



An  
Bord  
Pleanála

## Inspector's Report ABP-313411-22

<b>Question</b>	Whether the change of use and works on site of former public house with residential development and football pitch at Seanins, Sallypark, Latteragh, Nenagh, Co. Tipperary, into a Council depot and offices is or is not development and is or is not exempted development?
<b>Location</b>	Seanins, Sallypark, Latteragh, Nenagh, Co. Tipperary
<b>Declaration</b>	
<b>Planning Authority</b>	Tipperary County Council
<b>Planning Authority Reg. Ref.</b>	S52226
<b>Applicant for Declaration</b>	Michael Power and Margaret Ryan
<b>Planning Authority Decision</b>	Is exempted development
<b>Referral</b>	
<b>Referred by</b>	Michael Power and Margaret Ryan
<b>Owner/ Occupier</b>	Tipperary County Council
<b>Observer(s)</b>	None
<b>Inspector</b>	Angela Brereton
<b>Date of Inspection</b>	23 <sup>rd</sup> of March 2023

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## 1.0 Site Location and Description

- 1.1. The site is located at Sallypark, Latteragh, which is in the rural area c.12.7kms south east of Nenagh. This is accessed via the R498 and the local road network, L6154. It is located at a crossroads and is to the northeast of the junction and is bounded to the west by the R498 and to the south by the L6154.
- 1.2. The site is broadly rectangular in shape and has a stated area of c.1.32 ha and appears relatively flat. It contains a former public house building and carpark, and is currently being used as a Council depot, and associated facilities. This includes new structures, lighting, boundary fencing, hard surfaced yard and access off the L6154. There is also a hard standing on the side of the frontage facing the R498 and a newly constructed footpath to the gated entrance to the compound on the L6154. On the day of the site visit I noted some storage containers, concrete slabs and road surfacing materials stored on the site. There is a surface water grid on the L6154 close to the gated entrance to the site.
- 1.3. The Sallypark Stream to the north of the site, flows west into the Nenagh River. The Nenagh River and Latteragh Quarry are located on the opposite side of the R498 further to the west and north. The R498 is a very busy heavily trafficked road with several trucks, including as I noted when on my site visit, some turning for Latteragh Quarry, to the north via the junction to the local road on the opposite side of the R498. There is a bridge in this location over the Nenagh River.

## 2.0 The Question

- 2.1. Whether the change of use and works on the site of former public house with residential accommodation and football pitch purchased by Tipperary County Council (on an overall site of c.1.32ha) at Seanins, Sallypark, Latternagh Nenagh, Co. Tipperary, E45 EE61, into a Council depot and offices is development and is or is not exempted development?
- 2.2. Details relative to the change of use and the works carried out as per the Referral documentation submitted are itemised and discussed in the Assessment below.

### 3.0 Referral to the Planning Authority

- 3.1. A Referral under Section 5 of the Planning and Development Act 2000, as amended was made to the Planning Authority by Rosemarie McLoughlin of RML Planning on behalf of Michael Power and Margaret Ryan on the 8<sup>th</sup> of March, 2022 and is summarised under the following headings:

#### History and context

- The previous use of the site was residential and prior to that public house with residential above. The site also incorporated a previously used Irish Football Association (IFA) football pitch. Historical maps indicate this was the site of Latteragh Post Office.
- The property and site were sold to Tipperary County Council and they are registered as the full owner from 20<sup>th</sup> of September 2020.

#### Operational description and impact on adjacent property

- A description of current operations on site to facilitate the Council depot and the new structures that have been constructed thereon.
- The operations on the site create considerable noise owing to the tipping of quarried materials, waste and heavy vehicle movements on the site. The noise levels are continuous and ongoing and a severe nuisance and annoyance for nearby residential. The Referrer has measured the noise levels with a decibel reader as 80DbA.
- This previously quiet area in the open country has been transformed by the activity and processing that is being carried out on the subject site. They note continuous and ongoing noise nuisance. There are no restrictions on hours of operation.
- The operations generate significant dust from the materials dumped on the site from articulated vehicles and in the removal of same from the site.
- Nuisance created by light spillage leading to light pollution.
- They are concerned about the generation of traffic hazard proximate to the referrers home.

- The operations retain waste materials from road cleaning vehicles stored on the site. The mounds are then removed and it is unknown to which licenced provider. The Referrers are raising this matter with the EPA.
- Surface water is discharged into the Nenagh River from the site (gully at entrance).
- Sallypark Stream which bounds the north of the site, flows west into the Nenagh River. The river waterbody water framework directive status of this watercourse 2013-2019 has fallen to 'moderate', in the last record and the category of river waterbodies risk projection 'at risk.'

#### Appropriate Assessment

- They are concerned that AA screening has not taken place. While there are no direct connections, there is an indirect hydrological link to the Slievefelim to Silvermines Mountains SPA.
- A Section 5 Referral also requires to be screened for AA (and EIA). The screening should also take into account the direct, indirect and in-combination impacts. They also note that there is a large quarry c.400m from the road east of the site and a Part 8 road development.

#### Environmental Impact Assessment

- They refer to sub-threshold development and the need for a screening determination and to refer to case law. They consider there is a need to screen this section 5 referral for EIA to include regard to the cumulative impacts of other development and consented development.

#### Application of relevant legislation to this referral

- They refer to the relevant provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended).
- They refer to the works carried out and consider that there has been a material change of use of structure or other land. This is from a public house including carpark/residential use and football pitch to other uses associated

with the operations at the council depot (they provide a list relative to change of use and works).

- There can be no doubt that development has been carried out pursuant to section 3 of the PDA 2000 (as amended).

#### Contravention of development plan

- They note the policies from the North Tipperary CDP 2010 which then applied. These are relative to noise, lighting, wastewater, stormwater, inland water and riparian zones, water framework, strategic road network development management and natural heritage.
- They refer to case law and note that there is an obligation on the local authority to consider whether or not a proposed development contravenes the Plan. Providing that a local authority is not entitled to undertake development in contravention of its own development plan.
- Restrictions on exemptions are also referred to, namely Section 178(1) where the council of a county shall not affect any development in its functional area which contravenes materially the development plan.

#### Restrictions on Exempted Development

- Reference is had to the relevant Sections of the PDA 2000 (as amended) which provide for situations of exempted development. They also refer to Article 6 of the PDR 2001 (as amended) and to the restrictions on exemption provided in Article 9.
- They note that only one of the criteria in the restrictions to exemptions needs to apply in order for development to be considered exempted development.
- A detailed Assessment is made of such and provides that in this case the relevant (listed) exemptions do not apply. This includes reference to the Articles in Schedule 1 and to Schedule 2 of the PDR 2001 (as amended).

#### Temporary uses

- It is unclear if the Council indicates that the compound is temporary. They refer to caselaw and note that in order for development to be considered temporary that it must have a start date and an end date.

## Part 8

- They note that on the 24<sup>th</sup> of August 2017 Councillors adopted a Part 8 subject to conditions.
- The Part 8 did not refer to the change of use of existing lands to a Council depot. No documentation indicated a depot at the subject site.
- They refer to the CPO Ref. CH92.307931 and note permanent and temporary landtakes. That these did not include the site of the subject Council depot.

## Conclusion and Recommendation

- They provide a list (a) to (i), noting the relevant legislation in the PDA 2000 (as amended) and the PDR 2001 (as amended) and other issues and invite Tipperary County Council to concur with the Referrers that the change of use and works are development and are not exempted development for the reasons outlined in their referral.
- They ask the planning authority to invoke the provisions of Section 5(4) of the PDA 2000 (as amended) and that the Question be referred to and decided as to what is or is not exempted development be decided by the Board.
- In advance of the final determination of this section 5 referral by the final authority, they request that works and the change of use on the site cease, and the site be vacated until determination is made.

## **4.0 Planning Authority Declaration**

### **4.1. Declaration**

On the 4<sup>th</sup> of April 2022, Tipperary County Council concluded that:

*The change of use and works on the site of the former public house with residential development and football pitch located at Sallypark, Latteragh, Nenagh, Co. Tipperary into a council depot and offices used by Tipperary County Council is development within the meaning of the Planning and Development Act 2000, as amended and is exempted development pursuant to Section 4(1)(aa) of the Planning and Development Act 2000, as amended.*



## 4.2. Planning Authority Reports

The Planner noted the Section 5 Referral made to the Council and the Question asked including relevant to the change of use and works carried out (as noted in the Question above). Their response included the following:

### General Observations

- The lands that are the subject of this Declaration are owned by Tipperary County Council and were purchased by them in 2020. They were developed for use by the Council as a works depot for the Nenagh Municipal District South – East Area.
- Nenagh Municipal District have confirmed that works were undertaken following the purchase of the lands and they provide a list of these works.
- Nenagh Municipal District confirmed expenditure on the works undertaken on the site (amount given).
- They confirm that a new entrance was not developed (existing entrance that previously served as pub was used and improved) and that piping of surface water into the Nenagh river was/is not undertaken.
- Nenagh Municipal District have confirmed that the site has been used by same for a period of time prior to its acquisition.

### Statutory Provisions

- They refer to the statutory provisions relevant to a referral case in both the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended).

### Assessment

- They note the Question posed and consider that the change of use constitutes 'development' within the meaning of the PDA 2000 (as amended).
- They consider the works undertaken by the Council associated with the change of use come within the definition of 'works' as defined under the PDA 2000 (as amended) and therefore constitute 'development' within the meaning of the said Act.

- They consider that the development undertaken by the Council (change of use and works on the lands) are exempted development pursuant to Section 4(1)(aa) of the PDA 2000 (as amended).
- The development does not come under any classes of development listed under Article 80 of the PDR 2001 (as amended) that are prescribed for the purposes of section 179 of the Act.
- The lands are not used for the disposal of waste. The cost of development undertaken does not exceed €126,000.
- The proposal has been screened as to the requirements of AA and the screening assessment (attached to their Report) considers that the development does not impact on any Natura 2000 site.
- The proposed development is not a type of development included for under Part 1 or 2 of Schedule 5 of the PDR 2001 (as amended).
- They have reviewed the policies and objectives of the North Tipperary CDP 2010, as varied and are satisfied the development does not materially contravene the said Plan.

#### Recommendation

Tipperary County Council in considering this referral, had regard particularly to –

- (a) Sections 2,3 and 4 and Section 179 of the Planning and Development Act, 2000 as amended.
- (b) Article 6, 9 and 80 of the Planning and Development Regulations 2001, as amended.
- (c) The former use of the site.
- (d) The current use of the site by the Council as a depot used by Nenagh Municipal District.
- (e) The nature and extent of development undertaken by the Council.

Their conclusion is as noted in the Declaration above i.e: is development and is exempted development pursuant to Section 4(1)(aa) of the Planning and Development Act 2000, as amended.

#### 4.3. Other Technical Reports

None noted on file.

### 5.0 Planning History

The Planning Authority Report and the Referral make reference to the following history cases:

#### Subject site

- Reg.Ref. 5111625 – Permission granted subject to conditions to increase the floor area of the licensed premises by way of internal alterations and extension to the rear – provision of carpark.

#### Adjacent to the site:

- CH92.307931 - Confirmation without modification by the Board of a Compulsory Purchase Order authorising compulsory acquisition of lands and entitled Tipperary County Council – R498 Latteragh Realignment Scheme Compulsory Purchase Order (Roads) (No.2) 2020

A copy of the Board's decision is included in the History Appendix to this Report.

### 6.0 Policy Context

#### 6.1. Tipperary County Development Plan 2022-2028

This is now the pertinent plan, made for the entire county of Tipperary and has been adopted and has been effective from the 22<sup>nd</sup> of August 2022.

#### Introduction - Framework

Section 1.1 provides: *This is the first Plan ever prepared for the entire county of Tipperary, and it replaces the South Tipperary Plan 2009, and the North Tipperary County Development 2010. This Plan was adopted at the plenary meeting of Tipperary County Council (the Council) on 11th July 2022.*

Section 1.1.1 notes: *This Plan is influenced by, and must comply with, a set of overarching planning frameworks, each shaping and coordinating planning,*

*economic and spatial development at national, regional and local levels. These include the National Planning Framework 2018 (NPF), and the Southern Regional Spatial and Economic Strategy 2020 (RSES).*

Section 1.4 provides: *The development objectives in this Plan are consistent, as far as practicable, with the conservation and protection of the environment.*

### Core Strategy

Section 2 provides the Core Strategy. Table 2.3 Settlement Typologies. It is noted that the subject site is located outside of any settlement in the open countryside.

### Environment

Section 11 has regard to Environment and Natural Assets

This includes regard in Section 11.3 to Conservation and Protection of 'European Sites' SACs and SPAs.

Section 11.4 refers to Water Quality and Protection noting regard to the Water Framework Directive.

Section 11.8 to Noise and Light Emissions.

Section 11.9 provides policies relevant to the protection of the environment. These include:

*Policy 11-1: In assessing proposals for new development to balance the need for new development with the protection and enhancement of the natural environment and human health. In line with the provisions of Article 6(3) and Article 6 (4) of the Habitats Directive, no plans, programmes, etc. or projects giving rise to significant cumulative, direct, indirect or secondary impacts on European sites arising from their size or scale, land take, proximity, resource requirements, emissions (disposal to land, water or air), transportation requirements, duration of construction, operation, decommissioning or from any other effects shall be permitted on the basis of this Plan (either individually or in combination with other plans, programmes, etc. or projects).*

*Policy 11-2: Ensure the protection, integrity and conservation of European Sites and Annex I and II species listed in EU Directives. Where it is determined that a development may individually, or cumulatively, impact on the integrity of European*

sites, the Council will require planning applications to be accompanied by a NIS in accordance with the Habitats Directive and transposing Regulations, 'Appropriate Assessment of Plans and Projects, Guidelines for Planning Authorities', (DEHLG 2009) or any amendment thereof and relevant Environmental Protection Agency (EPA) and European Commission guidance documents.

Policy 11-7 includes: a) *Ensure the protection of water quality in accordance with the EU WFD, and support the objectives and facilitate the implementation of the associated Programme of Measures of the River Basin Management Plan 2018-2021 and any successor....*

Policy 11-17 includes: *Ensure the protection of the visual amenity, landscape quality and character of designated 'Primary' and 'Secondary' amenity areas. Developments which would have a significant adverse material impact on the visual amenities of the area will not be supported....*

## Roads

Section 4.3.2 refers to the key town of Nenagh and includes: *The RSES has identified local road improvement measures including a link road between the N52 and the R445 and an inner relief road from the R498 to the R445.*

Section 12 refers to support for integration and provision of Sustainable Transport.

Section 12.5 refers to Roads Priorities for Tipperary and this includes reference to the delivery of Strategic Roads Investment Projects including:

- Thurles Bypass linking the N62, N75 and R498.

Section 12.6 provides the Planning Policy relative to Sustainable Transport and Roads. This includes:

*Policy 12-5: Maintain and protect the safety, capacity and efficiency of Tipperary's roads network and associated junctions in accordance with the Spatial Planning and National Roads Guidelines for Planning Authorities, (DECLG, 2012) and the Trans-European Networks Regulations and to avoid the creation of additional access points to national roads to which speed limits greater than 60kmh apply.*

## Volume 3 Appendix 6 – Development Management Standards

### *Section 1 -Introduction*

This includes reference to the Habitats Directive Assessment and AA and to Environmental Assessment and to EIA.

*Section 3 – Low Carbon and Climate Resilient Development*

This includes reference to SUDs, Lighting, Noise, Biodiversity, Sustainable Transport, Water etc.

*Section 6 – Parking, Traffic and Road Safety*

This includes Road Design and Visibility at a Direct Access. Regard is had to Traffic and to Road Safety.

**6.2. Nenagh Local Area Plan 2013-2019 (as extended)**

As stated in the Core Strategy, the current Town Development Plans and LAPs will remain applicable until they are replaced with LAPs, in accordance with the framework and timeline as set out in Table 4.2 of the Tipperary CDP 2022-2028. This provides a Framework of Town Plans and Local Area Plans.

The Council website provides that Tipperary County Council is preparing a new Local Area Plan for Nenagh, which will set out the land use strategy for the town to ensure the town can grow, support employment and homes and can do so sustainably and successfully.

Reference is had in the Referral to Strategic Objective 7: *To ensure that the water quality of the Nenagh River and its tributaries, groundwater and public source of drinking water are improved and protected from pollution.*

**6.3. Natural Heritage Designations**

- 6.3.1. There are no natural heritage designations either within or immediately abutting the referral site. The site is some distance from Natura 2000 sites.

## 7.0 Referral to the Board

### 7.1. Referrer's Case

On the 22<sup>nd</sup> of April 2022, An Bord Pleanála received a request for a review of the Declaration of Tipperary County Council, from Rosemarie McLoughlin, RML Planning on behalf of local residents Michael Power and Margaret Ryan. This refers to the Question raised and provides a list of the change of use and works carried out and in summary includes the following:

#### Summary of Referral issues arising

- They provide a summary of referral on declaration and refer to the legislation. They include a list of what they submit are the relevant sections of the Planning and Development Act 2000 and the Planning and Development Regulations 2001.
- They refer to the provisions of local planning policy i.e the North Tipperary CDP 2010 (as amended), the Nenagh Local Area Plan 2013-2019 as varied and to the proper planning and sustainable development of the area.
- They note the Planning Authority in the planning report do not consider that any waste is or has been stored on the site and this is disputed by the referrers.
- The Planning Authority in the planning report do not consider that a new entrance was created and this is disputed by the referrers.
- One lighting standard has been erected, flood lights have been placed on the rear of the existing building and excavation wiring has taken place for a second lamp standard.
- Since making the section 5 reference, the Council have constructed a new footpath adjacent to the Local Road L6154.
- Since making the section 5 reference, the Council have placed some early planting inside the fencing.

- They submit that Tipperary County Council have not correctly interpreted the relevant legislation in making the change of use and works that have taken place are development and are not exempted development.
- They have regard to the site context and to Part 8 development and to the quarry in the vicinity of the site.
- Reference is had to the Water Framework Directive.
- To hydrological connection to the Nenagh River and to the SAC.
- They refer to the purchase of the site and the monies expended to date.
- The planning history and the nature of the uses and works previously and currently carried out on site.
- They refer to the submissions from neighbouring property.

#### Restrictions on Exemption

- It is submitted that the development that has occurred is not exempted development, and their reasons are noted.
- The change of use and works materially contravene the CDP in contravention of section 178 of the Planning and Development Act, 2000 as amended and the Nenagh LAP.
- The development is not exempted development pursuant to section 4(4) of the Planning and Development Act, 2000 as amended as an appropriate assessment is required owing to the nature of the development and where the specific site conditions result in run-off to the Nenagh River which is a pathway to an SAC and where the ground water vulnerability is designated as '*extreme*' and the river waterbodies risk projection is '*at risk*'.
- In addition to the development not being exempted development under the primary legislation, it fails to be excluded from the Part 8 process under the Planning and Development Regulations as amended and their reasoning is provided.



## Site Context

- They provide details relative to the site and note the proximity of the Referrer's home opposite the site.
- They note that Tipperary County Council is registered as the full owner of the depot site, from September 2020.
- The local road bounding the site forms part of the Ormond Way hiking trail which connects from the Latternagh Crossroads to the Nenagh River. The route is way marked and forms part of the Beara-Breifne Way.
- They refer to watercourses in the area and note that site is bounded to the north by Sallypark Stream that flows west into the Nenagh River. The salmon population of the SAC are known to spawn in the Nenagh River.
- The Water Framework Directive status of this watercourse 2013-2018 has fallen to 'moderate' in the last monitoring record and the category of river waterbodies risk projection is 'at risk'.

## Operations and impact on adjacent property

- The site currently operates as a Council depot, offices, staff facilities, vehicle parking, vehicle washing, storage of waste collected by the Council and distribution thereafter, storage of quarry materials and other materials and distribution thereafter.
- The site contains a new structure (two new containers connected with a canopy), new boundary fencing, new access of the L6154, new lighting, new concrete pad, and ancillary works. The c.528sq.m concrete slab is c. 33m from the Referrers house and c.6m from the boundary of the property.
- Correspondence from the Council to the Referrers (email dated 6<sup>th</sup> of May 2021) states that the depot may be used at nights and/or weekends in addition to daytimes/weekdays. The Referrers note that there are no restrictions on noise or hours of operation.
- They have regard to the description of the works that have been carried out on site as described by Nenagh Municipal District and note there is some lack of clarity in the works as outlined and in correspondence (Appendix 1 refers).

- The operations generate significant dust from materials dumped on site from articulated vehicles and in the removal of same from the site.
- Significant light spillage is also generated.
- They are concerned about disposal of waste and dust creation from the site.
- The activity on site creates traffic hazard, the queuing of articulated and other vehicles on the regional and local road.
- They submit that the impact on residential amenity has not been addressed in the planning report.

### Planning History

- Planning permission was granted for an extension to the licenced premises and carpark in 1985 (Reg.Ref.5111625 refers). They refer to Article 9(1)(a)(i) of the PDR 2001 (as amended) and note that restrictions on exemption include where the development would contravene a condition attached to a permission. They consider this to be the case (Appendix 4 refers).

### Relevant Planning Policy

- They refer to policies of note in the North Tipperary County Development Plan 2010 (as varied). In summary, these relate to noise, lighting, wastewater, stormwater, Natura 2000 Sites, Protected Structures, tourism, drainage, water framework, development management, traffic and transport assessments and natural heritage.
- They refer to natural heritage and note the R498 is situated between 'Secondary Amenity Areas' Slievephilim Complex to the east and Devils Bit Mountain to the west.

### Legislative provisions and application

- The PDA 2000 (as amended) and the PDR 2001 (as amended) apply in seeking whether a question is development and is or is not exempted development.
- They include reference to Interpretations and definitions – primary and secondary legislation and to restrictions on exemption.

### Section 5 application

- The referrer considers that the change of use and works that have taken place on the site is development, is not exempted development for the reasons they have outlined.
- They note development pursuant to the definition in Section 3 of the PDA 2000 (as amended) in relation to works and the change of use. They consider that new development that has taken place without any planning process.
- That there is a material change of use from public house including car park/residential use and football pitch to the following i.e: Office and staff facility, Storage and distribution of quarry material, Storage and distribution of waste material, Storage and distribution of other material, Vehicle parking and cleaning, Enclosures from open lands to enclosed lands.

### Contravention of Development Plan

- The Referrer submits that the change of use and works that have occurred on site materially contravene the development plan. They provide a summary table to assess the relevant North Tipperary CDP 2010, as varied, policies against the development.
- They submit that the overarching principle of local authority own development is that the local authority may never contravene materially the development plan. Reference is had to Section 6 and Table 1 which refers to application of County Development Plan policy within the subject site.
- They refer to case law in this respect. They note that the Courts and the Board, have taken strict interpretations of matters materially contravening a Development Plan.
- They refer to Strategic Objective 7 of the Nenagh LAP 2013-2019 and provide that the development that has occurred does not secure the WFD status of the Nenagh river as assigned and increases the risk of pollution. That a material contravention of the LAP has occurred.

### Appropriate Assessment

- Section 4(4) of the PDA2000 provides that development shall not be exempted development if an EIA or an AA of the development is required.
- They contend that AA screening has not been carried out by the Planning Authority as Competent Authority in advance of the project being carried out.
- They provide that the High Court decision in *Carville and Ors -v- Dublin City Council* [2021] has set the standard for local authority own development that if development is to proceed, the requirements of the EIA Directive and the Habitats Directive must be addressed and complied with.
- They refer to the Habitats and Birds Directive and note that these are transposed into Irish Legislation by Part XAB of the PDA 2000 and the Birds and Natural Habitats Regulations 2011.
- The new development and operations that have taken place on this site have changed the nature of the site and intensified the use of the site. This includes regard to the open storage of materials, cleaning of heavy vehicles and lack of dust control measures.
- Drainage systems have not been put in place and there is no bunding for oil/fuel, or petrol interceptors. They note the proximity of the Sallypark Stream and the Nenagh River. Also, the risk of contamination of groundwater.
- The Nenagh River is a tributary of the Lower River Shannon SAC and they note that there is a direct hydrological pathway to the SAC and a river 'at risk' requiring protection under the WFD.
- They refer to the OPR Practice Note PN01 *Appropriate Assessment Screening for Development Management 2021*. They submit that in view of the site location and the works carried out thereon that best practice and the precautionary would require an AA.
- Relative to the trigger for AA, this referral also refers to: *Eoin Kelly v. An Bord Pleanála* [2019] IEHC 84 (High Court) and a discussion is provided of such. Note is also had of the *Waddenzee* case C-127/02 relative to the precautionary principle.

- That in-combination effects raise at least the likelihood and probability that effects exist from the nature of the development that has taken place without any proper AA or planning processes applied in advance of the development.
- The subject site may also be considered an indirect hydrological link to the Slievefelim to Silvermines Mountains SPA c.5.2km to the east.
- Rather than conducting an assessment of *Likely Significant Effects*, the planning authority have only assessed the *possible impacts* arising from the proposal. That they have not demonstrated the *beyond reasonable scientific doubt* at the Screening stage and an AA is required.

#### Application of relevant exempted provisions/assessment of restrictions

- They set out the relevant potential exemptions under the PDA2000, as amended. This includes an assessment against the restrictions as set out. They state that Board will be aware that only one of the criteria in the restrictions to exemptions needs to apply in order for development not to be exempted development.
- They refer to Article 6 Schedule 2 Part 1 of the PDR2001 for certain works that have taken place on site and consider these exemptions are not met.
- They submit that the relevant articles are assessed in order of relevance rather than sequential order. They provide a discussion of such and consider that the exemptions do not apply.
- The development is causing a traffic hazard and/or obstruction of road users and therefore is not exempted development contrary to Art. 9(1)(a)(iii) PDR 2001.
- A determination as to *whether the storage of raw material, by-products and waste is or is not development or is or is not exempted development* was determined by ABP Ref.PL17.RL3084 as development and not exempted development.
- They refer to the decision of the High Court in relation to local authority own development in order to consider a matter temporary, it must have a start and an end date, Carvill and Ros-v-Dublin City Council [2021] IEHC 544.

## Part 8

- They note the adopted Part 8 did not include documentation which indicated a depot at the subject site. There are no provisions for a change of use of a building or a site within this part 8.
- They refer to the maps and documentation submitted with the CPO (ABP-307931-22) and provide that the areas of temporary acquisition shown do not coincide with the subject site.
- The subject site was not subject to either a temporary or permanent CPO. The potential of the site being used as a depot was not discussed.
- The development that has taken place on the subject site should have been subject to Part X relative to AA screening being carried out.

## Environmental Impact Assessment

- The development may be considered under several sub-threshold categories including 11(b) of Schedule 5, Part 2. This is relative to installations for the disposal of waste. They note that the Council deny any waste is stored on site, but the referrers hold the position that road sweeping materials are stored on the site.
- It may be noted in the Part 8 carried out for the new road in the vicinity, the subject site was not included in the EIA or AA screenings.

## Conclusions and Recommendations

- They request a review from the Board of the declaration of Tipperary County Council and particularly to –
  - a) Sections 2, 3, 4, 5, 177U, 178 and 179 of the Planning and Development Act ,2000, as amended including part XAB;
  - b) Articles 5, 6, 9 and 10 of the Planning and Development Regulations, 2001, as amended;
  - c) Parts 1 and 4 of the Second Schedule to the PDR 2001 as amended;
  - d) The European Communities (Water Policy) Regulations 2003 as amended;
  - e) The provisions of the Tipperary CDP 2010 as amended;

- f) The provisions of the Nenagh LAP 2013-2019 as varied;
  - g) The hydrological pathway of the Nenagh River to a SAC;
  - h) The permitted Part 8 development in the vicinity of the site;
  - i) The quarry in the vicinity of the site;
  - j) The Water Framework Directive and status assigned to adjacent rivers;
  - k) The purchase of the site and the monies expended to date;
  - l) The submissions below and the impact on neighbouring property;
  - m) The nature of the uses and works previously and currently on site;
  - n) The planning history of the site;
  - o) The location of the site and the pattern of development in the area; and
  - p) The proper planning and sustainable development of the area.
- They request that ABP concur with the position set out in their Referral report and agree that the change of use and works that have taken place are development and are not exempted development.
  - Appendix 1 in their Referral includes an email from Tipperary County Council relevant to the usage of the site and the works carried out to facilitate the operation of the site as a road's depot for the Council.
  - Appendices 2 and 3 provide a list of expenses/costings relative to the works carried out on site.
  - Appendix 4 provides a copy of the 1985 planning permission relative to reconstruction and extension to the public house.

## 7.2. Planning Authority Response

Their response includes the following:

- They strongly rebut the statement that the legislation was incorrectly interpreted. The Planning Authority have given due consideration to the relevant legislation as per the Planning and Development Act 2000, as amended and the Planning and Development Regulations, 2001 as amended.

- They are satisfied that the development to which their declaration relates does not materially contravene the North Tipperary CDP 2010, as varied. The Nenagh Town and Environs DP 2013, as varied is not relevant to this site.
- They do not consider that the development endangers public safety by reason of traffic hazard. That the development fences and encloses lands opened to the public or that same contravenes a planning condition. These are restrictions on exemptions under Article 9 of the Planning and Development Regulations 2001, as amended which do not apply in this case.
- The overall expenditure on the development to which the Declaration relates has not exceeded €126,000 and therefore does not require a Part 8 application.
- An Appropriate Assessment was carried out in relation to ref. S5/22/26 and it was determined there was no potential for significant effects and therefore AA was not required.
- There is no surface water discharge to the Nenagh River, surface water percolates through the unbound surface as a SUDS measure. The road and gully on the public road outside the entrance was in place prior to the operation of the council depot.
- The Planning Authority conclude the change of use and works on the site of the former public house with residential development and football pitch on the subject site, into a council depot and offices used by the Council is development within the meaning of the Planning and Development Act 2000, as amended and is exempted development pursuant to Section 4(1)(aa) of the Planning and Development Act 2000, as amended.

## 8.0 Statutory Provisions

### 8.1. Planning and Development Act, 2000

#### Section 2

Section 2(1) of the Act states as follows:-

In this Act, except where the context otherwise requires –



'development' has the meaning assigned to it by Section 3 and 'develop' shall be construed accordingly.

'exempted development' has the meaning specified in Section 4.

'structure' means any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined;

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

"use", in relation to land, does not include the use of the land by the carrying out of any works thereon;

### **Section 3**

Section 3(1) of the Act sets out the meaning of development as follows: 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**

Section 4(1) The following shall be exempted development for the purposes of this Act:

(aa) development by a local authority in its functional area (other than, in the case of a local authority that is a coastal planning authority, its nearshore area);

(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;

(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.

Section 4(2) of the Act notes that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations 2001, as amended.

## **Section 5**

This section provides the details of the process of a declaration and referral on development and exempted development and facilitates a review by An Bord Pleanála on the determination.

Section 5(1) provides in summary that any person may seek a declaration on a referral from the planning authority.

Section 5(3)(a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

## **Part XI – Development by Local and State Authorities, ETC.**

Section 178(1) – The council of a county shall not affect any development in its functional area which contravenes materially the development plan.

Section 179 (1)(a) The Minister may prescribe a development or a class of development for the purposes of this section where he or she is of the opinion that by reason of the likely size, nature or effect on the surroundings of such development or class of development there should, in relation to any such development or development belonging to such class of development, be compliance with the provisions of this section and regulations under this section.

(b) Where a local authority that is a planning authority proposes to carry out development, or development belonging to a class of development prescribed under paragraph (a) (hereafter in this section referred to as “proposed development”) it

shall in relation to the proposed development comply with this section and any regulations under this section.

### **Part XAB – Appropriate Assessment**

Section 177U refers to Screening for AA by the competent authority.

— (1) A screening for appropriate F930[assessment of a draft Land use plan or application for consent for proposed development] shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that Land use plan or proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site.

## **8.2. Planning and Development Regulations, 2001**

### **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.

### **Article 9** Restrictions on exemption.

(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act—

- (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,
- (ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width
- (iii) endanger public safety by reason of traffic hazard or obstruction of road users.
- (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,

(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,

## **Article 10**

Article 10 (1) states: 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.

Part 1 of Schedule 2 sets out exempted development class for exempted development general to which Art 6(1) refers.

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.

Class 14 - Change of use exemptions

Class 14(b) from use as a public house, to use as a shop.

Class 22 refers to exemptions for Storage within the curtilage of an industrial building.

Part 4 of Schedule 2 – Exempted development – Classes of Use

## **Part 8**

Requirements in respect of specified development by, on behalf of, or in partnership with local authorities.

Article 80 (1) - Subject to sub-article (2) and sub-section (6) of section 179 of the Act, the following classes of development, hereafter in this Part referred to as “proposed development”, are hereby prescribed for the purposes of section 179 of the Act —

h) the use of land, or the construction or erection of any installation or facility, for the disposal of waste, not being—

(i) development which comprises or is for the purposes of an activity in relation to which a waste licence is required or

(ii) development consisting of the provision of a bring facility which comprises not more than 5 receptacles,

(k) any development other than those specified in paragraphs (a) to (j), the estimated cost of which exceeds €126,000, not being development consisting of the laying underground of sewers, mains, pipes or other apparatus.

### **Local Authority Development EIAR/AA**

Chapter 4 refers to Local Authority Development

Article 117(1) – refers to local authority scoping request to the Board.

#### *Sub-Threshold EIAR*

Article 120(3)(b) – refers to where any person considers that a development proposed to be carried out by a local authority would be likely to have significant effects on the environment, he or she may, at any time before the expiration of 4 weeks beginning on the date of publication of the notice referred to in article 81(2), apply to the Board for a screening determination as to whether the development would be likely to have such effects.

#### *Screening determination for AA*

Article 250 (3)(b) – provides that where any person considers that a development proposed to be carried out by a local authority would be likely to have a significant effect on a European site, he or she may apply to the Board for a determination as to

whether the development would be likely to have such significant effect and the Board shall make a determination on the matter as soon as possible.

Chapter 6 – Procedure for declarations and referrals under section 5 of the Act

### 8.3. Case Law

The Referrer makes reference to a number of legal cases, which they consider to be of relevance. In summary these are noted as follows:

Carman’s Hall Community Interest Group & Ors -v Dublin City [2017] IEHC 544

wherein Mr. Justice Binchy judgement in summary included that the failure to apply Development Plan policy in considering the proposal to develop and change the use of the premises formerly used as a parish centre to provide accommodation for people experiencing homelessness is a material contravention of the Development Plan.

Carvill and Ros -v- Dublin City Council [2021] IEHC 544

In this case the Referrers note that the High Court decision in Carville and Ors -v- Dublin City Council [2021] IEHC 544 has set a standard for local authority own development and that if development is to proceed, the requirements of the EIA Directive and the Habitats Directive must be addressed and complied with.

The Waddensee case C-127/02. The reference for a preliminary ruling concerns the interpretation of Article 6 of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora – The Habitats Directive. Paragraph 3(a) and (b) provide an interpretation of the Ruling relative to Article 6(3) of the Directive.

Eoin Kelly v. An Bord Pleanala [2019] IEHC84 wherein Mr. Justice Barnville concluded his judgement in summary to include regard to the Habitats Directive and Screening: mitigation measures i.e:

*The Board and its inspector did not take into account mitigation measures’ at the screening stage in breach of Article 6(3) of the Habitats Directive and the decision of the CJEU in People Over Wind.*

#### 8.4. Other Referral Cases

These include those considered of relevance in the Referral, and while they refer to different cases/circumstances, in summary they include the following:

ABP-RL29N.308540 – A Question arose as to ‘Whether the change of use from residential to hostel, at Lower Drumcondra Road, Dublin 9, is or is not development or is or is not exempted development’. The Board concluded in summary that this constituted a material change of use which contravenes materially the development plan. Also, of note *(d) the material change of use would not come within the scope of Article 10(1) of the Planning and Development Regulations, 2001, as amended, as it does not constitute a change of use within any one class... and (e) there are no other exemptions available for the material change of use within existing legislation.* The Board decided that the change of use from residential use to a hostel for homeless accommodation is development and is not exempted development.

PL03.307064 – A Question arose as to “Whether the change of use of Westbrook House from a commercial guest house to a homeless hostel run by an approved housing body at Westbrook House, Gort Road, Ennis, Co. Clare is or is not development and is or is not exempted development. The Board’s conclusion included: *(f) this material change of use would not come within the scope of Article 10(1) of the Planning and Development Regulations, 2001, as amended, as it does not constitute a change of use within any one class... and (g) there are no other exemptions available for the material change of use within existing legislation.* The Board decided that the change of use from a commercial guesthouse to a homeless hostel run by an approved housing body at Westbrook House, is development and is not exempted development.

RL3084 a Question arose as to ‘Whether the erection of standard wooden post and wire, sheep fencing at Glencap Commons South, County Wicklow, is or is not development or is or is not exempted development. The Boards’ conclusion included that: *(d) the works come within the scope of the restrictions on exemption under Article 9(1)(x) of the Planning and Development Regulations 200, as amended.* The Board decided that the said erection of a standard wooden and wire sheep fencing at Glencap Commons South, County Wicklow is development and is not exempted development.

RL17.RL3584 – a Question arose as to “Whether the storage of raw material, by-products and waste at Deanshill, Hayestown, Navan Co. Meath is or is not development or is or is not exempted development.” The Board’s conclusion referred to a condition of an earlier permission (Ref. PL17.242496 relates) and includes that (c): *The development would, therefore, not be exempted development pursuant to Article 9(1)(a)(i) of the Planning and Development Regulations, 2001 and (d) There are no other provisions in the Act or Regulations, by which such storage would constitute exempted development.* The Board decided that the storage of raw material, by-products and waste material, both within and outside a designated area at Tarstone Limited, Deanhill, Navan, is development and is not exempted development.

#### Other Referrals of note

RL52.RL3040 – A Question arose as to “Whether change at Clonmel Corporations’ land (now Clonmel Borough Council) at Melview, Clonmel, County Tipperary from use as a garden centre to use as a general purpose depot is or is not development or is or is not exempted development.” The Board’s conclusion noted this constituted works and development and a material change of use. However, that (c) the provision of the general purpose depot was carried out by Clonmel Corporation (now Clonmel Borough Council) and the lands concerned are located within the functional area of the Council, and therefore comes within the scope of section 4(1)(c) of the Planning and Development Act 2000 (as amended). Also: *The intensification of the use of the site, by partially using the site for Council depot/compound is not materially different from the use as the site solely as a horticultural nursery.* The Board decided that the said development of change of use from garden centre to general purpose depot at Melview, Clonmel, Co. Tipperary, is development and is exempted development.

Note copies of the Inspector’s Reports and Board Decisions relative to these Referrals are included as an Appendix to this Report.



## 9.0 Assessment

### 9.1. Introduction

- 9.1.1. It should be stated at the outset, that the purpose of this referral is not to determine the acceptability or otherwise of the subject matter in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so falls within the scope of exempted development, within the meaning of the relevant legislation. 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 claimed.
- 9.1.2. Likewise, planning enforcement is a matter for the planning authority, and does not fall within the jurisdiction of the Board.

### 9.2. Is or is not development

- 9.2.1. The subject of this referral as per the Question raised, in summary relates to a change of use and works on the site of a former public house with residential accommodation and football pitch on lands (1.32ha) purchased by Tipperary County Council, into a Council depot and offices. The definition of development at s.3(1) of the Act provides that a material change of use of a structure or land would comprise development within the meaning of the Acts.
- 9.2.2. It is of note that the Referrer provides that in the interests of clarity and to ensure that all matters are considered, including the cumulative development on the site, the known changes of use and works were itemised, and the details included in their Report. Details as provided by the Referrer are noted below:

The **change of use** relates to the following:

- (a) Change of use of site of former public house with residential accommodation into site for receipt, storage and distribution/transport of quarrying materials.
- (b) Change of use of site of former public house with residential accommodation for receipt, storage and distribution/transport of waste materials.
- (c) Change of use of site of former public house with residential accommodation to parking of articulated trucks, heavy and light vehicles and cars,

- (d) Change of use of site of former public house with residential accommodation building to offices and staff facilities.
- (e) Change of use of site of former public house with residential accommodation to a facility for cleaning vehicles (including those used for tar).
- (f) Change of use of former public house with residential accommodation to facility for storage and distribution of various materials used by Tipperary County Council.
- (g) Change of use of formerly open land to enclosed land.

The **works** relate to the following:

- (h) Erection of steel galvanised fencing c.2.6m high.
- (i) Creation of new access and set back into site from Local Road L6154 (access measures c.6.5m).
- (j) Erection of four c.9m high floodlights.
- (k) Erection of two connected container structures c. 52sq.m with a c. 4.5m canopy.
- (l) Erection of concrete slab c.528sqm for the purpose of storing materials.
- (m) Works to former public house and residential accommodation.
- (n) Piping of surface water into Nenagh river from subject site that stores and distributes waste materials and quarry content and where the site includes the use of fuels, oils, lubricants, etc associated with the use.

9.2.3. The Local Authority Planner's Report relative to the Referral to the Council notes that Nenagh Municipal District have confirmed the following works were undertaken following the purchase of the lands (August 2020):

- The site was developed into a works depot for the Nenagh Municipal District South-East Area. There are 7 outdoor staff assigned to the depot.
- The existing building was modified internally to provide showers, changing room and kitchen for the staff. The windows were replaced and the heating system improved.

- The compound was secured with fencing and a concrete slab cast for the storage of bulk road making materials.
- The depot is used for the storage and distribution of road making materials and construction materials.
- The depot is used by commercial and private vehicles.
- Occasional cleaning of vehicles occurs.
- The access to the site was improved.
- 4 floodlights were erected for site security and safety.
- 2 containers with a canopy were placed on site and used in connection with the site use as a Council depot.

9.2.4. It is noted that as per the documentation submitted in the Referral and the Planner's Report relative to the assessment of the case and the Council's Declaration, there are some discrepancies between the Referrer and the Council as to the extent of works that have been carried out. In this case, Nenagh MD have confirmed that a new entrance was not developed (existing entrance that previously served the pub was used and improved), and that tipping of surface water into the Nenagh river was/is not undertaken. Also, they have confirmed expenditure on the works undertaken on site, for maintenance. These issues are noted further in this Assessment below. However, I note that it is evident, that works have occurred and that a material change of use has taken place.

9.2.5. Section 3 (1) of the Planning and Development Act, 2000 (as amended) states that development "means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land". In the case of the items that are the subject of this referral, and as noted on my site inspection, it is quite evident that they have involved the carrying out of works and a material change of use on these lands has occurred hence they constitute development as defined for the purposes of the Act.

### 9.3. **Is or is not exempted development**

9.3.1. Under the Irish planning system, development can lawfully be carried out in either of the following circumstances:

- In accordance with the terms of the planning permission granted for it; or
- In the case of an exempted development, without planning permission but in accordance with the terms of the exemption.

9.3.2. It is of note that the Planning Authority's declaration and response to the Referral concludes the change of use and works on the site of the former public house with residential development and football pitch on the subject site, into a council depot and offices used by the Council is development within the meaning of the Planning and Development Act 2000, as amended and is exempted development pursuant to Section 4(1)(aa) of the Planning and Development Act 2000, as amended. As per this section, development by a local authority in its functional area (other than, in the case of a local authority that is a coastal planning authority, its nearshore area) is exempted development. The local authority bases their declaration on this Section.

9.3.3. However, the Referrer disputes this and provides that there are other relevant issues that serve to de-exempt the development. They have provided a detailed assessment of such and note that this includes regard to the nature of the development (material change of use), the operations and impact of the works carried out on the environment and the referrers property. They consider this is in material contravention of the development plan and that the development has not been screened for EIA and Appropriate Assessment. They also refer to Part 8.

9.3.4. They note that only one of the criteria in the restrictions to exemptions needs to apply in order for development not to be considered exempted development. A detailed Assessment is made of such and provides that in this case the relevant (listed) exemptions do not apply. This includes reference to the Articles in Schedule 1 and to Schedule 2 of the PDR 2001 (as amended).

9.3.5. However the issue in this case is that the Planning and Development Act 2000 (as amended) is the Primary legislation and exemptions for local authority works and own development are provided in Section 4(1)(aa) of the Act. As this development is exempt under the primary legislation, this takes precedence over the exemptions in Planning and Development Regulations 2001 (as amended) which is secondary to the Act. Therefore, a discussion of whether the exemptions under the Regulations apply is not relevant as the development is exempt under the primary legislation.

#### 9.4. **Material Contravention of the Development Plan**

- 9.4.1. Part XI of the Planning and Development Act 2000 (as amended) refers to Development by Local and State Authorities, etc. This includes Section 178(1) – *The council of a county shall not affect any development in its functional area which contravenes materially the development plan.*
- 9.4.2. The Referrer submits that the change of use and works that have occurred on the subject site materially contravene the North Tipperary CDP 2010 as varied and provide a Table (Section 6 - Table 1) relative to policies therein. These include reference to policies and the impact on the environment and neighbouring property relative to Noise, Light pollution, Wastewater disposal, Stormwater disposal, Natura 2000 site and Protected species, the Water Framework Directive, Strategic Road network and Public Rights of Way.
- 9.4.3. It is noted that the Council's response refutes this and provides that the Planning Authority is satisfied that the development does not materially contravene the North Tipperary CDP 2010 as varied. They also provide that the Nenagh Town and Environs Development Plan 2013, as varied is not relevant to the site.
- 9.4.4. It is of note that this proposal was considered by the Referrer, under the North Tipperary County Development Plan 2010 (as varied) and their Assessment and the documentation submitted, including the Referral to the Council and subsequently to the Board, includes reference to policies and objectives under this plan. This has now been superseded by the policies and objectives of the current Tipperary County Development Plan 2022-2028, and those of relevance have been noted and this includes those referred to in the Policy Section above. Therefore, I would consider that as the remit of the North Tipperary County Development Plan 2010 plan has now been superseded, that the policies and objectives as quoted in the referral are no longer current.
- 9.4.5. In this case I would not consider that it has been established that the change of use and works carried out by the Council on this site would be in material contravention of the current development plan. Also, as the previous plan has now been superseded, it could not be said that the policies therein are now of consideration.

- 9.4.6. In addition, in view of the site location, in the rural area and outside zoned land and of the boundaries of this plan, I would concur with the Council that the Nenagh Town and Environs Development Plan 2013, as varied is not relevant. Rather the encompassing relevant plan for the county, is now the Tipperary CDP 2022-2028.
- 9.4.7. Therefore, in view of these issues, I do not consider that it has been established nor that it is the purpose of the assessment of this Referral to ascertain that the change of use and works carried out are in material contravention of the policies of the current plan, when the North Tipperary CDP 2010 has been superseded. Also, as has been noted, the development is exempt under Section 4(1)(aa) of the Planning and Development Act 2001 (as amended).

## 9.5. Restrictions on Exemption relative to EIA and AA

- 9.5.1. Section 4(4) of the Act essentially de-exempts any development which attracts a requirement for Environmental Impact Assessment (EIA) or Appropriate Assessment (AA) i.e: *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.*
- 9.5.2. It is noted that paragraph 4(1)(aa) is not specifically referred to here. This would imply that Section 4(1)(aa) is not de-exempted by Section 4(4). Therefore the requirement for an EIA or AA is not of issue for consideration relevant to the exemption for local authority own development as given by Section 4(1)(aa) of the Act.

### Screening Determination

- 9.5.3. Chapter 4 of the Planning and Development Regulations 2001 (as amended) refers to Local Authority Development. Article 120 refers to Sub-threshold EIAR. Of note, Article 120(3)(b) – refers to: *where any person considers that a development proposed to be carried out by a local authority would be likely to have significant effects on the environment that he or she may apply to the Board (time periods given) for a screening determination as to whether the development would be likely to have such effects.*

9.5.4. Also of note relative to Local Authority Development, Article 250 of the Regulations, refers to Screening for Appropriate Assessment - 250(3)(b) provides that: *where any person considers that an application for development proposed to be carried out by a local authority would be likely to have a significant effect on a European site, he or she may apply to the Board for a determination as to whether the development would be likely to have such a significant effect and the Board shall make a determination on the matter as soon as possible.*

9.5.5. It must be noted that this is a Referral case, and that separately a Screening Determination has not been applied for. Such is not within the scope or remit of this Referral. Therefore, it is not of relevance in the context of this Referral to carry out Screening Determinations or Assessment relative to consideration of EIAR or AA.

#### 9.6. **Part 8 Consideration**

9.6.1. Note is had in the Referral that on the 24<sup>th</sup> of August 2017 the Councillors adopted a Part 8 subject to conditions. Reference is had to Ref. ABP-307931-20 where the Board confirmed (without modification) the Compulsory Purchase Order authorising compulsory acquisition of lands and entitled '*Tipperary County Council – R498 Latteragh Realignment Scheme Compulsory Purchase Order (Roads)*'.

9.6.2. The Referrer has regard to this CPO and to permanent and temporary landtakes. They note that the minor areas referred to do not coincide with the overall landholding that is the subject depot site. The indicated land for the compound was not subject to either a temporary or permanent CPO. They provide that the potential of the site being used as a depot has not been addressed.

9.6.3. As the subject depot site was not included in the lands outlined in the Council's CPO they consider that this should have been included. Further as a temporary compound approved in the vicinity of the subject site, the in combination and cumulative impacts of the two compounds has not been assessed. They submit that works and change of use for the subject council depot are inconsistent with the approved Part 8 and were not included in the consent process contrary to section 179 of the PDA2000 and Art.80(1) of the PDR2001.

9.6.4. The Referrer submits, that the cost of the development exceeds €126,000 contrary to Art. 80(1)(k) of the PDR2001. The site cost is integral to the development as it

could not take place if the Council had not bought the site. They consider that several costs have been omitted.

- 9.6.5. The Council's response to the Referral to the Board provides that the overall expenditure on the development to which the Declaration relates has not exceeded €126,000 and therefore does not require a Part 8 application.
- 9.6.6. Having regard to these issues, I do not consider that the purpose of a Referral is to determine whether or not a Part 8 is required for the works carried out, or that a modification to the existing Part 8 (Ref. ABP-307931-20) as referred to above is relevant. Rather it is to determine whether or not the change of use and works carried out is or is not development or is or is not exempted development. The Part 8 process is dealt with under separate remit.

## 10.0 Recommendation

- 10.1. 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 change of use and works on the site of former public house with residential accommodation and football pitch purchased by Tipperary County Council (on an overall site of c.132ha) at Seanins, Sallypark, Latteragh, Nenagh, Co. Tipperary, into a Council depot and offices is or is not development or is or is not exempted development:

**AND WHEREAS** RLM Planning on behalf of Michael Power and Margaret Ryan requested a declaration on this question from Tipperary County Council and the Council issued a declaration on the 4th day of April, 2022 stating that the matter is development and is exempted development:

**AND WHEREAS** RLM Planning on behalf of Michael Power and Margaret Ryan referred this declaration for review to An Bord Pleanála on the 22nd day of April, 2022:



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

- (a) Part 1, Sections 2(1), 3(1) and 4(1)(aa) and (h) and 4(4) of the Planning and Development Act, 2000, as amended,
- (b) Part XAB, Section 177U, and Part XI Section 178(1) and Section 179 (1) of the Planning and Development Act, 2000, as amended,
- (c) Articles 6(1), 9(1) 10(1) and article 80 (1) of the Planning and Development Regulations, 2001, as amended,
- (d) Parts 1 and 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (e) the provisions of the Tipperary County Development Plan 2022-2028
- (f) the planning history of the site.
- (g) the nature of the uses previously and currently on site and the pattern of development in the area,
- (h) the documentation on file, including details submitted by the referrer and the planning authority declaration and response to the referral,
- (i) the report of the Planning Inspector:

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) the change of use and works on the site of former public house with residential accommodation and football pitch purchased by Tipperary County Council (on an overall site of c.132ha) at Seanins, Sallypark, Latteragh, Nenagh, Co. Tipperary, into a Council depot and offices constitutes development.
- (b) the current use as council depot from former public house with residential accommodation and football pitch constitutes a material change of use under Section 3(1) of the Planning and Development Act 2000, as amended.

- (c) this development by a local authority in its functional area, would come within the scope of exemption under Section 4(1)(aa) of the Planning and Development Act 2000 (as amended);
- (d) Section 4(1)(aa) does not come within the restrictions on exemption relative to environmental impact assessment or an appropriate assessment of the development, under Section 4(4) of the Planning and Development Act 2000 (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 change of use and works from former public house with residential accommodation and football pitch to council depot is development and is exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

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Angela Brereton  
Planning Inspector

20<sup>th</sup> of June 2023