constructed in the accordance with the then exemptions. The method in which the floor area was calculated by the Council Engineer in 2021 (following complaints) was incorrect. Floor area is stated by the referrer to be 483sqm; PA state it was 400sqm. A drawing submitted as part of application REF 21/266 by the current owner indicates an internal floor area of 468.38sqm. The central passageway, which had a slatted tank underneath, was excluded from the floor area by the Engineer. The Council state the building in question was constructed as two separate buildings with a central open passageway which wasn't counted in the floor area. Referrer states it was one building and the passageway between them should have been included in calculation of the floor area. Referrers includes old photos of the building. Referrer considers that as the floor area of the building subject of this referral was constructed above the size permitted in the then exemptions, it was unauthorised, and intensified the authorised element of the piggery, thereby rendering the overall piggery farm unauthorised development.
- Noted in documentation that 1977 exempted development regulations were amended in 1984, when condition on exemptions limited the total area of structures within a farmyard complex to 450sqm. Authorised nature of buildings subsequently constructed on the farm is questioned. Owner claims in application ref 21/266 that most of the existing buildings on the site were in use in mid-1970s, which is incorrect and conflicts with letter from previous owner Michael Quirke who states only two buildings were there in 1980 when he sold the farm.
- Included in the referrer's case is an affidavit from a worker who worked on the site between 1980 and 1988 – it states original building to rear of piggery was constructed in 1982, and additional buildings were added to the farm in 1985.
- 1984 Regulations were in force in 1985, which updated 1977 regulations – permitted exempted floor area was 300sqm and it was a limitation that the

total area of such structures situated within the same farmyard complex or within 100m of the complex could not exceed 450sqm floor area in aggregate.

- Reference to Article 11 of 1977 regulations, which states development shall not be exempted if the carrying out of works is to a structure the use of which is an unauthorised use.
- 1990s – The last building constructed on the site was a weaner house (over the slurry tank constructed with the piggery building in 1973), which was also unauthorised. This date of construction is confirmed by another worker on the site (affidavit submitted).
- It is considered by the referrer that the original use of the site as a piggery was abandoned in 2013. It was at that time operating as an unauthorised piggery which had materially intensified from the permitted level conferred through the exemption for the only permitted building on the site in 1973. The authorised use of the site as a piggery with limited capacity ceased in 1982, although became immune from planning enforcement over time. That immunity ceased in 2013 when the piggery was abandoned.
- One affidavit from a worker who worked on site between 1986 to 2013 is submitted stating internal equipment relating to the piggery was removed from the site when the piggery closed in 2013.
- The farm was acquired by Rory O'Brien and Monica O'Brien in 2008 and operated as a piggery. Mr O'Brien's pig business ceased in 2011 and the last pigs were removed from the site in 2013 and the use of the site and buildings was stated by the referrer to have been abandoned thereafter. The unauthorised use which had been ongoing for 31 years, ceased 7 years ago with no signs of any intent to reopen the piggery.
- Various financial operations were in possession of the piggery from 2011-2020.
- Pigs were re-introduced into the site in May 2020 under the current owner Jim Foran. Construction works were undertaken in 2020 to the building constructed in 1982 to accommodate the pigs.

- It is the referrers case that reopening the pig farm in 2020 is development and is not exempted development.
- Previous Section 5 dated from July 1982 and correspondence was with the PA. Under the legislation at that time Section 5 referrals were decided upon by the Minister and not the PA. The letter from the PA to the owner is not a formal Section 5.
- The pig housing areas either side of the vented passageway along with a single underground pig slurry tank was a single building for the purposes of the P&D Acts and regulations, and exceeded the floor area for exemption at the time. Pig house constructed onto original building in 1982 was therefore unauthorised and exemptions do not apply as a result, as per article 11, restrictions on exemptions, 1977, where works are to an unauthorised structure or a structure the use of which is an unauthorised use. The floor area was miscalculated by council engineer by 83sqm. Other unauthorised buildings were subsequently constructed.
- AA screening was flawed and outcome incorrect. AA carried out by Jane Russell as part of an objection to an application, which was subsequently withdrawn. It concluded that no development on the site could be screened out for AA. Asbestos left on site in the past. Waste from slurry tanks was dumped on the ground in 1982, close to the stream. Part of the area is part of a flood zone. PA being inconsistent, as required AA for development on farm nearby, that is beside the same stream as this piggery.
- EIA Screening incorrect – the piggery is of a class and PA stated it wasn't a development type that is subject to EIA. PA was obliged to determine whether the works and use involved sub-threshold development and record its reasons and considerations.
- The enforcement file should have been made public.
- Issue of Abandonment – FI requested by PA and not properly answered by applicant and inadequate documentation submitted. Previous owner sold the business due to financial issues and therefore did not intend to re-open it as a piggery. There was a period of non-use as a piggery for seven years. In 2013

pigs were removed and equipment used in the piggery removed. No evidence that the owner had any intention of resuming the use of the site as a piggery. A storm in 2014 seriously damaged the building and no steps were taken to repair or maintain it. The site was used for a period of time for unlawful dumping.

- Use of the piggery was unauthorised due to substantial intensification of unauthorised use over the years.
- Storm damage to building in 2014. Renovation works undertaken by new owner in 2020 were unauthorised – including re-roofing, groundworks, installation of new slats over existing slatted tanks, stripping of materials and part demolition. Pigs were reintroduced to the site in 2020. Section 4(1)(h) didn't apply as building was unauthorised. Also de-exemption applies if works could have adverse impact on any EU Habitat site. There are streams to front and rear of site connected hydrologically to designated SACs.
- No consideration to case put forward that the 1982 building, renovated in 2020, was unauthorised when constructed in 1982. It was over the size limit and no permission given from neighbouring house. Therefore any repairs were unauthorised.
- No proof that farm building was constructed in 1991. Sworn statements refute building constructed in 1991 and invoice from applicant is not proof and does not relate to same site as referral site. Development on the site of unauthorised buildings over the years has increased the capacity of the piggery and exacerbated and intensified the existing unauthorised situation on the site.

6.2. Planning Authority Response

- The position of the PA regarding the building constructed in 1982 remains unchanged.
- The AA Screening Report prepared by Jane Russell O'Connor included with the referral submission concerns the development proposed under PL Ref

21/266 (withdrawn) and not the development to which the subject declaration and referral relates.

- The PA undertook an AA Screening Assessment in relation to development to which subject declaration and referral relates and found it did not present potential for significant effects on the Lower River Suir SAC.
- Position of PA regarding EIA remains unchanged.
- The consideration of the PA regarding abandonment was arrived at having examined and assessed all information provided under the declaration application and information received as further information.

6.3. Owner/ Occupier's response

- Agree with declaration issued by the Council in July 1982 and that the structure was exempted development under Class 7 of the 1977 Planning and Development Regulations. Agree with the Council that the central passageway should have been excluded from the calculations given it does not form part of the floor area.
- Refer to *Narconon Trust v ABP* [2020] IEHC 25, dated 24th January 2020, wherein the High Court ruled that ABP was not allowed deal with subsequent Section 5 referrals where there is a prior valid unappealed declaration made by a local planning authority in accordance with a separate reference, if the relevant planning facts or circumstances have not changed between the issuing of the local authority's declaration and the subsequent referral. The referral seeks to reopen a decision that the Council have made a declaration on and was not challenged. Seek for the Council to dismiss the Section 5 application.
- Evidence supplied by referrers is inaccurate and at worst false and misleading.
- Storage Tank – the fact that there is one storage tank serving two separate building does not mean that it is in effect one building and there is no basis upon which to substantiate this claim.

- Roofing materials – Roofing material on site is stored in accordance with Health and Safety Authority advise.
- Dumping of Organic Material – 95% of material was removed from site and used as organic fertiliser. Remaining 5% dry matter content was stored on the field but not close to the stream.
- Flood Risk – None of the works carried out or the storage of pigs pose any risk to the stream as pointed out by Council’s Environment Department verbally during their inspections.
- Illegible invoice – dispute the view of referrer’s that invoice is illegible. The invoice is legitimate as confirmed by company who supplied pig housing materials in 1991.
- Abandonment – Reasons given as to why farm was not operational and there was never any intention to abandon the farm. The buildings were in working order when the farm was purchased by Mr. Foran in 2020. Only minor refurbishment was required to make them operational.
- Judgements – the bank did not sell the property. They instructed the owner who did it voluntarily.
- Equipment removed – Some equipment was removed in 2013 but not all of it. A wet feed system was left on site. 3 feed silos, pig feeders and ventilation controllers were all left on site.
- Inaccessible – Site was never inaccessible. Horses were kept on the site and therefore continual access was possible/needed.
- Unlawful dumping – reports exaggerated. Illegal fly tipping occurred at the entrance, which was investigated by Environment Section of the Council. There was no asbestos dumped.
- Substantial unauthorised use – Prior to new owner being in place, there was never any question in relation to the planning status of the building. This is an attempt to retrospectively raise issues.
- Minor refurbishment – all existing walls and tanks are still in place. Majority of roof timbers were reused. Some of the slats in the house are still in use.

Storm damage can happen to any building and owner is entitled to replace same without the need for planning permission. Replacement of damaged slats does not need planning permission.

- Letter – letter in question is with the Council and Board are requested to obtain the letter as owner can't obtain it.
- Quirke Claim – it is inconceivable that there would be no weaner accommodation with the finishing house as this would never happen on any pig farm. This brings into question the credibility and validity of the Quirke claim.
- Closure of pig business – there are numerous inconsistencies in referral submission, including statement that Mr. O'Brien's business closed in 2011, when pigs were removed in 2013.
- Doors – claims that two buildings were one on basis of doors between them is nonsensical.
- Mockler (former employee of previous owner) Photograph – building labelled to be constructed in 1985 was constructed in 1991 as per invoice included.
- Owner seeks to dismiss the referral as there is already a Section 5 referral relating to the key elements of the development.
- In the event the Board continue to adjudicate on the Section 5 application, Board is invited to agree with the Council that the 1977 and 1982 declarations are fully valid and continue to be relied upon. Seek the Board to dismiss any allegations about abandonment of the farm.

7.0 Statutory Provisions

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

Section 2(1) of the Planning and Development Acts 2000 (as amended) states

In this Act, except where the context requires otherwise –

.....

“agriculture” includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and “agricultural” shall be construed accordingly;

“development” has the meaning assigned to it by section 3, and “develop” shall be construed accordingly.

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

Section 3 (1) defines development as follows: “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 of the Act states:

(1) The following shall be exempted developments for the purposes of this Act—

(a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used;

(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;

.....

Section 4(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

7.2. **Planning and Development Regulations, 2001 (as amended)**

Article 6(3) of the Regulations states that: Subject to article 9, in areas other than a city, a town or an area specified in section 19(1)(b) of the Act or the excluded areas as defined in section 9 of the Local Government (Reorganisation) Act, 1985 (No. 7 of 1985), development of a class specified in column 1 of Part 3 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 3 opposite the mention of that class in the said column 1.

Schedule 2, Part 3, Exempted Development - Rural

- Classes 6 - 10 provides exemptions for Agricultural Structures.

Article 9 (1) provides: 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—

(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

...

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site.

(c) if it is development to which Part 10 applies, unless the development is required by or under any statutory provision (other than the Act or these Regulations) to comply with procedures for the purpose of giving effect to the Council Directive.

7.3. **Planning and Development Regulations, 1967**

Third Schedule, Part III, Exempted Development - Rural

CLASS 6 - The construction, excavation, extension, alteration or replacement of any store, barn, byre, shed, glasshouse, pen, sty, poultryhouse, silo or other structure on land not less than 30 feet from any public road the metalled part of which is more

than 12 feet in width or from the site of any road improvement work or new road and carrying out or construction of which is an objective of any development plan or, during the period prior to the making of a development plan, is declared by resolution of a planning authority to be an objective which they propose to include in a development plan.

Conditions: 1. No such structure shall be used for any purpose other than the purpose of agriculture or forestry; 2. No such structure for the housing of pigs or poultry or for the making of silage shall be situated within 100 feet of any dwellinghouse save with the consent of the owner and occupier thereof; 3. No such structure within 100 yards of any public road shall exceed 21 feet in height above ground level.

7.4. Planning and Development Regulations 1977

Third Schedule, Part III, Exempted Development - Rural

CLASS 7 - Works consisting of the provision, on land not less than 10 metres from any public road the metalled part of which at the nearest point is more than 4 metres in width, of a roofed structure for the housing of pigs, cattle, sheep or poultry, having a floor area not exceeding 400 square metres (whether or not by extension of an existing structure) and any ancillary provision for effluent storage.

Conditions: 1. No such structure shall be used for any purpose other than the purpose of agriculture; 2. No such structure for the housing of pigs or poultry shall be situated within 100 metres of any dwelling- house save with the consent of the owner and occupier thereof; 3. No such structure within 100 metres of any public road shall exceed 7 metres in height above ground level; 4. No effluent from such structure shall be stored within 100 metres of any dwellinghouse save with the consent of the owner and occupier thereof.

7.5. Planning and Development (Exempted Development and Amendment) Regulations 1984

Exempted Development – Rural

Class 7 - Works consisting of the provision of a roofed structure for the housing of pigs, cattle, sheep, poultry, donkeys or horses, having a floor area not exceeding 300 square metres (whether or not by extension of an existing structure) and any ancillary provision for effluent storage.

Conditions: 1. No such structure shall be used for any purpose other than the purpose of agriculture; 2. The total area of such structure together with any other such structures situated within the same farmyard complex or within 100 metres of that complex shall not exceed 450 square metres floor area in aggregate; 3. No such structure shall be situated within 10 metres of any public road the metalled part of which at the nearest point is more than 3 metres in width; 4. No such structure within 100 metres of any public road shall exceed 8 metres in height above ground level; 5. No such structure shall be situated and no effluent from such structure shall be stored, within 100 metres of any dwelling house or school, church or building used for public assembly, save with the consent of the owner and occupier thereof; 6. Effluent storage facilities adequate to serve the structure having regard to its size, use, location and the need to avoid water pollution shall be provided.

8.0 Assessment

8.1. Introduction

- 8.1.1. It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the use of the shed in question for pigs in respect to the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so falls within the scope of exempted development.
- 8.1.2. The subject site comprises a number of farm buildings, which appear to be in various states of repair/disrepair, with one building in use for the housing of pigs. The field to the east of the building has a horse and donkey grazing on it. I note the chronology of the development of buildings at the site has been set out by the referrer with supporting letters from two previous workers on the farm, and a limited chronology has been set out by the current owner, with commentary in relation to timing of the construction of one of the farmyard buildings and issue of abandonment. The two

accounts in relation to the site and its development differ, however, both concur in that the building subject of this referral was constructed in 1982, pursuant to the issuing of a declaration in relation to exemptions issued by the Council in 1982.

- 8.1.3. There are two letters on file which appear to be exemption declarations, and which relate to two farm buildings. The exemption cert issued in 1982 relates to the building subject of this referral. The previous 1972 exemption cert relates to the building to the west of it. There are no drawings accompanying the exemption letters. The referrer disputes that the 1982 exemption declaration was a legal Section 5 declaration, but considers it was a letter and therefore it is not legally binding. I note the exemption declaration issued in 1982 follows the same format as the exemption declaration issued in 1972, with the latter one accepted as valid by the referrer. I consider both letters to be valid as Section 5 declarations.
- 8.1.4. The referrer disputes that the 1982 building was constructed in accordance with the exemption provisions at the time, contending that the floor area as constructed was greater than the allowed 400sqm by circa 84sqm. The floor area has been questioned in recent times (approx. 2021) in response to complaints received from the public, which has resulted in an enforcement file being opened by the PA. Information included in the file by the referrer includes emails with the PA, which indicates the PA measured the shed in question as part of its enforcement file and determined that the building was built as two structures separated by a central through passageway between the buildings and took measurements excluding the passageway with a stated net floor area of 397.48sqm. The PA considered it reasonable to assume that old piggery buildings were constructed in this way in the past and hence took this approach to the measurements. The Mullinahone Action Group consider the building was constructed as one building and the central passageway between the buildings should have been included as floor area, in which case, the measurements are short by c. 84qm and the structure was over 400sqm in area and therefore not exempt. The PA considers the building was originally constructed in line with exempt development regulations then applicable.
- 8.1.5. The referrer also contends that the condition on the exemption requiring the permission of the neighbouring house owner/occupier to be given was not obtained, however, the PA in their report state the owner submitted a letter stating verbal permission was received from the neighbouring owner by the previous owner. The

Council are of the view that this cannot be disproved and there is a conflict in the information submitted from both sides. Given the lack of evidence, it cannot be proved or disproven that consent was given (which was not required to be written under the relevant regulations).

- 8.1.6. Based on all the documentation on file, I do not think that it can be categorically concluded without reference to before and after drawings, which are not available, whether or not works undertaken in 1982 were in compliance with the then exempt development regulations. The works undertaken may have been exempted in that in the opinion of the Planning Authority, such works did meet the exempt development provisions. Based on the evidence provided one cannot in my opinion categorically conclude that the works carried out in 1982 required planning permission and the information from both sides cannot in my view be satisfactorily corroborated. Hence it cannot be concluded that the building occupying the site currently constitutes unauthorised development and I find the assessment of the PA to be reasonable in this regard. Matters of enforcement are not for the Board to determine.
- 8.1.7. In considering *Narconon Trust v ABP* [2020] IEHC 25, which was raised in the owners submission, I note that this referral differs from that originally issued in that it addresses new matters, questions of abandonment and change of use, and subsequent repairs and alterations.
- 8.1.8. The question submitted in this referral relates to one shed and not the other sheds in existence on the site. The question in this referral is as set out in section 2 of this report.
- 8.1.9. I focus my attention on the question relating to works undertaken in 2020; question of abandonment and question of whether a change of use has occurred with the restocking of the shed with pigs; and question in relation to additional works referenced.
- 8.1.10. In assessing the merits of the case I have reviewed previous relevant declarations made by the Board.

8.2. Is or is not development

- 1. Whether carrying out of repairs in 2020 to an existing unoccupied piggery building constructed to house pigs in 1982 and its re-use for housing pigs is development and if so whether it is exempted development.

8.2.1. One of the sheds at this farm in Mullinahone has been subject to repair works, stated to have been undertaken in 2020, and has following these works, been stocked with pigs. I note none of the other sheds on the farm are currently used for the keeping of pigs.

8.2.2. The repairs undertaken are described as replacement of roof covering with new roof covering, undertaking of internal repairs, alteration of the roof to cover and enclose a throughway between the buildings that house pigs and the installation of air extraction vents in the roof. In my opinion, the repairs amount to works as defined by Section 2 of the P&D Act 2000 (as amended) and constitute development, within the meaning of Section 3 of the Act. The next question arises in relation to whether these works are exempted development. This is discussed further under Section 8.3 hereunder.

8.2.3. The second part of the question relates to the shed and it's 're-use for housing pigs'. This matter is addressed by the PA and the referrer as an issue relating to the concept of abandonment, which if proven would result in the commencement of this use being a material change of use, which would constitute development. I address hereunder the issue of abandonment and use.

8.2.4. From documentation submitted, it would appear the shed was in active agricultural use until 2013. It is stated in the documentation submitted by the referrer that the piggery ceased to operate in 2013 due to the personal circumstances of the farmer and newspaper articles are included. A storm in 2014 is stated by the referrer to have caused significant damage to the roof of the building in question and the storm felled two trees across the entrance to the piggery, which were not removed until the site was acquired in 2020. From 2014 to 2020 it is stated by the referrer that no attempt was made to repair damage to the site during this six-year period or to seek to occupy the site. It is the referrers case that the use of the site as a piggery was permanently ceased in 2013 and the owners had no intention to resume the said use, which is evidenced by the lack of maintenance or repair of the site. In addition a

statement included from a worker on the site, Timmy Brett, indicates equipment relating to the piggery was removed from the site to other farms owned by the then owner, hence the referrer's case that there was no intention to resume the use on the site, and the dumping that occurred on the site which was not cleaned up for a long time is also stated to be indicative of the lack of intention to resume the use. It is the referrers case that the use was abandoned.

- 8.2.5. It is the owners case that the farm was never abandoned. The previous owner of the farm states in a submission from the current owner that the piggery was depopulated in 2013 due to an outbreak of disease at another of the owner's farms, which resulted in this farm having to be depopulated for a period of 9-12 months. The previous owner states that due to unforeseen circumstances arising, they were not in a position to repopulate the farm after that time and it was always his intention to repopulate the farm, but due to other circumstances it was decided to sell the farm in 2019. While equipment supporting the piggery was removed from the farm, the owner states that some piggery equipment was retained on the site. It is the owners case that the entrance to the farm was not permanently block, that horses were kept on the site during that time and access was therefore possible for them. It is also the owners case that storm damage occurred and permission is not required to replace a damaged roof.
- 8.2.6. In relation to the issue of use, I note that while the farm is referred to as a piggery by the referrer, the established use of the land and associated buildings is an agricultural use, as defined in the Planning and Development Act. Two sheds on the site are stated by the current owner to have been built in 1977 and 1982 under agricultural exempt development regulations in force at the time. While the farmer at the time indicated the shed/development (subject to the 1982 exemption letter and subject of this referral) was 'for extension to rear of existing piggery', I note the exemptions that the shed was assessed under did not limit the shed solely to the storing of pigs, but rather it was allowed under the exemptions that the shed could be used for the housing of pigs, cattle, sheep or poultry, and its use was limited only to 'agricultural purposes'. The use at present of the shed for the housing of pigs remains an agricultural use.
- 8.2.7. Abandonment is not defined in law, however, case law presents a number of tests which can be applied in consideration of the issue of abandonment, namely the

physical condition of the premises; the period of non-use; the nature and character of the intervening use, if any; and the intentions of the owner. I have reviewed the case law as submitted by the referrer. It is not disputed that the farm shed was in a state of disrepair, which seems to be attributed to two reasons – the depopulating of the sheds with pigs (for health reasons and subsequently financial/personal reasons) and a storm in 2014 which caused significant damage to the roof. While the building was in a state of disrepair, given the specific circumstances surrounding this disrepair and the removal of the pigs, I do not consider that this issue alone points to abandonment of agricultural use. In terms of the period of non-use of the shed for the housing of pigs, this amounts to a period of seven years. There is no statutory period as to what constitutes an abandonment of use and an examination of case law does not reveal any particular time period after which abandonment is certain to have taken place. Varying periods of time have been accepted in differing cases. Consideration must also be given to the intention of the then owner to resume the use. It is stated by the previous owner that the farm was depopulated of pigs due to a disease outbreak on his other farms and other financial circumstances eventually led to the farm being sold. The shed I note remained viable as a farm shed for agricultural use pre the storm affecting the roof. While the use of the shed for the storage of pigs ceased, this does not in my opinion indicate that the farm was being abandoned but rather that the storage of pigs on the farm had ceased for reasons which appear reasonable and there is a rationale as to why all the equipment was not at that point required. Based on all the information submitted, I do not consider that the circumstances of this case gives rise to the abandonment of the agricultural use of the farm land and its associated buildings. I do not consider an intervening unauthorised use of the land for dumping affects the established use of the land for agriculture.

- 8.2.8. I consider the established use of the lands for agricultural purposes remains and no material change of use or development has occurred with the re-occupancy of the agricultural shed by animals, namely pigs. I do not consider an intensification of use has occurred over what was originally allowed based on the size of the shed as constructed under exempted development regulations. As no development has occurred, the question in relation to exemptions and applicability of EIA does not therefore arise. I note that the issue of licencing and control of pollution is a separate

matter within the remit of the EPA and the Department of Agriculture, Food and the Marine and not ABP.

- (2) Whether the re-opening of the pig farm is or is not development and is or is not exempted development.

8.2.9. I have discussed separately under question 1, the issue of the use of the shed in question for the housing of pigs and the issue of abandonment. I do not consider that the farm and its associated sheds have been abandoned. While the farm in question has changed ownership a number of times over the years, it has remained in agricultural use and no material change of use of the land and associated shed has occurred. The 're-opening' of the pig farm is not development and as no development has occurred, the question of exempted development does not arise.

- 3. Whether (a) removing the roof covering and associated structural supports and ventilation stacks so as to reinstate an open-through bridge passageway between adjoining sheds and (b) Undertaking to alter the sheds such that the enclosed internal floor area of same do not exceed 200sqm individually, is development and, if so, whether it is exempted development.

8.2.10. I'm going to refer to the works described in this part of the question as alterations, to distinguish from the repairs listed in question 1. The alterations proposed come within the definition of development, within the meaning of Section 3 of the Act. The next question arises in relation to whether these works are exempted development. This is discussed further under Section 8.3 hereunder.

8.3. Is or Is Not Exempted Development

- (1) Whether carrying out of repairs in 2020 to an existing unoccupied piggery building constructed to house pigs in 1982 is exempted development.

8.3.1. As highlighted earlier in this report, these repairs are described as replacement of roof covering with new roof covering, undertaking of internal repairs, alteration of the roof to cover and enclose a throughway between the buildings that house pigs and the installation of air extraction vents in the roof. I have considered Section 4(1)(h) of the Act in relation to consideration of the repairs listed.

- 8.3.2. Section 4(1)(h) states the following shall be exempted for the purposes of the area: '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'.
- 8.3.3. I consider the works to the roof comes within Section 4(1)(h), in that they are works for the maintenance, improvement or other alteration of the structure, which in my opinion do not materially affect the external appearance of the shed so as to render the appearance inconsistent with the character of the structure or of neighbouring structures, ie with the other farm sheds. The site is not visible from the road or neighbouring residential properties and I do not consider the works result in a visually significant impact. I consider any internal works to the building are exempt, in accordance with Section 4(1)(h) of the Act.
- (3) Whether the removal of roof covering and associated structural supports and ventilation stacks so as to reinstate an open-through bridge passageway between adjoining sheds and undertaken to alter the sheds such that the enclosed internal floor area of same do not exceed 200sqm individually is or is not exempted development.
- 8.3.4. It is not clear to me what these works are arising from. If they are works arising from an Enforcement Notice, or if they are proposed works.
- 8.3.5. I'm proceeding on the basis of my assessment of the works as listed, and not consideration of any Enforcement Notice. The alterations come within Section 4(1)(h), in that they are works for the maintenance, improvement or other alteration of any structure, being works which in my opinion would not materially affect the external appearance of the shed so as to render the appearance inconsistent with the character of the structure or of neighbouring structures, ie with the other farm sheds. The site is not visible from the road or neighbouring residential properties. I consider any internal works to the building are exempt, in accordance with Section 4(1)(h) of the Act.

8.4. Restrictions on Exempted Development

- 8.4.1. Article 9(1) of the Regulations outlines that development which would otherwise constitute exempted development shall not be exempted development, for the purposes of the Act, if development meets any of the criteria set out under this section of the regulations. I am satisfied that the provisions of Article 9(1)(a)(iii) are not applicable in this instance.

8.5. Appropriate Assessment

- 8.5.1. I note the site does not extend into any European site and there are no proposals for works to any European Site. There are two watercourses on either side of the farm. I note the GIS map shows the watercourse to the west adjoining the farm building, however, on site inspection, I note the watercourse runs along a ditch to the west of the building. This watercourse is not registered as a river on the EPA maps, but appears to be a drainage ditch from the farm further west (this farm was subject of a recent permission and AA). The western watercourse flows southwards and connects with the river running to the east of the piggery boundary, which is named on EPA mapping as 'Mullinahone Branch'. This river continues its flow in a southerly direction along the boundary of the community park and through Mullinahone, to the Anner River, which forms part of the Lower River Suir SAC, c. 3.7km to the south of the referral site.
- 8.5.2. Having regard to the nature and scale of the development, together with the degree of separation between sites, I do not consider that any Appropriate Assessment issues arise and I do not consider that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.6. EIA Screening

- 8.6.1. The repairs and alterations are not of a class for the purpose of EIA.

8.7. Conclusion

- 8.7.1. I consider the use of the farm and the shed in question for the storage of pigs is an agricultural use, which is not a material change of use, therefore no development has occurred. I consider the repairs and alterations is development and is exempted development.

9.0 Recommendation

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

WHEREAS a question has arisen as to:

1. Whether carrying out of repairs in 2020 to an existing unoccupied piggery building constructed to house pigs in 1982 and its re-use for housing pigs is development and if so whether it is exempted development.
2. Whether the re-opening of a pig farm in 2020 – last use as a pig farm in 2013 – is development and, if so, whether it is exempted development.
3. Whether (a) removing the roof covering and associated structural supports and ventilation stacks so as to reinstate an open-through bridge passageway between adjoining sheds and (b) Undertaking to alter the sheds such that the enclosed internal floor area of same do not exceed 200sqm individually, is development and, if so, whether it is exempted development.

is or is not development or is or is not exempted development:

AND WHEREAS Mullinahone Piggery Action Group requested a declaration on this question from Tipperary County Council and the Council issued a declaration on the 21st day of July, 2021 stating that

- Question 1: The undertaking of the alterations is development and is exempted development.
- Question 2: The re-opening of the pig farm is not development.

- Question 3: 'The works' are considered development and is exempted development.

AND WHEREAS Mullinahone Piggery Action Group referred this declaration for review to An Bord Pleanála on the 16th day of August, 2021:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(a) and Section 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (d) the planning history of the site:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The repair works undertaken in 2020 is development and is exempted development.
- (b) The shed has been used as an agricultural shed since 1982 and is an established agricultural use.
- (c) There is no evidence that the shed is unauthorised.
- (d) The use of the shed and the land has not been abandoned.
- (e) The use of the agricultural shed for the storage of pigs is an agricultural use which is not a material change of use and is not development.
- (f) The alterations to the building are development and are exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the use of the shed for the storage of pigs is not development; and the repair works and proposed works to the building is development and is exempted development.

Una O'Neill

Section Planning Inspector

21st November 2022