



An
Bord
Pleanála

Inspector's Report ABP-313970-22

Question

Whether the repair of machinery within an existing building at Omard, Kilnaleck is or is not development or is or is not exempted development.

Location

Omard, Kilnaleck, Co Cavan. A82 XK76.

Declaration

Planning Authority

Cavan County Council

Planning Authority Reg. Ref.

299

Applicant for Declaration

Niall O'Reilly

Planning Authority Decision

None

Referral

Referred by

Cavan Co. Co.

Owner/ Occupier

Niall O'Reilly.

Observer(s)

None.

Date of Site Inspection

2nd May 2023.

Inspector

Barry O'Donnell

1.0 Site Location and Description

- 1.1. The subject site lies in the townland of Omard, approx 3.5km south-west of Kilnaleck, Co. Cavan. The site contains a commercial building and external storage areas that formerly formed part of a commercial mushroom growing enterprise.
- 1.2. The commercial building and external areas immediately outside of it are currently in use for the repair of machinery, as part of a business known as Zero Grazer. The repair of machinery and vehicles takes place within the building, with storage taking place both internally and externally.
- 1.3. The site is accessed from the L2530, a c.6.5m wide local road that leads north-east to the R154 and Kilnaleck. The commercial building is set back from the L2530 and there is a parking area in the intervening space. Access to the main part of the site is provided at the western corner of the building.

2.0 The Question

- 2.1. The question the subject of the referral before the Board is: -

'Whether the repair of machinery within an existing building at Omard, Kilnaleck, Co. Cavan is development or exempted development.'
- 2.2. I proposed to reword the question slightly, as follows: -

'Whether the repair of machinery within an existing building at Omard, Kilnaleck, Co. Cavan is or is not development or is or is not exempted development.'

3.0 Planning Authority Assessment

- 3.1. A Planning Report dated 29th June 2022 has been provided, which forms the basis of the Planning Authority's referral. It states that the most recent permission for the subject building relates to it being used as a mushroom casing plan (Reg. Ref.

98/483) and that the question to be addressed is whether the repairs use falls under the same use class.

4.0 Planning History

4.1. There are a number of historic permissions pertaining to the site, from the 1980s and 1990s. The following are of relevance to this referral: -

293/S5: The Planning Authority determined that the tidying up of a unit and selling and servicing of agricultural machinery is development and is not exempted development.

98/483: Permission granted for erection of mixing yard extension to existing mushroom casing plant.

5.0 Policy Context

5.1. Cavan County Development Plan 2022-2028

5.1.1. The site is located in a rural, unzoned part of County Cavan.

5.2. Natural Heritage Designations

5.2.1. The site is not located within or adjacent to a designated European site, the closest such site being Lough Sheelin SPA (Site Code 004065) which lies c.2.9km south.

5.2.2. Lough Sheelin is also identified as a proposed Natural Heritage Area (Site Code 000987).

5.1. EIA Screening

5.1.1. This referral relates to a change of use of an existing building, for the repair of machinery. This type of development does not constitute an EIA project and so the question as to whether or not it might be sub-threshold does not arise.

6.0 The Referral

6.1. Referrer's Case

- 6.1.1. The Planning Authority referred the application to the Board on 1st July 2022 requesting that the Board make a determination on the above-outlined question. The referral includes a Planning Report, which has been summarised at Section 4.1 above.

6.2. Owner/ occupier's response

- 6.2.1. The site operator Niall O'Reilly, who was the original applicant, made a submission on the referral on 31st August 2022, the contents of which can be summarised as follows: -

- Permission was granted on this site for the erection of a workshop and later to Kilnaleck Engineering Ltd for an extension to the workshop. The same and similar activities would be carried out today, as were under by Kilnaleck Engineering Ltd.

6.3. Further Responses

- 6.3.1. None.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. Section 2: Definitions

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

7.1.2. Section 3(1): Development

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.

7.2. Planning and Development Regulations, 2001

7.2.1. Article 5 – Interpretation

“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, or

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,

and for the purposes of this paragraph, "article" includes-

(i) a vehicle, aircraft, ship or vessel, or

(ii) a sound recording, film, broadcast, cable programme, publication and computer program or other original database;

7.2.2. Article 10 – Changes of Use

(1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not—

(a) involve the carrying out of any works other than works which are exempted development,

(b) contravene a condition attached to a permission under the Act,

(c) be inconsistent with any use specified or included in such a permission, or

(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

(2) (a) A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.

7.3. Relevant Case Law

7.3.1. Narconon Trust v An Board Pleanala (2021, IECA 307)

The Court of Appeal granted an order of *Certeorari*, quashing two decisions made by the Board under Section 5 of the Act, whereby the Board decided that a change of use from a nursing home development to a residential drug rehabilitation facility is development and is not exempted development. In its conclusion, the Court stated as follows: -

“The Board was precluded from determining a section 5 referral in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority’s determination. It had jurisdiction to receive the referral and to commence its determination. Once it became apparent that the question referred was the same, or substantially the same, and in respect of the same land, and that there was no evidence of any change in the planning facts or circumstances, it ought to have concluded that: the referral by the notice parties amounted to an impermissible attack on the 2016 declaration, which, in substance, amounted to questioning the validity of the section 5 declaration other than by way of s. 50; that such a challenge is prohibited by s. 50(2); and that for the Board to proceed further to determine the referral on the merits amounted to facilitating a breach of s. 50(2) and was, accordingly, ultra vires.”

8.0 Assessment

8.1. The Board’s Jurisdiction to Determine this Referral

8.1.1. The question referred to the Board is as follows:

'Whether the repair of machinery within an existing building at Omard, Kilnaleck, Co. Cavan is or is not development or is or is not exempted development.'

8.1.2. I am aware that the Planning Authority made a determination on a similarly worded Section 5 application in 2022, Reg. Ref. S5/293, which related to 'Whether the tidying up of a unit and selling and servicing of agricultural machinery is or is not development and is or is not exempted development.' In that case, the Planning Authority determined that the tidying up of the unit and selling and servicing of agricultural machinery is development and is not exempted development.

8.1.3. I have given consideration to the current proposal in the context of the *Narconon* judgement, which found that the Board may not determine a section 5 referral if a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination.

8.1.4. It is my view that the provisions of the *Narconon* judgement are not applicable in this instance as the question asked under Reg. Ref. S5/293 was materially different to the current referral question. The previous question related to the sale and service of agricultural machinery, whereas the current referral question relates solely to the repair of machinery. I therefore consider it is within the Board's jurisdiction to determine this referral.

8.2. **Is or is not development**

8.2.1. Development is defined under Section 3(1) of the Act, as "*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.*" Works are defined under Section 2(1) of the Act as including "*any act or operation of construction, excavation, demolition, extension...*"

8.2.2. The use of the subject site for the repair of machinery is of an existing nature and comprises internal and external elements. I noted on my site visit that repairs of vehicles and machinery take place indoors, with storage taking place both internally and externally.

- 8.2.3. There is no indication within the application documents that any act of works was required in order to facilitate the machinery repair use but, having considered the application drawings provided with previous application Reg. Ref. 98/483 and my on-site observations, no alterations or extensions to the industrial building appear to have been undertaken. Thus, from the information available to me, I am satisfied that the use of the building for machinery repairs did not involve any act of works.
- 8.2.4. The question of 'development' also requires consideration as to whether a material change of use has arisen. The site planning history indicates that its permitted use at the time of the most recent grant of permission, Reg. Ref. 98/483 was as a mushroom casing plant. The Planning Authority's report also refers to this former approved use.
- 8.2.5. Details of the former mushroom casing plant use have not been provided but I consider there are a number of material differences to the machinery repair use. For example, the casing plant is likely to have produced little or no noise, would not have required largescale external storage of vehicles and machinery (including end-of-life machinery to be used for parts) and would not have involved the storage and use of pollutant materials such as hydrocarbons.
- 8.2.6. I would also draw the Board's attention to interpretation contained at Article 5 of the Regulations, which separately defines 'light industrial building' and 'industrial building'. I consider the mushroom casing plant use to be consistent with a 'light industrial building', as it is a use that can be undertaken in any residential area without detriment to the amenity of the area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit. I consider the machinery repair use to be consistent with an 'industrial building', the definition of which expressly includes repair of vehicles under the term 'industrial process'.
- 8.2.7. In view of the above, I consider the change of use is material and, thus, constitutes development.

8.3. **Is or is not exempted development**

- 8.3.1. Article 10(1) of the Regulations states that Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, subject to specified restrictions.

Class 4 relates to ‘use as a light industrial building’ but there is no use class relating to an ‘industrial building’, meaning there is no exemption available for a change of use to an industrial building.

- 8.3.2. In view of the above, I consider the material change of use from mushroom casing plant to machinery repair is not exempted development.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether the repair of machinery within an existing building at Omard, Kilnaleck, Co. Cavan is or is not development or is or is not exempted development.

AND WHEREAS Niall O’Reilly requested a declaration on this question from Cavan County Council and the Council referred the applicant to the Board for determination, on the 1st day of July, 2022

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Article 10(1) of the Planning and Development Regulations, 2001 – 2023, and
- (d) the planning history of the site.

AND WHEREAS An Bord Pleanála has concluded that the repair of machinery within an existing building at Omard, Kilnaleck, Co. Cavan comprises a material change of use of the structure, thus comprising development as defined under Section 3(1) of the Planning and Development Act, 2000 as amended, and does not

consist of a change of use within a class of use specified in Part 4 of Schedule 2 of the Planning and Development Regulations 2001 – 2023.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (X) (x) of the 2000 Act, hereby decides that the repair of machinery within an existing building at Omard, Kilnaleck, Co. Cavan is development and is not 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.

Barry O'Donnell
Planning Inspector

2nd August 2023.