



An
Bord
Pleanála

Inspector's Report ABP-312136-21

Question

Whether the alterations and extensions to the permitted tank farms at West Cork Distillers by the installation of additional items of plant and equipment and structures of the nature of plant and equipment is or is not development or is, or is not, exempted development

Location

Fastnet Industrial Estate, Marsh Road, Skibbereen, Co. Cork

Declaration

Planning Authority

Cork County Council

Planning Authority Reg. Ref.

D/44/21

Applicant for Declaration

West Cork Distillers

Planning Authority Decision

N/A

Referred by

Cork County Council

Owner/ Occupier

West Cork Distillers

Observer(s)

None

Date of Site Inspection

23rd January 2023

Inspector

Mary Kennelly

1.0 Site Location and Description

- 1.1. The site is located on Marsh Road in the northern suburban area of Skibbereen, West Cork. The central part of the town is located to the south of the N71 Relief Road, which is the main route west from Cork City serving West Cork. The N71 runs in an east-west direction to the north of the main built-up area with a number of North-South routes crossing it. Marsh Road is one such route which runs northwards from the roundabout with the N71 at Ilen Street. Marsh Road is a long straight road with several commercial and industrial premises along the route. There are a few single detached houses on the western side of the road.
- 1.2. The site of the referral is located approx. 500m to the north of the N71 junction on the eastern side of the road. The NCT Centre and the National Driver Licence Service are located immediately to the south, with Skibbereen Mart just beyond, and a business park is located to the north. The River Ilen flows southwards to the east of the referral property and under the N71 and turns to an East-West flow when it reaches the centre of the town. The R593 (Mill Road) is another N-S route which travels roughly parallel to Marsh Road to the east. This road is separated from the site by the River Ilen and the intervening landscape.
- 1.3. It has a site area of 4.547ha and comprises an industrial site in use as a distillery and a fish processing plant. The site includes production and processing facilities, bottling plants, bonded warehouses, storage buildings and a recently constructed visitor centre. There are several areas of open storage and a number of tank farms on the site also, in addition to cooling fan plant and equipment. The fish processing unit is located within the main building block, which faces onto Marsh Road. In recent years the use as a distillery has been expanded and consolidated, incorporating additional tank farms, warehouses and storage buildings, which are generally located to the north and north-east of the fish processing plant.

2.0 The Question

- 2.1. Whether the alterations and extensions to the permitted tank farms by the installation of additional items of plant and equipment, and structures of the nature of plant and equipment, and by the implementation of mitigation measures proposed in the

attached Landscape and Visual Impact Assessment are development and are or are not exempted development.

3.0 **Planning Authority Declaration**

3.1. **Declaration**

No declaration made. The Referral is from Cork County Council.

3.2. **Planning Authority Reports**

No planning report has been provided by the planning authority.

3.3. **Planning History**

3.3.1. Planning permissions have been recently granted for significant expansion of the uses of the site.

PA Ref. 17/365 – permission was granted on 28th November 2017 for the following –

Retention of –

- (i) Detached Bonded Warehouse no. 1 (278m²)
- (ii) Spirit Tank Farm and associated bund
- (iii) Tank Farm no. 2 and associated bund
- (iv) 2.4m high security fencing along Eastern boundary

Permission for –

- (a) 4no. Detached bonded Warehouses with floor area of 999m²
- (b) Detached Discouraging Building (430m²)
- (c) Detached Distillery/Visitor's Centre Building (1,350m²)
- (d) Detached Grain Intake Building (42m²)
- (e) Construction of 2 additional entrances off Marsh Road and security gates and fencing

- (f) 2.4m high security fencing to Northern boundary, remaining Eastern boundary, part carpark boundary and from SW entrance to Existing Building
- (g) Installation of grain silos (6-10m height)
- (h) New carparking
- (i) Demolition of existing glass-lined storage tank and associated site works.

PA Ref. 19/779 – permission was granted on 27th July 2020 for the following –

Retention of –

- (i) Tank Farm No. 3 and bund (627m²)
- (ii) Tank Farm No. 4 and bund (67m²)
- (iii) Tank Farm No. 5 and bund (557m²)
- (iv) Tank Farm no. 6 and bund (117m²)
- (v) R.O. Building Extension (126m²)
- (vi) Discouraging Building (increase of floor area – 430m²)
- (vii) Grain Intake (72m² in lieu of 42m²)
- (viii) Grain Out take building (22m²)
- (ix) Fenestration changes to Distillery Visitor Centre

Permission for -

- (a) Discouraging/Dry Goods Building (396m²)
- (b) Extension to Bottling Building (555m²)
- (c) Bonded Warehouse No. 6 (1980m²)
- (d) Revisions to Distillery/Visitor Centre

PA Ref. 19/214 – permission granted for installation of a 30tonne LPG tank on site.

PA Ref. 20/283 – Permission granted for relocation of 30T LPG tank (granted under 19/0214) – modifications to an establishment to which the Major Accidents Directive applies.

PA Ref. 20/585 – Alterations to Distillery Visitor Centre – Following requests for FI and Clarification of FI, application was withdrawn.

- 3.3.2. Three Declarations were made by the Planning Authority on the **3rd February 2021**, on the basis of information provided by West Cork Distillers on 7/01/21. The Declarations may be summarised as follows:

D/1/21 – (1) The existing cooling plant and equipment at Marsh Road is development and is not exempted development on the grounds that -

- (a) The construction of the structures constitutes development within the meaning of section 3 of the PDA 2000 (as amended).
- (b) As such the proposed development is subject to the restrictions on exemptions in Article 9(1)(a)(i) of the PDR 2001 (as amended) as it would contravene Condition no. 26 attached to permission granted under 17/365.
- (c) The information provided is insufficient to enable the P.A. to determine whether sub-threshold EIA or AA of the development is or is not required.
- (d) Accordingly, by reason of Section 4(4) of the PDA 2000, the development is not exempted development.

(2) The proposed cooling plant and equipment is development and is not exempted development on the grounds that –

- (a) The structure constitutes “development” within the meaning of S3 of the PDA 2000 (as amended).
- (b) The information provided is insufficient to enable the P.A. to determine whether sub-threshold EIA or AA of the development is or is not required.
- (c) Accordingly, by reason of Section 4(4) of the PDA 2000, the development is not exempted development

D/2/21 – Alterations and extensions to the permitted tank farms is development and is not exempted development on the grounds that –

- (a) The construction of the structures constitutes “development” within the meaning of section 3 of the PDA 2000 (as amended).
- (b) The development materially alters the external appearance of the premises of the undertaking and does not therefore meet the limitations and conditions of Column 2 of class 21 of Part 1 of Schedule 2 of the PDR 2001 (as amended).
- (c) The proposed development is subject to the restrictions on exemptions in Article 9(1)(a)(i) of the PDR 2001 (as amended) as it would contravene Condition no. 26 attached to permission granted under 17/365.
- (d) The information provided is insufficient to enable the P.A. to determine whether sub-threshold EIA or AA of the development is or is not required.
- (e) Accordingly, by reason of Section 4(4) of the PDA 2000, the development is not exempted development.

D/3/21 – The provision of hard surfaced areas for open storage of empty casks is development and is exempted development on the grounds that –

- (a) The provision of hard surfaced areas for open storage of empty casks constitutes “works” that come within the meaning of “development” as set out in Section 3(1) of the PDA 2000 (as amended).
- (b) The works fall within a class of exempted development under Article 6, namely Class 21 and Class 22 of Part 1 of Schedule 2 of the PDR 2001 (as amended).
- (c) The works do not come within the scope of restrictions on exemption under Article 9 of the PDR 2001 or Section 4(4) of the PDA 2000 (as amended).

3.3.3. Two Declarations were made by the Planning Authority on the **15th April 2021**, on the basis of information provided by West Cork Distillers on 26/03/21. The Declarations may be summarised as follows:

D/17/21 – The installation of new cooling plant at Marsh Road is development and is not exempted development on the grounds that –

- (a) The construction of the structures constitutes “development” within the meaning of section 3 of the PDA 2000 (as amended).

- (b) When taken together with the proposed mitigation measures would be development that is not exempted development considered to be within the scope of section 4(1) of the PDA 2000 (as amended).
- (c) As such, the proposed development is subject to the restrictions on exemptions in Article 9(1)(a)(i) of the PDR 2001 (as amended) as the proposed development, in the absence of mitigation measures which are deemed not to be exempted development, would contravene Condition no. 26 attached to permission granted under 17/365.

D/18/21 – The alterations and extensions to the permitted tank farms at Marsh Road is development and is not exempted development on the grounds that –

- (a) The construction of the structures constitutes “development” within the meaning of section 3 of the PDA 2000 (as amended).
- (b) The development materially alters the external appearance of the premises of the undertaking and does not, therefore, meet the requirement of conditions and limitations of Column 2 of Class 21 of Part 1 of Schedule 2 of the PDR 2001 (as amended).
- (c) The proposed development is subject to the restrictions on exemptions in Article 9(1)(a)(i) of the PDR 2001 (as amended) as the proposed development would contravene Condition no. 26 attached to permission granted under 17/365.

4.0 Policy Context

4.1. Cork County Development Plan 2022-2028

- 4.1.1. **Introduction:** - The referral was made by the planning authority under the previous development plan for the area, namely the Cork County Development Plan 2014. However, a new Development Plan was adopted on the 25th of April 2022 and came into effect on the 6th of June 2022. The new County Development Plan incorporates the plans for each of the Municipal Districts. The site is located within the West Cork Municipal District which is contained within Volume 5 of the CDP.

- 4.1.2. The site is zoned 'Existing Mixed General Business Industrial Uses'. It is an established industrial site and is within the development boundary for the town.
- 4.1.3. The site is identified in the as a **Lower Tier SEVESO** site (Table 8.8 of Main volume 1 CDP). Policy objective **EC8-8, EC8-9 and EC 8-10** are considered relevant. These policies generally seek to ensure that development is in compliance with the Seveso III Directive in reducing the risk and limiting the potential consequences of major industrial accidents.
- 4.1.4. At **2.8.72 of the West Cork MD (Vol 5)**, it is stated -

West Cork Distillers Ltd. operate a distillery at a site in Marsh Road to the north of Skibbereen town. This is a new establishment under which the Seveso Directive (2012/18/EU) applies. Accordingly, the Health and Safety Authority have applied a consultation distance of 300m in relation to this establishment in accordance with the Chemical Act (Control of Major Accidents Hazards involving Dangerous Substances) Regulations 2015-S.I No. 209 of 2015.

- 4.1.5. The site is located partially within Flood Zone A and partially within Flood Zone B. In terms of flood risk, it is stated at 2.8.70-71 (Vol. 5) -

In extreme weather conditions the town is at risk of flooding from the tide, the Ilen River, and the Caol Stream. The areas at risk of flooding are illustrated on the settlement map. The suitability of the current zoned land supply in the town has been reviewed in this plan and amendments to the zoning designations have been made having regard to the potential flood risk of these lands. The approach to Flood Risk Management is set out in Chapter 11 of Volume One of this Plan and in the updated Strategic Flood Risk Assessment (SFRA), October 2021. The updated SFRA should be consulted for any settlement specific comments and recommendations, including any site-specific recommendations made as part of any Justification Tests carried out, prior to any application for development.

This Skibbereen Flood Relief Scheme was constructed by the powers of the OPW under the Arterial Drainage Act 1945 and amended in 1995. The main

works contract is substantially complete since 2019 and the scheme is now in the Operation and Maintenance phase. To mitigate flood risk this scheme utilises flood defences together with pumping and the use of a flood storage area adjacent to the Caol Stream on the Castletownshend Road. Remedial works in the form of river realignment works downstream of Kennedy Bridge have significantly improved the situation by reducing the frequency of flooding.

4.1.6. There are no specific objectives relating to the site.

4.2. **Natural Heritage Designations**

Lough Hyne Nature Reserve and environs SAC (000097) c. 5km to the southwest

Castletownshend SAC (001547) c. 7km to the southeast

Myross Wood SAC (001070) c. 8km to the east

Roaringwater Bay and Islands SAC (000101) c. 7km to the southwest

Sheep's Head to Toe Islands SPA (004156) c. 5.5km to the south

5.0 **The Referral**

5.1.1. **Question posed – Section 5 Declaration Form**

- Are the alterations and extensions to the permitted tank farms by the installation of additional items of plant and equipment, and structures of the nature of plant and equipment, and by the implementation of measures to mitigate visual impact at West Cork Distillers, Marsh Road Skibbereen County Cork development, and if so, are they exempted development?
- The works in question are shown in blue and referenced as Site A and Site B on the Site Layout Drawing (Drawing No. 30F) in Appendix A. The works comprise the alteration and extension of the tank farms which were included in the grants of permission under P.A. Ref. No. 17/365 and 19/779.
- Reference is made to two previous Section 5 Declarations issued by the P.A. The Declaration issued in Feb 2021 under Ref. D/2/21 concluded that the

alterations and extensions to the tank farms were not exempted development on the grounds that: -

- The development materially alters the external appearance of the premises of the undertaking.
 - The development contravenes condition No. 26 of Permission Ref 17/365.
 - The information provided is insufficient to enable the P. A. to determine whether subthreshold environment impact assessment or appropriate assessment is required.
- A further Declaration on this issue was issued in April 2021 under Ref. D/18/21 concluded that the alterations and extensions to the tank farms were not exempted development on the grounds that: -
 - The development materially alters the external appearance of the premises of the undertaking.
 - The development contravenes condition No. 26 of Permission Ref 17/365.
 - It is submitted that the works in question fall within the definition of 'development' in section 3(1) of the P& D Act and fall within the scope of Class 21 (a)(iii) of Part 1, Schedule 2 of the P & D Regulations, which relate to development carried out by an industrial undertaker on industrial lands for the purposes of any industrial process involving the installation or erection by way of addition or replacement of plant or machinery or structures of the nature of plant and machinery.
 - It is pointed out that the P.A. have previously accepted that the tanks comprise the installation of plant and machinery as described in Class 21, but it has not accepted that they comply with the conditions and limitations of this class of development. It is submitted that the outstanding issues have been addressed in the current application as follows: -
 - Impact on external appearance of the undertaking – addressed by mitigation as set out in the attached Landscape and Visual Impact Assessment. This demonstrates that the impact on landscape character is not deemed to be materially different to that anticipated at the time

permission for the tank farm was granted. Mitigation in the form of colour scheme and screen planting will ensure that any impact will be reduced to 'slight' or 'slight imperceptible' across all viewpoints. The residual impact will, therefore, be lower than anticipated at the time permission was granted, once mitigation is implemented.

- Compliance with condition 26 of 17/365 – the issues relating to noise are being addressed by the installation of new cooling towers as set out in the compliance submission dated 07/06/21. Furthermore, it is submitted that the installation and operation of the tanks does not have any material impact on the noise levels within the site.
- Adequacy of information to enable determination as to whether subthreshold EIA of AA of development is required – The P.A. accepted in the second Declaration (D/18/21) that the revised Screening Reports submitted with that application had allowed the P.A. to determine that EIA and AA are not triggered by the proposed development. Copies of the EIA Screening Statement (Rowan) and the AA Screening Statement (Rowan) are attached as Appendices C and D.
- The Board is invited to concur with the referring party that the alterations and extensions to the permitted tank farms, which relate to the installation of additional industrial plant on an industrial premises by reference to Class 21(a)(iii) of the Regulations, is exempted development.
- The referring party is of the opinion that the proposed additional plant and equipment would be deemed **Exempted Development** as
 - Firstly, it has been demonstrated that the conditions and limitations of Class 21 can be complied with, as evidenced by the submission of the Drawings and Sections showing the height of the plant within the 15m limit and by the submitted Landscape and Visual Impact Assessment by Macroworks, which shows that there would be no material alteration to the external appearance of the undertaking, and

- Secondly, that no restrictions under Article 9 of the Regulations would apply as Condition 26 of the previously granted permission has been complied with as evidenced by the previously submitted 'compliance submission to Condition No. 26' of the permission granted under 17/365, (dated 07/06/21).

5.2. Planning Authority Response

No further comment.

6.0 Statutory Provisions

6.1. Planning and Development Act, 2000

Section 2(1) – Works includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...

“**alteration**” includes—

- (a) plastering or painting or the removal of plaster or stucco, or
- (b) the replacement of a door, window or roof, that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures;

“**establishment**” has the meaning that it has in the Major Accidents Directive

"**Major Accidents Directive**" means Council Directive 96/82/EC of 9 December 1996 amended by Directive 2003/105/EC of the European Parliament and Council of 16 December 2003

Section 3(1) – 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 – Exempted Development

Section 4 sets out various forms and circumstances in which development is exempted development and includes those which arise by reason of regulations

made by the Minister providing for any class of development being exempted development under **Section 4(2)**, where he/she is of the opinion that -

By reason of the size, nature or limited effect on its surroundings of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development.

Section 4(1)(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.

6.2. **Planning and Development Regulations, 2001 [as amended]**

Article 5(1) – interpretation for this part

‘industrial building’ means a structure (not being a shop, or a structure in or adjacent to and belonging to a quarry or mine) used for the carrying on of any industrial process.

‘industrial process’ means any process which is carried on in the course of trade or business, other than agriculture, and which is –

- (a) For or incidental to the making of any article or part of an article
- (b) For or incidental to the altering, repairing, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article, including the getting, dressing or treatment of minerals.

Article 6(1) – 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.

Schedule 2 Part 1

Class 21 – Development for Industrial Purposes

- (a) Development of the following descriptions, carried out by an industrial undertaker on land occupied and used by such undertaker for carrying on, and for the purposes of, any industrial process, or on land used as a dock, harbour or quay for the purposes of any industrial undertaking –
- i. The provision, rearrangement, replacement or maintenance of private ways or private railways, sidings or conveyors,
 - ii. The provision, rearrangement, replacement or maintenance of sewers, mains, pipes, cables or other apparatus,
 - iii. The installation or erection by way of addition or replacement of plant or machinery or structures of the nature of plant or machinery.
- (b) Any works for the provision within the curtilage of an industrial building of a hard surface to be used for the purposes of or in connection with the industrial process carried on in the building.

The following **conditions and limitations** are specified in Column 2 -

1. Any such development shall not materially alter the external appearance of the premises of the undertaking.
2. The height of any plant or machinery, or any structure in the nature of plant or machinery, shall not exceed 15 metres above ground level or the height of the plant, machinery or structure replaced, whichever is the greater.

Restrictions on exemption

Article 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
 - (i) Contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,
 - (viiB) 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, the use of which is unauthorised.
- (c) If it is development to which Part 10 applies (EIA)
- (d) If it consists of the provision of, or modifications to, an establishment, and could have significant repercussions on major accident hazards.

7.0 Precedent Cases

By reference to the Board's referrals database the following precedent cases are noted.

7.1. ABP Ref. RL2044

Westpoint, Carrigrohane, Ballincollig, Co. Cork – Whether works comprising (1) changes to the elevations of a structure, (2) erection of a steel frame and cladded structure/extension to northern elevation and installation of three silos adjacent to northern elevation, and (3) erection of structure/extension to the western elevation to the enterprise units permitted under s/99/5054 is/is not development and is/is not exempted development. The Board decided (2003) by reference to section 4(1)(h) of the P&D Act and to Class 21, Part 1, Schedule 2 of the Regulations, that the changes to the elevations, erection of cladding, frame, silos outside the original footprint of the permitted building and canopy of use did not come within the scope of S4(1)(h) or within the conditions and limitations of Class 21 are development and are not exempted development.

7.2. **ABP Ref. RL2211**

Carbon Chemicals Group, Raheens East, Ringaskiddy, Cork - Whether the installation of storage tanks and drumming off installation is or is not development and/or is or is not exempted development. The Board decided (2005) that the installation of storage tanks and drumming off installation did not constitute plant or machinery and that the storage of the solvent was not connected to the industrial process being undertaken. As such it did not come within the scope of either Class 21 or Class 22, Part 1, Schedule 2 of the Regulations, and that the proposed works were development and not exempted development.

7.3. **ABP Ref. RL2336**

Topaz Facility, Railway Road, Birr, County Offaly - Whether works to replace 5 tanks with 3 new tanks was development and exempted development. The Inspector noted that the tanks were visible from a range of public areas and it was considered that they would result in a material alteration to the appearance of the site, and would not therefore be exempt under Class 21. The Board decided (2006) that the storage and distribution of fuel did not fall within the definition of the term 'industrial process' and that the development in a revised location materially alters the external appearance of the premises. As such, the proposed development did not come within the scope of either Class 21 or Class 22, Part 1, Schedule 2 of the Regulations.

7.4. **ABP Ref. RL2385**

Baldoyle Industrial Estate, Baldoyle, Dublin - whether the stacking of steel containers on an industrial site is or is not development and is or is not exempted development. The Inspector had noted that the extent of container storage was quite substantial and that it was clearly visible from a number of public places and from adjoining premises, which materially altered its appearance. The Board decided (2007) that the stacking of containers did not come within the definition of plant or equipment and that the proposed development materially altered the external appearance of the undertaking. As such, it was decided that the stacking of containers was development and was not exempted development by reference, in particular, to Class 21 and Class 22, Part 1, Schedule 2 of the Regulations.

7.5. ABP Ref.RL2486

Ballinascorney Upper, Brittas, Co. Dublin – whether the installation of additional new fixed plant and machinery and the expansion of quarrying activity beyond the area permitted is/is not development and is/is not exempted development. The Board decided (2008) that the installation of the replacement plant/the additional plant came within the scope of Class 21 (a)(iii) subject to the proviso that it does not facilitate expansion of output from the aggregates processing plant beyond that authorised under the existing permission for this activity and was exempted development. However, the expansion of the quarry beyond the permitted area was not exempted development.

7.6. ABP Ref RL3551

Stewarts Mill, Boyle, Co. Roscommon

Whether the installation of distillery equipment and the change of use from the production of grain and maize products to a whiskey distillery is development and is/is not exempted development. The change of use from the production of grain and maize products to distillery use was considered to differ materially in planning terms and that neither use would fall within the definition of light industry. The Board decided that the installation of whiskey distillery equipment and the change of use from the production of grain and maize products to a whiskey distillery is development and is not exempted development in Feb 2017. However, it decided that some of the works to the protected structure involved were exempted development.

7.7. 305937 KMK Metals Recycling Ltd., Kilbeggan, Co. Westmeath

Whether the installation and operation of 2 no. specialised degassing machines for the treatment of 7,000 tonnes of refrigerators and freezers per annum is or is not development and is/is not exempted development. The Board decided (May 2020) inter alia, that the works comprising the installation of the degassing machines are exempted development having regard to Section 4(1)(h) of the Planning and

Development Acts 2000 (as amended) and Class 21 of Part 1 of Schedule 2 of the Planning and Development Regulations. However, it was decided that the operation of the machines was not development as it did not raise any new or additional planning considerations over and above those already considered under the previously granted planning permission.

8.0 Assessment

8.1. Introduction and Background

8.1.1. The question posed is whether the proposed alterations and extension to the permitted tank farms at West Cork Distillers, Fastnet Industrial Estate, Marsh Road, Skibbereen, Cork by the **installation of additional items of plant and equipment and structures of the nature of plant and equipment**, and by the **implementation of the mitigation measures proposed in the submitted Landscape and Visual Impact Assessment (LVIA) by Macroworks** are or are not development and are or are not exempted development.

8.1.2. It should be noted, in the first instance, that the wording of Class 21(a)(iii) differs slightly from the wording of the question posed in that it refers to 'plant or machinery' not 'plant and equipment'. However, it is considered that this does not result in a material difference in the meaning of the question posed. Secondly, the reference to 'mitigation measures' does not feature in the wording of class 21 and the mitigation proposed in this instance involves use of a colour scheme and planting of trees and hedgerows, which is not in itself development. Thus, it is considered, for the sake of completeness, that the question should be rephrased as follows:

“whether the proposed alterations and extension to the permitted tank farms at West Cork Distillers.... By the installation of items of plant or machinery and structures of the nature of plant or machinery, are or are not development and are or are not exempted development”.

8.1.3. The site comprises an industrial undertaking, sited on an established industrial site within an industrial estate, which includes a distillery of various types of alcohol and a fish processing plant, together with a visitor centre (relating to the distillery). The premises was originally used as a fish processing plant and the distillery business

was established there within the last 5-6 years. Since then, the alcohol distillery business has expanded rapidly and now includes the production of Irish Whiskey, Vodka, Gin, Poitin and Fermented Wine (known as 'Glan' and used as a raw material in the production of other products off-site).

- 8.1.4. Several planning permissions have been granted since 2017, which included significant elements of development for retention, including all six of the tank farms on site. The first permission (17/365) granted retention of the first two tank farms and permission for most of the warehouses subject to conditions, one of which established noise restrictions (Cond. No. 26). The second main permission (19/779) granted retention for Tank Farms 3, 4, 5 and 6 and permission for significant warehouse/discouraging buildings and bottling facilities. Other permissions (19/0214 and 20/0283) related to the siting/relocation of an LPG tank within the eastern section of the site.
- 8.1.5. A further planning application (Ref. No. 20/585) was withdrawn following requests for further information wherein the P.A. had expressed 'grave concern regarding the level of unauthorised development on the site'. This was followed by a series of applications in 2021 for Declarations from the PA. regarding different elements of the use/development. Declaration Ref. Nos. D/2/21 and D/18/21 (and the current one before the Board) related to the expansion of the permitted Tank Farms. This was considered to NOT constitute exempted development on the basis of the material alteration of the external appearance of the undertaking and on the basis that the development would contravene the noise restrictions established by Cond. No. 26 of Permission 17/365, which restricts any exemption by reason of Article 9(1)(a)(i) of the P&D Regulations.
- 8.1.6. Further Declarations were made (D/1/21 and D/17/21) that cooling plant and equipment did not constitute Exempted Development on the basis that it would contravene the noise condition (No. 26 of 17/365) and that the open storage of empty casks (D/3/21) was exempted development. Initially, it was considered that exemption was restricted in respect of D/1/21 and D/2/21 on the basis of inadequate information to enable a determination on EIA and AA to be made. However, this matter was addressed to the P.A.'s satisfaction by the submission of screening reports in respect of both EIA and AA in the later applications.

- 8.1.7. The current Declaration application, (which was initially submitted to the P.A. under D/44/21 and subsequently referred to the Board for a determination), is accompanied by similar EIA/AA screening reports, as well as a letter of compliance relating to Condition 26 and a Landscape and Visual Impact Assessment which proposes certain mitigation measures. The LVIA seeks to demonstrate that the visual impact of the proposed development can be mitigated by means of a colour scheme and by screen planting and thereby comply with the conditions/limitations of Class 21(a)(iii).
- 8.1.8. The site is a designated Lower Tier SEVESO “establishment” to which the provisions of the Major Accidents Directive applies. The Health and Safety Authority (HSA), which is the central Competent Authority under COMAH, sought further information (under 19/779) and as a result, several compliance conditions were attached to the permission. The activities on site are also subject to an IPC Licence from the EPA, an application for which is currently pending (at the time of writing this report) with the EPA (Ref. No. P1174-01).
- 8.1.9. It should be noted that the purpose of this referral is not to determine the acceptability or otherwise of the subject matter in respect of the proper planning and sustainable development of the area. Nor is it the function of the Board to determine whether or not certain development on the site is unauthorised or whether enforcement action would be appropriate. The purpose of the referral is to determine whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development, and whether any restrictions on exemption apply. The onus of proof is on the party seeking to prove the exemption, and the development in question must fall clearly and unambiguously within the terms of the exemption being claimed.

8.2. **Manufacturing process**

- 8.2.1. The manufacturing process involves the distillation of three types of Irish Whiskey (Pot Still, Grain and Malt), Vodka and Poitin, Gin and Fermented Wine. The production of the spirits involves brewing (milling and mashing) and fermentation of grain followed by distillation in casks, which in the case of whiskey, can take several years. Following distillation, the spirits are blended, bottled and stored prior to dispatch. The fermented wine is produced from a liquid raw material by fermentation,

centrifugation and membrane filtration. It is then transferred to silos where it is stored prior to dispatch.

8.2.2. The operations on site (as permitted by 19/799) involve the following key components -

- Maize and grain storage – capacity 280 tonnes p.a.
- Whiskey Distillation – 24 no. fermenters for malt/grain whiskey Capacity 4.5million litres p.a.
- Production of Gin, Vodka, Poitin – 500,000 litres p.a.
- Fermented wine (Glan) – 8 million litres p.a.
- Whiskey warehousing (maturation) – capacity 56,000 casks
- General storage capacity – 200,000 bottles p.a.
- Bottling capacity – 4 million bottles p.a.
- Visitor centre.

8.2.3. Since permission 19/779 was granted, **Tank Farm 5** has been expanded by the addition of the following: -

- 5 no. tanks each with a capacity of 100,000 litres, 10 metres in height.
- 7 no. tanks each with a capacity of 50,000 litres, 6.5metres in height.
- 27 no. horizontal tanks, each with capacity of 80,000 litres (9.1m high)
- 2 no. mobile carbon tanks
- 6 no. other tanks in Site B (up to 7.9m high).

8.2.4. Thus, the additional capacity of the tank storage is estimated to be at least 3,010,000 litres. The area of Tank Farm 5 has been increased from 557m² to 1,282m², which is almost the extent of the combined area of all the permitted tank farms in their entirety (1,368m²).

8.2.5. The submitted EIA Screening Report at section 2.2.3 describes the proposed project in the context of the permitted storage capacity (including future storage) as follows:-

- The development permitted under Planning Register Nos. 17/365 and 19/779 provides for an increase to c.13 million litres at which site storage capacity will have been achieved.
- The tank farm extensions allow for greater holding capacity at existing production levels and remove the requirement for a “just in time” dispatch schedule. Dispatch schedules can be adversely affected by bad weather and cancellation of ferry crossings.
- The tank farm extensions allow for increased holding capacity in the fermentation process at existing production levels which eliminates the vulnerability of the existing fermentation capacity to stretches of cold weather.

8.2.6. It is difficult to reconcile these statements with the scale of the expansion of Tank Farm 5 as described at 8.2.3-4 above. Thus, the question arises as to whether the extensions and alterations to the permitted tank farms raise new or additional planning issues beyond that already permitted and whether it facilitates expansion of the output beyond that previously permitted.

8.2.7. In accordance with the definition of ‘development’ under section 3(1) of the Planning and Development Act 2000 (as amended), it falls to be considered whether this change constitutes a material change of use of the site. Having regard to legal case precedent as set out in Galway Co. Co v. Lackagh Roack Ltd., wherein Barron J. indicated that “To test whether or not the uses are materially different....what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or the present use. If these matters are materially different, then the nature of the use must be materially different.”

8.2.8. In this regard, I note the following points: -

- **Physical form/land take/area of development** – the expansion of Tank Farm 5 occupies an area almost equivalent to Tank Farms 1-6 combined and is directly adjacent to the southern boundary of the site and extends further to the east towards the river. Much of this land was previously undeveloped and may have had a role as a visual/environmental buffer.

- **Visual impact on adjacent lands** – the substantial increase in area occupied by large tanks with individual capacities of up to 100,000 litres and up to 10-11m in height, is of such a scale that it necessitates landscape mitigation. It is noted that there is also an acoustic wall or de facto screen erected to the east of the horizontal tanks, which is c.10m tall and is not included in any permitted layout drawings.
- **Surface water management and flood risk** – the tank farm expansion involves a significantly increased area of hard-surfaces which raises the issue of the adequacy of attenuation storage capacity prior to discharge to the river.
- **Water quality** – the necessity to construct new bunds to contain the additional tanks raises issues of the likely nature/volume of discharge of contaminated waters from bunds and attenuation of wash water etc. prior to discharge.
- **Traffic impact and road safety** – the increase in volumes/frequency of truck movements within and to/from site which may arise from the additional tank capacity on site raises issues of traffic impact and road safety. In addition, the potential impact from any additional truck movements within the site on pedestrian safety would need to be examined, particularly as this issue had been raised in the FI request in the assessment of 19/779.
- **Storage capacity** - Management/storage of raw materials, products and waste materials. It is not clear whether the volume of materials being stored on site has been increased, and to what extent, or if there are any dust or other emissions arising for such storage use.
- **Health and Safety** - Implications for HSA compliance conditions (Nos. 2-8 inclusive attached to planning permission 19/779), which affected the area concerned and Tank Farm 5 as permitted.

8.2.9. It is noted that the proposal before the Board in this referral relates to ‘works’, involving installation of additional plant and machinery, which it is claimed is exempted development. However, it is considered that the scale of the proposed development is such that it raises questions regarding whether there has been an intensification of use which would amount to a material change of use of the premises.

8.3. Is or is not development?

- 8.3.1. There is no dispute that the 'works' constitute 'development' as defined in Sections 2 and 3 of the Planning and Development Act 2000 (as amended). If 'development' the question arises as to whether the use or activity on site is consistent with the existing planning permission as permitted, or whether there has been a material change in the use by reason of intensification.
- 8.3.2. The scale of the recent expansion suggests that the output of the industrial activity may have been increased beyond that previously permitted. The submission from the agents for West Cork Distillers states that no increase in output has occurred. However, even if this turns out to be the case, it raises additional planning issues (as set out in 8.2.8 above) beyond those already addressed in previous permissions, which would be required to be taken into account in the event of a planning application being made. However, it is considered that insufficient information has been provided regarding the nature of the substances stored in the additional tanks, their relationship with the manufacturing activities, any additional vehicular movements generated within and to/from the site, any additional discharges or emissions and issues relating to health and safety.
- 8.3.3. It was noted during my site inspection that further additional tanks, plant and equipment had also been installed within the area occupied by Tank Farm 5, which have not been included in either the permitted site layout plans or those submitted as part of the referral. I am not aware of any further planning permissions relating to these works, which may or may not require permission.
- 8.3.4. As noted previously, the purpose of this referral is not to determine the acceptability or otherwise of the proposal or to determine whether or not any development is unauthorised. These are matters for the planning authority. In order to determine whether the matters in question are development and/or constitute exempted development, the Board must be provided with sufficient information to demonstrate proof of that exemption, as the onus of proof of exemption is on the party seeking to prove the exemption.
- 8.3.5. **In conclusion**, on the basis of the information before the Board, it is considered that the information provided is insufficient to allow a determination regarding whether or not the alterations and extensions to the permitted tank farms are consistent with the

planning permissions as granted, or whether they are likely to have involved a further intensification of use which may amount to a material change of use, which would therefore, constitute 'development'.

8.4. Is or is not exempted development?

- 8.4.1. Section 4 of the P & D Act 2000 (as amended) set out various provisions for exempted development.
- 8.4.2. **Section 4(1)(h)** of the P & D Act, provides for exemption where 'works' may be considered to comprise works for the maintenance, improvement or other alteration of the property which affects only the interior of the structure, and **which do not materially affect the external appearance of the structure so as to render it inconsistent with the character of the structure or of neighbouring structures.**
- 8.4.3. The additional plant and equipment comprised an additional area of c.1,282 sq.m and the addition of at least 47 no. tanks to one of the permitted tank farms, Tank Farm 5. This tank farm had c.12 tanks permitted in accordance with permission 19/779. The majority of the tanks permitted under 17/365 and 19/779 were located within the middle or northern section of the site and were generally screened from view externally by existing buildings within the site. Tank Farm 5 was the first such tank farm to be clearly visible from outside the site, with two rows of tall, vertical tanks adjacent to the southern boundary and immediately to the east of the NCT building on the adjoining site to the south.
- 8.4.4. The additional 47 no. tanks are located to the east of the permitted Tank Farm 5 and involve 5 further rows of vertical tanks, as well as a set of 27 horizontal tanks which are stacked in rows of three, a screening structure and various ad hoc tanks, all immediately adjacent to the southern boundary. The existing and expanded tank farm is, therefore, prominently visible from the NCT car park and from other sites to the south as well as from various public roads as demonstrated in photographs on file. These include the NDLs and Skibbereen Mart, several industrial/business premises and from the N71 bypass road.
- 8.4.5. As the works involved are highly visible from surrounding lands and adjoining sites, it is considered that these works materially affect the external appearance of the existing undertaking, and the scale of the expansion is such that it renders it

inconsistent with neighbouring structures, notwithstanding mitigation in the form of a colour scheme and planting. Such mitigation would not alter the fact that the development would materially affect the external appearance of the premises. It is considered, therefore, that no exemption is available under S4(1)(h) in this instance.

Class 21 Part 1, Schedule 2 of the Planning and Development Regulations (2001) as amended

8.4.6. Section 4(2) of the Act enables the Minister to provide for any class of development being exempted development, provided that, inter alia,

By reason of the size, nature or limited effect on its surroundings of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development.

8.4.7. It seems to me that the size, nature and effect of the development on the surrounding lands are such that this proviso may not be met. Notwithstanding this, it follows that exemptions are provided for by Article 6 of the P&D Regulations 2001 (as amended). This provides that development of a class specified in Schedule 2 of the Regulations shall be exempted development provided that the conditions and limitations attached to those various classes are met.

8.4.8. The only class that is of any relevance to the case currently before the Board is Class 21(a)(iii) of Part 1, Schedule 2 which relates to Development for Industrial Purposes involving the installation or erection by way of addition/replacement of plant or machinery or structures of the nature of plant or machinery. The planning authority has already accepted in several previous declarations that the alterations and extensions to the tank farm can be considered to be additional plant or machinery. Although there is still some uncertainty regarding the nature and purpose of the substances stored in the additional tanks, it is considered that the tank farms form an integral part of the distillation process and can be considered to be 'plant' or 'machinery' in this instance.

8.4.9. If the Board agrees, the development must comply with the conditions and limitations in column 2 in order to be 'exempted development'. There is general agreement that it can comply with Condition 2 of Class 21(a)(iii), which specifies a maximum height

of 15m above ground level. However, the parties disagree regarding compliance with Condition 1, namely, that -

“the development shall not materially alter the external appearance of the premises of the undertaking.”

8.4.10. As discussed above in 8.4.2 - 8.4.5, the scale, extent and visual prominence of the expanded area of the tank farm is such that it is considered that it would materially alter the appearance of the premises. The expanded tank farm, with the additional rows of vertical tanks, stacked horizontal tanks and screening wall together with the gantries and suspended walkways, tower above the NCT building and the large HGVs parked in the NCT car park. The extended tank farm directly abuts the southern boundary, and no amount of landscaping would be able to screen this development from the neighbouring sites to the south. It is considered that the views from the south clearly indicate that the expanded tank farm fails to meet this condition as it materially alters the external appearance of the undertaking.

8.4.11. The applicant has submitted a ‘Landscape and Visual Impact Statement’ with photomontages showing how, following the implementation of mitigation by screen planting in the form of hedgerows and trees, the proposed development would be screened from two vantage points on Mill Road (R593) to the east. In addition, it is proposed to use a ‘dispersed and intermittent colour scheme’ for the tank farm with ‘individual tanks assigned a dark, medium or light tone on the green-grey colour range, excluding the steel tanks. It is stated that this...

“.....will break up the perceived massing by generating a sense of solid and void and thereby present as less of a block of structure when viewed intermittently through and between sections of intervening vegetation.”

8.4.12. The second form of mitigation is -

“to plant a 5m wide band of vegetation along the eastern site boundary..... [involving] a triple staggered row of native whips and semi-mature trees in order to provide a consolidated screen throughout the seasons.”

8.4.13. However, the Board should note that the issue here is not whether the expanded tank farm would be visually acceptable or affect the visual amenities or landscape character of the area as viewed from certain vantage points, but whether it would “materially alter the external appearance of the premises of the undertaking.” This is

the test that must be passed in order for the development to be regarded as Exempted Development.

- 8.4.14. In this regard, it is considered that the fact that it would require the application of a specific colour scheme and substantial screen planting to minimise the visual impact, in effect, concedes the point that the development is visible from outside the site and that in the absence of such mitigation, would materially alter the external appearance of the undertaking. Notwithstanding this, it is considered that the implementation of the mitigation as proposed would not prevent the material alteration of the external appearance of the undertaking, particularly when viewed from the south. The proposed development, which is currently in place, is highly visible and very prominent from outside the site, most notably from the NCT carpark, the NDLS, Skibbereen Mart and other industrial/commercial premises as well as from the N71 bypass road.
- 8.4.15. It is considered, therefore, that by reason of the nature, scale and extent of the development, the number of additional tanks and their visual appearance, and their proximity to the site boundaries and clear visibility from adjoining properties, the proposed development would clearly alter the appearance of the premises in a material way. As such, the proposed development does not meet the conditions and limitation of Class 21 and does not, therefore, avail of exemption under this part of the legislation.
- 8.4.16. **I conclude**, based on the documentation provided on file that the proposed development does not come within the scope of Class 21(a)(iii) as it fails to comply with the conditions and limitations for that class of development, notwithstanding proposed mitigation by employment of a colour scheme and screen planting. It is further considered that the proposed development does not come within the scope of Section 4(1)(h) of the Act, as it would materially alter the external appearance of the premises, notwithstanding the proposed mitigation.
- 8.4.17. It is noted that the Board has decided in a number of similar proposals that the replacement or addition of plant or machinery came within the scope of Class 21(a)(iii) but that the proposal had failed to comply with the conditions and limitations of that class, or had only complied on the basis that it would not facilitate the expansion of output from the undertaking. These were File Ref. 305937 Kilbeggan,

Co. Meath, File Ref. RL2486 Brittas Co. Dublin and File Ref. RL2336 Birr Co. Offaly. In addition, the Board decided in respect of changes to the elevations of an industrial structure, that it did not come within the scope of section 4(1)(h) of the Act, or within the limitations of Class 21 (Ref. RL2044 at Westpoint Ballincollig, Co. Cork). These decisions are summarised at 7.0 above.

8.5. Restrictions on Exempted Development

8.5.1. It is noted that the planning authority had previously addressed the matter of restrictions on exemption under Article 9. The issues of concern had related to compliance with conditions of the previous planning permissions, (in particular condition 26 of 17/365), and in terms of whether the proposed development might trigger the need for Environmental Impact Assessment and Appropriate Assessment. Given that it has been concluded at 8.4 above, that the proposed development is **not exempted development**, there is no need, in my view, to examine these potential restrictions on exemption. Should the Board disagree, however, and consider that the proposed development is in fact exempted development, these potential restrictions would have to be examined.

8.5.2. In addition to these possible restrictions, it should be noted that as the site is a designated Lower Tier SEVESO site, which means that it is an “establishment” to which the provisions of the Major Accidents Directive applies, (Seveso III Directive 2012/2018/EU), **Article 9(1)(d)** also raises the prospect of a restriction -

“if the development consists of the provision of, or modifications to, an establishment, and could have significant repercussions on major accident hazards”.

In this regard, it should be noted that in the course of the processing of PA Ref. 19/799, the HSA had raised seven outstanding issues that needed to be addressed (correspondence to P.A. dated 27/07/20), which were attached as compliance conditions to the permission (Condition Nos. 2-8 inclusive).

8.5.3. **In conclusion**, it is considered that the proposed development involving alterations and extensions to permitted tank farms at West Cork Distillers, Marsh Road, Skibbereen which comprises the installation of additional items of plant or machinery or structures of the nature of plant or machinery, **is development and is not**

exempted development in accordance with Section 4(1)(h) of the Planning and Development Act 2000 (as amended) or Article 6 (1) and Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended), as it does not comply with the conditions and limitations of Class 21.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether the proposed alterations and extension to the permitted tank farms at West Cork Distillers, Fastnet Industrial Estate, Marsh Road, Skibbereen, Cork by the installation of additional items of plant or machinery and structures of the nature of plant or machinery, are or are not development and are or are not exempted development;

AND WHEREAS West Cork Distillers care of McCutcheon Halley Planning Consultants, 6 Joyce House, Barrack Square, Ballincollig, County Cork requested a declaration on this question from Cork County Council on the 28th day of October 2021;

AND WHEREAS Cork County Council referred this matter under section 5(4) of the Planning and Development Act 2000 (as amended) for a determination to An Bord Pleanála on the 3rd day of December, 2021;

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

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) Articles 5(1) and 6(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Class 21 of Part 1, Schedule 2 of the Planning and Development Regulations, 2001, as amended,

- (d) the planning history of the site, and
- (e) the pattern of development in the area;

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The alterations and extension to the permitted tank farms by the installation of plant or machinery and structures of the nature of plant or machinery is development which comes within the scope of section 3(1) of the Planning and Development Act, 2000 (as amended);
- (b) The alterations and extension to the permitted tank farms by the installation of plant or machinery and structures of the nature of plant or machinery are not exempted development as they do not fall within the scope of Section 4(1)(h) of the Planning and Development Act 2000 (as amended);
- (c) The alterations and extension to the permitted tank farms by the installation of plant or machinery and structures of the nature of plant or machinery does not comply with the conditions and limitations provided in Column 2 of Class 21(a)(iii) of the Planning and Development Regulations, 2001 (as amended);

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 said installation of plant or machinery at West Cork Distillers, Fastnet Industrial Estate, Marsh Road, Skibbereen, County Cork is development and is not exempted development.

Mary Kennelly
Senior Planning Inspector

31st July 2023