



An
Bord
Pleanála

Inspector's Report ABP-311735-21

Question

Whether a pre-1963 farm dwelling have an implied condition of residential use in respect of section 160(6)(b) of the Planning and Development Act 2000 as amended and other questions are or are not development and are or are not exempted development.

Location

Drumumna, Crusheen, Co. Clare.

Declaration

Planning Authority

Clare County Council

Planning Authority Reg. Ref.

R21-57

Applicant for Declaration

Maura O'Grady

Planning Authority Decision

No declaration

Referral

Referred by

Clare County Council.

Owner/ Occupier

Danny & Michael Liddy, T/A
Burrenside Oil

Observer(s)

None

Date of Site Inspection

31st of March 2022.

Inspector

Adrian Ormsby

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1.0 Site Location and Description

- 1.1. The site is located c. 1.6 km north east of Crusheen in County Clare. The site is accessed from a local road through a vehicular entrance with metal palisade gates in excess of c. 2m height. The gates were open to the public at the time of the site inspection.
- 1.2. The site comprises of a fuel storage depot with three large tanks with bund walls, a fuel pump, concrete hard standing, hardcore access and egress routes and a large agricultural style building which includes a small internal office area. At the time of the inspection I observed a central storage area to the front of the site where a number of domestic oil tanks were in situ. Two oil trucks were parked to the eastern side of the site.
- 1.3. Cattle and agricultural uses were observed to the rear of the site past the storage tanks. The agricultural use generally appears to be divided from the depot use of the site by gates and a wall but can be accessed from same.

2.0 The Question

2.1. The Requester asks-

1. Does a pre-1963 farm dwelling have an implied condition of residential use in respect of section 160(6) (b) of the Planning Development Act 2000 as amended?
2. Is the use of a residential farm as an oil storage and distribution depot development and, if so, is it exempt development?
3. Is the retail sale of petrol, diesel and ancillary products by Burrenside Oil Ltd. At Drumumna, Crusheen, Co. Clare development and/or an intensification of development on this site?
4. Was the installation of an interceptor tank in October 2020 at Burrenside Oil Ltd., Drumumna, Crusheen, Co. Clare development and/or an intensification of development, and if so, is it exempt development?

5. Is the placing of approximately 300m² of concrete parking for the overnight parking loading and unloading of trucks at Burrenside Oil Ltd, Drumumna, Crusheen, Co. Clare development and/or an intensification of development, and if so, is it exempt development?
6. Is the construction of bunding installed in 2020 around oil storage tanks at Burrenside Oil Ltd., Drumumna, Crusheen, Co. Clare development and/or intensification of development and if so is it exempt development?
7. Is an increase in oil storage capacity from a much lower level to approximately 159,000 litres for sale and distribution development and/or an intensification of development, and if so, is it exempt development?
8. Is the construction of offices on a residential farm development and/or an intensification of development, and if so, is it exempt development?
9. Is the provision of wastewater treatment for on-site staff development and/or an intensification of development and if so is it exempt development?

2.2. In the interest of clarity, and as set out and explained in section 9 of this assessment, I consider it appropriate to reword the questions as follows-

1. Is the change of use of a site from residential and/or agricultural purposes to-commercial use incorporating an oil storage facility of up to c. 159,000 litres, a fuel distribution depot, the retail sales of petrol, diesel and ancillary products and an ancillary office development; and if so, is the change of use exempted development.
2. Are 'works' ancillary to the change of use outlined above including-
 - a. the installation of an interceptor tank,
 - b. installation of approx. 300 sq.m of hardstanding for the parking of vehicles,
 - c. a bunding wall,
 - d. provision of an onsite wastewater treatment system on the site development; and if so, are such works exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

In a letter received by An Bord Pleanála on the 21st of October 2021, Clare County Council have advised that they have not made a declaration in this instance and is referring the matter to An Bord Pleanála for a determination under Section 5 (4) of the Planning and Development Act, 2000 as amended.

4.0 Planning History

- There does not appear to be any planning history on this site and this is also acknowledged in a letter from Clare County Council dated 04/11/2021.
- Details of planning permission for the construction of two dwelling houses in the area have been submitted by the council. These are-
 - P97/6341 to Michael Liddy (10/11/97) and
 - P8/7555 to Daniel Liddy (31/12/73)
- The letter of 04/11/2021 refers to an Unauthorised Development file reference number UD 20-101. The local authority have advised that they consider pursuing enforcement action in this case as statute barred in respect of the use of the site as a fuel depot, as the depot has been operating at that location for longer than seven years.

5.0 Policy Context

5.1. Development Plan

- The Clare County Development Plan 2017-2023 is the operative plan.
- The site is located in a Rural Area Under Strong Urban Pressure and not within a Settlement Boundary.

5.2. Natural Heritage Designations

- The requester has submitted two OS 1:2500 Maps which identify the site boundary to which the questions relate.
- A section of the eastern part of the site and parts of its south western boundary are located within Slieve Aughty Mountains Special Protection Areas (004168)
- Save for a small part of the roadside boundary the site is entirely surrounded by the SPA

6.0 The Referral

6.1. Requester's Case

The issues raised by the Requester can be summarised as follows-

- The subject site was traditionally a residential farm with a pre-63 dwelling.
- In or around 2001 an oil storage and distribution depot commenced from the site at a small scale. Over the years this has intensified to the current situation with four rigid distribution trucks and several articulated oil tankers using the depot on a daily basis.
- Members of the public also visit the site to purchase fuel.
- In 2015 additional tanks were installed increasing the storage capacity.
- Following a complaint of unauthorised development and environmental pollution the Requester was informed that enforcement was statute barred as the development was more than 7 years in existence. The requester has advice that change of use is not statute barred.
- A concrete base and oil interceptor trap were installed subsequent to the complaint.
- The site forms part of the Slieve Aughty Mountains SPA.

- There are significant concerns that the operation of this depot is discharging petroleum hydrocarbons spillage into the ground, adjacent stream, groundwater and other surface water features locally.

6.2. Referrer's Case/Planning Reports

- 6.2.1. A letter from Clare County Council dated 04/11/21 provides some detail of planning history for the site and nearby houses. It also details an Unauthorised Development file for the site in which it is considered that pursuing enforcement action as statute barred in respect of the use of the site as a fuel depot as the depot has been operating at that location for longer than seven years.

6.3. Owner's response

- 6.3.1. The Owners have made a submission response to this declaration request dated the 16/11/21 which can be summarised as follows-
- The business was established in October 2001 as a family run oil distribution business. In the years following storage tanks were installed the last of which was in 2009 with the completion of bund walls. There has been no increase in storage capacity since that date.
 - A shed was built in 2009 for storing farm feed and equipment. Subsequently an office was constructed within the shed (approx. 13ft x 13 ft).
 - Activity in the yard includes-
 - One delivery of oil on average 3 times per week
 - Two delivery trucks in service with three at peak periods
 - Trucks usually parked at drivers house at night
 - They don't or never have sold or stored petrol through the yard.
 - In 2020, to comply with environmental licence requirements we installed an interceptor and a concrete apron were installed.
 - Two visits from the Environment Section of the Council revealed no evidence of oil contamination.

- Water samples from the area returned clear results.
- Copies of invoices confirming timeline for works ranging from 2004-2009 and water test results have been submitted.
- A letter of support from a neighbour is included.

6.4. Further Responses

6.4.1. A further submission was received from the Requester on the 23/11/21 and can be summarised as follows-

- A timeline of events from 08/09/20 – 20/09/21. This timeline appears to relate to an alleged oil spillage at the site and environmental pollution arising from same.
- An interceptor tank was delivered to the site on the 29/09/20
- 10 loads of concrete were delivered to the site on the 01/10/20
- Interceptor tank was installed on the 02/10/20
- Requester received advice recommending a section 5 declaration.
- The site is located within the Slieve Aughty SPA and no EIA or AA carried out regarding any of the development including recent works.
- Planning permission for an Interceptor Tank would require an EIS and NIS.
- The tank capacity is 159,000 litres. This exceeds 3500 litres and is not exempted development.
- The concrete wall bunding were constructed in 2020. The bund and base is still not complete.
- The submission includes-
 - Photos from google maps/street view
 - Hydrological Assessment, Interpretation of Hydrochemistry Results and Treatment Recommendations.
 - Advertising of Burrenside Oil

- Copies of application for licence for dangerous substances and objection to same
- Analysis of Aqueous Sample tests results
- Correspondence from the Environment Section and the Fire and Building Control section of the Council
- Enforcement complaint to the council
- Details of Pollution licences

6.4.2. A further submission was received from the Owners on the 15/12/21 and can be summarised as follows-

- From 2001 – 2018 they have supplied fuel to the residence of the complainant.
- There was no oil spillage. They Owners have a bored well serving three houses 20 metres from the site.
- A delivery schedule for Oct 21-Nov 21 is submitted showing 18 deliveries in October and 12 in November.
- Bund walls were completed along with installation of tanks. These are not recent.
- The response includes-
 - A review of the water tests submitted by the complainant carried out by Dr. Patrick O'Sullivan (Consultant Analytical and Industrial Chemist).
 - A letter from a sister of the complainant
 - A letter from a landowner adjacent to the stream and Lough Iscudda
 - Correspondence from Clare County Council
 - Invoices and Statements from suppliers of concrete.
 - As landowners they partake in Hen Harrier scheme. They are compliant with restrictions and obligations of same.
 - They consider the complaints to be vexatious.

- 6.4.3. A further submission was received from the Planning Authority on the 15/12/21 in which they state they do not wish to make a further submission or observation.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000-22 as amended (henceforth referred to as PDA's)

Section 2 provides the following interpretations-

“structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and—

(a) where the context so admits, includes the land on, in or under which the structure is situate, and.....

“unauthorised structure” means a structure other than—

(a) a structure which was in existence on 1 October 1964, or

(b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act F22[or under section 34, 37G or 37N of this Act], being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act);

“unauthorised use” means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 F22[or under section 34, 37G or 37N of this Act], being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;

“unauthorised works” means any works on, in, over or under land commenced on or after 1 October 1964, being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 F22[or under section 34, 37G or 37N of this Act], being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;

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

Section 3 (1), states the following:

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

Section 4 (1) sets out what is exempted development for the purpose of the Act.

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;

(aa) development by a local authority in its functional area;

**b)- (d) Deleted by Local Government Reform Act 2014 (1/2014), s. 5(7) and sch. 2 part 4 ref.11*

(e) development consisting of the carrying out by a local authority of any works required for the construction of a new road or the maintenance or improvement of a road;

(f) development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity;

(g) development consisting of the carrying out by any local authority or statutory undertaker of any works for the purpose of inspecting, repairing, renewing, altering or removing any sewers, mains, pipes, cables, overhead wires, or other apparatus, including the excavation of any street or other land for that purpose;

(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;

(i) development consisting of the thinning, felling or replanting of trees, forests or woodlands or works ancillary to that development, but not including the replacement of broadleaf high forest by conifer species;

(ja) development (other than development consisting of the provision of access to a national road within the meaning of the Roads Act 1993) that consists of—

(I) the construction, maintenance or improvement of a road (other than a public road) that serves a forest or woodland, or

(II) works ancillary to such construction, maintenance or improvement;

(j) development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;

(k) development consisting of the use of land for the purposes of a casual trading area (within the meaning of the Casual Trading Act, 1995);

(l) development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.

Section 4 (2) (a) states-

“The Minister may by regulations provide for any class of development to be exempted development for the purpose of the Act”

Section 4 (3) states-

A reference in this Act to exempted development shall be construed as a reference to development which is—

(a) any of the developments specified in subsection (1), or

(b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.

Section 4 (4) states-

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.

Section 5 (1) states-

If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

Section 5 (4) states-

Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

Part VIII Planning Enforcement- Section 160- Injunctions in relation to unauthorised development

Subsection 6 (b)states-

Notwithstanding paragraph (a), an application for an order under this section may be made at any time in respect of any condition to which the development is subject concerning the ongoing use of the land.

Section 177U- (Screening for Appropriate Assessment)

(3) In carrying out screening for appropriate assessment of a proposed development a competent authority may request such information from the applicant as it may consider necessary to enable it to carry out that screening, and may consult with such persons as it considers appropriate and where the applicant does not provide the information within the period specified, or any further period as may be specified by the authority, the application for consent for the proposed development shall be deemed to be withdrawn.

.....

(9) In deciding upon a declaration or a referral under section 5 of this Act a planning authority or the Board, as the case may be, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.

7.2. Planning and Development Regulations, 2001-22 as amended (henceforth referred to as PDR's)

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;

Article 6(1) of the PDR's states as follows:-

“Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.”

Article 9(1) details development to which article 6 relates and shall not be exempted development for the purposes of the Act. In particular the following are relevant-

9. (1) 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—

(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,

(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,

(x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility,

(xi) obstruct any public right of way

Article 10 details ‘Change of Use’ and states-

10. (1) 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.

Sub article 10 (2) (b) states-

- b) Nothing in any class in Part 4 of the Schedule 2 shall include any use—
- ii) as a motor service station,

Schedule 2, Part 1 of the PDR's deal with Exempted Development – General.

Description of Development	Conditions and Limitations
<p>CLASS 11</p> <p>The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –</p> <p>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres.</p> <p>2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative</p> <p>393</p>

	finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.
Class 14 Change of Use, 11 categories listed, none considered applicable to this referral	
Class 41 Works consisting of or incidental to— (c) the carrying out of development in compliance with a notice under section 12 of the Local Government (Water Pollution) Act, 1977 (No. 1 of 1977), (e) the carrying out of development in compliance with a condition or conditions attached to a fire safety certificate granted in accordance with Part III of the Building Control Regulations, 1997 other than the construction or erection of an external fire escape or water tank	

PART 4 Article 10 Exempted Development – 12 Classes of Use identified. It is considered the uses subject to this referral are not identified within these classes.

Schedule 5- DEVELOPMENT FOR THE PURPOSES OF PART 10 (EIA)

Part 2

3. Energy Industry

(e) Installations for the surface storage of fossil fuels, where the storage capacity would exceed 100,000 tonnes.

7.3. Referrals Database

7.3.1. I have searched and examined the Board's database of referrals and while noting the circumstances of each are different, I consider the following relevant to the determination of the subject referral-

- RL2336- The Board generally found the replacement of five number oil tanks with three larger tanks in a revised location, the construction of a bund and associated works is development and is not exempted development.
- RL2358- The Board generally found the modifications carried out to a fuel depot are development and are not exempted development.
- RL2663- The Board generally found an oil distribution business and storage (dump/infill), new yard, new entrance and new access road to be development and not exempted development.

8.0 Assessment

8.1. Introduction

8.1.1. Section 5 of the PDA is clear in that should any question arise as to what is or is not development or is or is not exempted development within the meaning of this Act, a person can request in writing from the relevant planning authority a declaration on that question. In this instance Clare County Council have decided to further refer the matter to An Bord Pleanala for a determination under section 5 (4).

8.1.2. It is also clear that the provisions of section 5 are not intended for the purpose of determining allegations or otherwise of Unauthorised Development or if enforcement proceedings should or should not be taken. Such provisions are to be considered under Part VIII of the Act- Enforcement. In this regard the matter of enforcement falls wholly under the jurisdiction of the Local Authority and offences may be trialled in the Courts if deemed necessary. These are not matters for An Bord Pleanala.

- 8.1.3. The requester has asked nine questions. Having reviewed these and having considered the contents of all the submissions on file most notably the Planning Authority's decision not to pursue enforcement proceedings, it seems to me that the Requester may be seeking declarations on some considerations that are outside the scope of a section 5 declaration and are instead, enforcement matters.
- 8.1.4. The decision of the Planning Authority not to pursue enforcement action under enforcement file reference number UD 20-101 on this site because such action is statute barred, is irrelevant for the purpose of this Section 5 determination. The Planning Authority's decision does, however, highlight the unauthorised nature of the development at the site, thereby and in my opinion answering much of the Section 5 referral, notwithstanding the fact the site has been operating as it has in excess of seven years.
- 8.1.5. I refer to question 1 which details 'Injunctions in relation to unauthorised development' and application to the High Court or Circuit Court for same. At the time of my inspection there was no evidence of a house (habitable or otherwise) or a residential use on this site e.g. mobile home. I note the requesters submission (23/11/21) includes pictures which suggest a house may have been on this site. The demolition of same does not form any part of the questions asked nor has any documentation been submitted to enable its consideration as part of the actual questions asked i.e. its habitable status, actual use or if its prior use had been abandoned. Furthermore the provisions of section 160 (6) (b) details an injunction may be sought for at any time in respect of any 'condition' to which the development is subject concerning the ongoing use of the land. In this regard, I note the use at the site has not been subject to a planning application as regards its use and consequently there are no conditions applicable. Having given consideration to the question as posed by the Requester, I am satisfied it is not possible to assess question 1 in the context of Section 5 of the PDA. As a result I do not intend to give it any further consideration.
- 8.1.6. The Requester's second question refers to a residential farm which suggests a residential and agricultural use at the site. The main building on the site is agricultural in appearance and as noted in section 1.3 a small part of the site outlined by the Requester does appear to be in agricultural use. It is important to highlight the Requester has not sought a declaration as regards to the main building on the

site and in this context I note there is no evidence on file of permission granted for the building nor has the Requester provided sufficient information to determine if the building would be exempt in the first instance under the provisions for agricultural buildings.

- 8.1.7. Having considered the above the Board may wish to consider if this referral should be dismissed under section 138 (b) of the Act having regard to the nature of the referral and the questions asked within.
- 8.1.8. Should the Board decide not to dismiss the referral it is considered appropriate and necessary to reword the questions put forward by the Requester. In this regard, I intend to consider the matter of 'change of use' within Question 1 and this change of use will be assessed against both residential and agricultural uses. It is also evident from all the submissions on file that the existing use on the site has been in operation since circa 2001 with 'works' ancillary to the main use carried out on the site over that time. I am satisfied all these 'works' can be considered under the provisions of section 5 in the context of a reworded second question.
- 8.1.9. Having considered the above it is appropriate to re-word the declaration as sought to ask the following-
 1. Is the change of use of the site from residential and/or agricultural purposes to commercial use incorporating an oil storage facility with a capacity up to c. 159,000 litres, a fuel distribution depot, the retail sales of petrol, diesel and ancillary products and an ancillary office development, and if so is the change of use exempted development?
 2. Are 'works' necessary for and ancillary to the change of use outlined above including-
 - a. the installation of an interceptor tank,
 - b. installation of approx. 300 sq.m of hardstanding for the parking of vehicles,
 - c. a bunding wall,
 - d. provision of an onsite wastewater treatment system on the sitedevelopment, and if so are such 'works' exempted development?

8.2. Is or is not development

- 8.2.1. From the information on file and having visited the site it is clear that a Fuel Distribution Depot operates from the site. I also note that part of the existing building and part of the site itself (as identified by the Requestor) operates for agricultural purposes. This part is to the north west and is separated by a wall and gate to the part of the site used as the depot. However, I am satisfied the primary use on this site as far as this referral relates is a Commercial Use and is best described as a 'Business Premises' within the meaning of the PDR's that is not an 'excluded premises'.
- 8.2.2. Section 3 (1) of the Act refers to the meaning of "development", which includes the making of any material change in the use of any structures or other land. The change of use of lands previously used for residential and/or agricultural purposes to that of a use for Commercial purposes such as a Fuel Distribution Depot with retail sales of goods and an ancillary office is evidently a change of use of the site.
- 8.2.3. In determining the materiality of this change of use, I have considered the matters relevant for assessing the impacts of the commercial use and its operations on the proper planning and sustainable development of the area e.g. nature of use in rural area, traffic generation, noise impacts, residential and visual amenity considerations etc. In my opinion a Commercial use in this context is a 'material change of use'. Accordingly, I am satisfied that the referral is 'development' within the meaning of the PDA's.
- 8.2.4. Section 3 (1) of the Act in defining "development" also includes any "works" on, in, over or under land. The Act defines 'works' as including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. The second question queries if 'works' necessary for and ancillary to the change of use outlined above are development. These works include-
- the installation of an interceptor tank,
 - installation of approx. 300 sq.m of hardstanding for the parking of vehicles,
 - a bunding wall, and
 - provision of an onsite wastewater treatment system on the site.

I am satisfied that all of these are 'Works' within the meaning of the Act and therefore are "development."

8.3. Is or is not exempted development

8.3.1. "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) provides for the making of regulations for certain exemptions. The following are relevant-

- Article 6 - Exempted Development. This provides that 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 identified conditions and limitations.
- Article 10 – Change of Use. This provides six subsections. The following are considered relevant to this Referral-
 - (1) 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 subject to listed criteria (a)-(d)
 - (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.
 - (b) Nothing in any class in Part 4 of the Schedule 2 shall include any use—
 - (ii) as a motor service station
 - (3-6) not considered relevant.

8.3.2. In order to consider question 1 of this Referral Article 10 is relevant.

- (a) To consider sub-article (1) Part 4 of Schedule 2 lists 12 classes of use. None of Residential, Agricultural or Commercial uses in the context of this Referral

are identified within the 12 classes of use and therefore it is not necessary to consider it further i.e. the listed criteria (a) – (d).

(b) In terms of sub article (2) the commercial use in operation at the ‘Business Premises’ is clearly the primary use on the site and is not incidental to any other use. The Requester asks and I was informed by the Owners that private vehicles can purchase fuel at the site. I also observed a fuel pump on my inspection. It is clear that one of the main services offered at a Motor Service Station i.e. to fuel cars is in operation at the site.

(c) Having considered the above, I am satisfied that none of the Exempted Development provisions for Change of Use as set out in Article 10 apply in this instance.

8.3.3. In order to answer question 2, I have considered Part 1 of Schedule 2 and the listed classes of Exempted Development. In this regard I note the following-

Works to the Business Premises	Comment
installation of an interceptor tank,	<p>Class 41 provides for the carrying out of development-</p> <ul style="list-style-type: none"> • in compliance with a notice under section 12 of the Local Government (Water Pollution) Act, 1977 (No. 1 of 1977). • carrying out of remedial works in compliance with an advisory notice issued under section 70H(5) of the Water Services Act 2007 (as inserted by section 4 of the Water Services (Amendment) Act 2012). <p>No evidence on file to demonstrate this exemption applies.</p>
installation of approx. 300 sq.m of hardstanding for the parking of vehicles	No exemption identified for commercial use
a bunding wall,	This could be considered to fall under Sundry Works set out in Class 11- The construction, other than within or bounding the curtilage of a house, of any wall. It shall not exceed 1.2 metres. The bunding wall is rendered.

provision of an onsite wastewater treatment system on the site.	There are no exemptions of on-site treatment systems
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8.3.6. I am satisfied the ‘works’ identified in question 2 are not provided for under section 4 (2) of the Act i.e. Article 6 of the PDR’s- Exempted Development and the associated classes of Exempted Development as set out in Part 1 of Schedule 2, save for the bunding wall.

8.4. Restrictions on exempted development

8.4.1. Following on from the above I am satisfied that the only ‘development’ in the 2 questions that could be considered to be ‘exempted development’ relates to the bunding wall, which may be exempt under the provisions for Sundry Works in Part 1 of Schedule 2 Class 11 of the PDR’s.

8.4.2. Article 9 of the Regulations details development to which article 6 relates and which shall not be exempted development for the purposes of the Act. Of particular relevance in this instance are the following-

- *(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,*
- *(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,*

8.4.3. Noting that the cumulative impacts of all ‘development’ on the site would be relevant for consideration under Article 9 (viiB) and not that of just the bunding wall, I propose to set aside this provision for separate consideration under section 8.5 as set out below.

8.4.4. In terms of Article 9 (viii), I note that the Act provides interpretations for “structure” “unauthorised development”, “unauthorised structure” and “unauthorised use”. The bunding wall clearly comes within interpretation of structure. Based on the information on file the Commercial use of the site is unauthorised. The purpose of

the bunding wall is to serve the unauthorised use of the lands i.e. protecting the site from fuel stored within the tanks. In the context of its presence and its purpose on the site, I am satisfied that the bunding wall is a structure, the use of which is an unauthorised use. Therefore any suggestion that it may be exempt under Article 6 is clearly restricted by the provisions of Article 9 (viii).

8.5. Environmental Considerations

8.5.1. Introduction

(a) Section 4 (4) of the Act details that ‘development’ shall not be ‘exempted development’ if an Environmental Impact Assessment (EIA) or an Appropriate Assessment (AA) of the development is required. In the interest of thoroughness it is appropriate to consider the referral further in this regard.

8.5.2. EIA Preliminary Screening

(a) This Section 5 referral has been submitted by a person who is not the owner of the site and has not carried out the development nor do they propose development at the site. In this regard, they have submitted very little information to the file to facilitate carrying out an adequate EIA screening.

(b) Article 109 of the PDR’s details requirements for Environmental Impact Assessment Reports for appeals. It does not specifically state ‘referrals’ but I consider this article pertinent for due consideration of this referral.

(c) Schedule 5 Part 2 of the Planning and Development Regulations 2001 (as amended) details Class (3) (Energy Industry). It provides that mandatory EIA is required for the following development (amongst others)-

(e) Installations for the surface storage of fossil fuels, where the storage capacity would exceed 100,000 tonnes.

(d) The development subject to this referral is clearly well below this mandatory threshold. Article 109 (2) of the PDR’s details where an appeal relating to a planning application for subthreshold development is not accompanied by an EIAR, the Board shall carry a preliminary examination of, at the least, the

nature, size or location of the development. I consider this criteria is also appropriate for 'referrals' to the Board.

- (e) On preliminary examination, I am satisfied the storage on site of up to 159,000 litres of fuel is significantly smaller than the volumetric capacity that would be reasonably associated with 100,000 tonnes and therefore a subthreshold EIA would not be required on the basis of size alone.
- (f) The site is located in a rural area and is reasonable distant from the nearest houses. The nature of the sites use does differ from adjoining land uses in this rural area and I accept it involves activities which may generate some risks such as waste, pollution and other nuisances including risks from major accidents and/or risks to human health. However the storage tanks on site and with a capacity up to 159,000 litres as per the referral are off a relatively small capacity in the context of EIA. They are surrounded by bunding walls to contain leaks and an interceptor trap has also been installed at the site aimed at avoiding environmental impacts. These would generally be appropriate mitigation measures for such land uses and are reasonably distant from adjoining properties to address other adverse risks.
- (g) I have considered the location of part of the site as identified by the Requester and the proximity of the majority of the site to the Slieve Aughty Mountains Special Protection Areas (004168). While I accept the environmental impact risks associated with such proximity, I am satisfied this consideration is best served under Appropriate Assessment below.
- (h) Having considered the nature, size and location of the subject site in accordance with Article 109 of the PDR's and based on the information on file, the 'development' subject to this referral would not in my opinion, be likely to have significant effects on the environment and upon preliminary examination only, an environmental impact assessment report for the 'development' would not be required.

- (i) Accordingly, and in terms of assessing this referral and based on the information on file, I do not consider the subject 'development' to be further restricted by section 4 (4) of the PDA in terms of requiring EIA.

8.5.3. **Appropriate Assessment**

- 8.5.4. Section 177U (9) of the PDA details that in deciding a referral under section 5 the Board, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.
- 8.5.5. This Section 5 referral has been submitted by a person who is not the owner of the site and has not carried out the development nor do they propose development at the site. In this regard, they have submitted very little information to the file to facilitate the Board in carrying out an Appropriate Assessment screening.
- 8.5.6. A section of the eastern part of the site and parts of its south western boundary are located within the Slieve Aughty Mountains Special Protection Areas (004168) and save for a small part of the roadside boundary the site is entirely surrounded by the SPA.
- 8.5.7. Considering the nature of the referral, the absence of information on file in relation to the overall development at the site including scaled drawings and applying the precautionary principle, significant effects on European sites cannot be excluded and it is considered an AA screening would be required. Furthermore, I note the bunding walls, interceptor trap, wastewater treatment system on the site could all reasonably be considered mitigation measures aimed at avoiding or reducing adverse effects on European sites. In such circumstances they cannot be considered at screening stage and can only be considered as part of an Appropriate Assessment.
- 8.5.8. Section 177U (3) of the PDA provides that the Board may, in carrying out screening for appropriate assessment of a proposed development request such information from the applicant as it may consider necessary to enable it to carry out that screening. As the 'applicant' in this instance is the Requester and is not the owner or developer of the site, it would not be appropriate to seek the necessary information to carry out the screening. Nor would it be appropriate to seek such information from the owners of the site considering they did not initiate the process.

- 8.5.9. Given these circumstances, and have specific regard that I have already found the matters subject to this 'referral' to be development and not exempted development, and having considered Section 177U (9) of the PDA, I do not consider it appropriate for the Board to conduct a screening for appropriate assessment for this referral in this context only.
- 8.5.10. Accordingly, and in terms of this referral only and based on the information on file, I do not consider the subject 'development' to be further restricted by section 4 (4) of the PDA in terms of requiring AA.

9.0 Recommendation

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

WHEREAS questions have arisen as to whether-

1. the change of use of a site from residential and/or agricultural purposes to commercial use-

incorporating an oil storage facility of up to c. 159,000 litres, a fuel distribution depot, the retail sales of petrol, diesel and ancillary products and an ancillary office,

is development; and if so, is the change of use exempted development?
2. 'works' ancillary to the change of use outlined above including-
 - (a) the installation of an interceptor tank,
 - (b) installation of approx. 300 sq.m of hardstanding for the parking of vehicles,
 - (c) a bunding wall,
 - (d) provision of an onsite wastewater treatment system on the siteare development; and if so, are such works exempted development?

AND WHEREAS Clare County Council referred this declaration for determination to An Bord Pleanála on the 20th day of October 2021

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

- (a) sections 2, 3, 4, 5, 138, 160 (6)(b) and 177U of the Planning and Development Act 2000, as amended,
- (b) the Planning and Development Regulations 2001, as amended, including-
 - (i) Articles 5, 6, 9, 10 and 109
 - (ii) Schedule 2 Part 1, including Classes 11 and 41 and their relevant Conditions and Limitations,
 - (iii) Schedule 5 Part 2, class 3 (Energy Industry),
- (c) the original agricultural and/or residential use at the site
- (d) the development at the site at the time of the inspection
- (e) the absence of a planning history of the site,
- (f) the pattern and nature of development in the area,
- (g) the submissions of the Requester, Referrer (Planning Authority) and the Owner, and
- (h) the report of the Inspector:

AND WHEREAS An Bord Pleanála has concluded that:

1. the ‘change of use’ of the site from residential and/or agricultural purposes to commercial use incorporating an oil storage facility of up to c. 159,000 litres, a fuel distribution depot, the retail sales of petrol, diesel and ancillary products and an ancillary office, and
2. ‘works’ ancillary to the change of use outlined above including the installation of an interceptor tank, installation of approx. 300 sq.m of hardstanding for the parking of vehicles, a bunding wall, provision of an onsite wastewater treatment system on the site;

constitutes a 'material change' of use and 'works' within the meaning of section 3 (1) of the Planning and Developments Act 2000, as amended.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) 4 of the 2000 Act, hereby decides that-

1. the change of use of the site from residential and/or agricultural purposes to commercial use incorporating an oil storage facility of up to c. 159,000 litres, a fuel distribution depot, the retail sales of petrol, diesel and ancillary products and an ancillary office, and
 2. 'works' ancillary to the change of use outlined above including the installation of an interceptor tank, installation of approximately 300 sq.m of hardstanding for the parking of vehicles, a bunding wall, provision of an onsite wastewater treatment system on the site,
- are development and are **not** exempted development.

Adrian Ormsby
Planning Inspector

17th of November 2022