



An
Bord
Pleanála

Inspector's Report ABP-314209-22

Question

Is the replacement of the Clarecastle wastewater treatment plant by diverting wastewater arising through a new sewer to the Clareabbey wastewater treatment plant, which discharges to an SAC, considered to be development and if so, is it exempted development?

Location

Clarecastle, Co. Clare

Declaration

Planning Authority

Clare County Council

Planning Authority Reg. Ref.

R22-1

Applicant for Declaration

Michael Duffy.

Planning Authority Decision

Is development and is exempted development

Referral

Referred by

Michael Duffy.

Owner/ Occupier

Uisce Eireann.

Observer(s)

None.

Date of Site Inspection

17th May 2024.

Inspector

Daire McDevitt

1.0 Site Location and Description

This referral refers to Uisce Eireann infrastructure at Clareabbey/Clarecastle in Co. Clare. Clarecastle is a town c.3km south of Ennis located on the River Fergus.

2.0 The Question

“Whether the replacement of the Clarecastle wastewater treatment plan by diverting water arising through a new sewer to the Clareabbey wastewater treatment plant, which discharges to an SAC, is or is not development and is or is not exempted development.”

3.0 Planning Authority Declaration

3.1. Declaration

Clare County Council in considering the referral had regard in particular to:

- a) Sections 2,3, and 4(1)(g) and 4(4) of the Planning and Development Act 2000 as amended
- b) Schedule 2, Article 6, Part 1, Class 58 of the Planning and Development Regulations 2001 as amended (Development by Irish Water) and the conditions and limitations thereunder
- c) Article 9 of the Planning and Development Regulations 2001 as amended – Restrictions on Exemptions
- d) The details and particulars submitted with the referral application, including the further information response.
- e) The details, particulars and declaration as contained on a Section 5 Declaration (ref. R21/61) by Irish Water.
- f) The conclusions by the Court of Appeal in relation to Narconon Trust v An Bord Pleanála.

And whereas Clare County Council has concluded:

The information submitted under the subject Section 5 declaration and that as submitted under ref. no. R21-61 is substantially the same, and is in respect of the same land, and that there has been no evidence of any change in the planning facts or circumstances.

Therefore: The planning authority in exercise of the powers conferred on it by Section 5 of the Planning and Development Act 2000 (as amended) hereby decides that:

The development consisting of the replacement of the Clarecastle wastewater treatment plant by diverting wastewater arising through any new sewer to the Clareabbey wastewater treatment plant, which discharges to an SAC, constitutes development which is considered to be exempted development, as defined within the Planning and Development Act 2000 (as amended) and associated Regulations.

3.2. Planning Authority Reports

3.2.1. Planning Reports

Report dated 1/02/22:

Following an assessment of the information submitted the Planner recommended that FI recommended on the following matters:

1. Identify the location (including a map) of the WWTP to be replaced as referred to in the application, and full details in relation to the specification of same (i.e capacity).
2. Details in relation to the development which is the subject of the application which would enable to the PA to carry out a full AA screening and a full EIA Screening (in relation to both mandatory development and subthreshold development).

The FI request included a note that the PA issued a Declaration to IW (ref R21 61) in relation to:

Whether the construction of new underground pumping station to grounds to the south of the existing Quay Road pumping station, diversion of existing waste water sewers to a new pumping station, internal revision to the existing Quay Road pumping station, and the installation of a new rising main

connection to the existing Clareabbey wastewater treatment plant is development and if so, is exempted development.

The referrer is also advised to note that the Court of Appeal has clarified the status of conflicting declarations issued under section 5 of the Planning and Development Act 2000, as amended. In *Narconon Trust v An Bord Pleanála*, the Court of Appeal confirmed that section 5 Declarations, once issued and not challenged, are conclusive. In the case of *Narconon Trust v An Bord Pleanála*, it was determined to be unlawful for the Board to have made a conflicting decision in 2018, to that made by the planning authority in 2016, on the same facts.

Report dated 27/06/2022:

- FI response received on 13/06/2022.
- It was noted that it was not clear how the information submitted with the FI refers to the question as posed in the subject section 5 Declaration referral. However, the planner referenced R21 61 as submitted by Irish Water. and considered that it was reasonable to conclude that the facts of the subject Section 5 Declaration do not substantially differ from those (insofar as they are relevant to the replacement of the ClareCastle wastewater treatment plant and diversion of wastewater through a new sewer to the Clareabbey wastewater treatment plant) from those as presented under R21 61.
- The planner concluded that they considered that the validity of the section 5 declaration as issued under R21 61 could not be challenged under Section 5 Declaration/Section 5 of the Planning and Development Act 2000, as amended. As a result it was considered reasonable to rely on the AA screening conclusions as reached under R21 61.

3.2.2. Other Technical Reports

AA Screening Report dated 01.02.2022 for R22 1 concluded that it was unable to make an assessment based on the limited details submitted.

AA Screening Report dated 27.06.2022 for R22 1 following further information.

Noted:

- Under information submitted with Section 5 Declaration R21 61, an AA screening Report and EIA Screening Report was prepared and submitted to the PA.
- No potential negative impacts are envisaged.
- Reference to two previous reports carried out in respect to a broadly similar referrals (Ref. RL19 39 and R19 62)

The Screening concluded that there was no potential for significant effects on European sites.

4.0 Planning History

PA Ref R 21-61 refers to a Section 5 referral by Irish Water relating to:

“Whether the construction of a new underground pumping station grounds to the south of the existing Quay Road pumping stations, diversion of existing wastewater sewers to a new pumping station, internal revision to the existing Quay Road pumping station, and the installation of a new rising main connection to the existing Clareabbey wastewater treatment plant is development and if so is exempted development”.

Clare CC Determined that the works constituted development which is exempted development.

PA Ref. R19-62 refers to a Section 5 referral by Brian Barry relating to:

“whether development of a sewer to transport wastewater arising in the agglomeration of Clarecastle for treatment in the Clareabbey WWTP and which discharges to waters in and/or connected to European sites from Clarecastle to Clareabbey, Ennis, Co. Clare is or is not development and is or is not exempted development”

Clare CC Determined that the works constitute development which is exempted development. ABP 309691 refers an appeal relating to this Section 5 to ABP by Brian Barry which was deemed invalid on the 10/03/2021.

PA Ref. R19-39 refers to a Section 5 referral by Brian Barry relating to:

“Whether the installation of a rising main sewer transporting raw sewerage from Clarecastle to Clareabbey WWTP at Clareabbey, Clarecastle, Co. Clare is or is not development and is or is not exempted development “

Clare CC determined that the works constituted development which is exempted development.

PA Ref. P18-1004 refers to a 2019 grant of permission to Irish Water for development consisting of upgrading the existing wastewater treatment plant, by demolishing existing inlet works, construction of new inlet works, storm tank, ESB substation and all ancillary site works.

PA Ref. P12-249, P08-1978, P08-12, P06-1754, P06-642 (ABP PL.03.223177 which was withdrawn) refers to applications by CLS Crystal Partners Ltd relating to adjoining residential development. These permissions included inter alia: alignment of roads outside the proposed Clareabbey WWTP, a temporary sewerage treatment plant, temporary connection into existing outfall from the Clareabbey treatment plant.

5.0 Policy Context

5.1. Development Plan

The operative plan is the **Clare County Development Plan 2023-2029**

Vol. 1 Section 11.4 states *“Uisce Éireann has responsibility for the provision and management of water supply and wastewater services. Clare County Council, through a Service Level Agreement with Uisce Éireann, manages the daily operation of infrastructure and the progression of capital projects. However, Uisce Éireann has responsibility for project prioritisation and financial investment. The Uisce Éireann Capital Investment Plan 2020 - 2024 sets out the priority projects to the year 2024. Priorities must include investment to ensure acceptable service levels to existing customers, to achieve regulatory compliance and to cater for future growth. In addition, minor upgrades and improvement works are continually carried out on a nationally prioritised basis through Uisce Éireann’s National Programmes, for example capital maintenance and mains renewal programmes amongst others.”*

Volume 3a Ennis Municipal District Settlement Plans

Section 1.14.5 refers to wastewater treatment. This states *“The Waste Water Treatment Plant (WWTP) at Clareabbey provides treatment for the southern part of Ennis and part of the Clarecastle area. The Clarecastle Agglomeration Upgrade is currently underway. The existing Clareabbey WWTP will have sufficient capacity to cater for the current load from the area along with some added capacity.”*

Objective V3(a)18 b) *To facilitate the development of new or upgrade of existing, wastewater infrastructure facilities to serve Ennis and Clarecastle and their environs subject to protect of the environment, and in compliance with the Habitats Directive and other environmental considerations.*

5.2. Natural Heritage Designations

Discharge to the River Fergus.

European designated sites of relevance:

- River Shannon and River Fergus Estuaries SPA (site code 004077).
- Lower River Shannon SAC (site code 002165).

Other:

- Fergus Estuary and Inner Shannon, North Shore pNHA (002048).

5.3 Other:

Information on Uisce Éireann website (accessed 12/06/24 and 26/06/24)

Uisce Éireann Wastewater Capacity Register accessed 26/06/24 has assigned Red status (no spare capacity at present based on load in 2022) to Clareabbey WWTP with reference to Ennis and Clarecastle. WWTP Project planned or underway to increase capacity and/ or improve treatment performance, based on available information in June 2023.

Upgrading the wastewater treatment plants in Clareabbey and Inagh Co. Clare as part of a €1.8 million investment.

Uisce Éireann, working in partnership with Clare County Council, is investing €1.8 million to undertake essential upgrade works to wastewater treatment plants in Clareabbey and Inagh Co. Clare. These improvement works include upgrades to the

inlet works, storm water management and sludge treatment and storage at the plants.

6.0 The Referral

6.1. Referrer's Case

The referrer has referenced his case as 'grounds of appeal' and has not submitted a question to the Board to Determine rather has appealed the Determination of Clare County Council under R22-1 relating to:

Whether the replacement of the Clarecastle wastewater treatment plan by diverting water arising through a new sewer to the Clareabbey wastewater treatment plant, which discharges to a SAC, is or is not development and is or is not exempted development.

The grounds of appeal are as follows:

- Determination documents not made available by Clare County Council on its website within 3 working days.
- Natural Justice – Objective Bias. Alleged conflict of interest as Irish Water is the Water Service Authority and should have been referred to the Board as prescribed in section 5(4).
- Flawed consideration of potential impacts on Europa sites, namely the adjacent SAC. The agglomeration of Clarecastle has no wastewater treatment and discharges raw sewerage to the River Fergus within an SAC under authorisation issued by the EPA.
- Mandatory EIA and AA required based on current PE for Clareabbey Plant.
- Permission granted under 18/1004 is to improve the inlet screening mechanism and the provision of a stormwater tank. It is stated not to be adding any additional capacity (EIAR Clarecastle Sewerage Scheme). The permission does not address the issue of stormwater overflow from the proposed tank and there is no permission for
- Material contravention of the development plan.

- The referral and appeal are grounded in the fact that the Clareabbey plant is already overloaded and there is no proper assessment of the likely impacts of the wastewater load arising in Clarecastle will have on the SAC and particularly the section of the of the river between two current discharges.
- No opportunity to inspect a mandatory AA Screening which should have been carried out for the Determination. The Determination does not include a conclusion, or any reference, to the mandatory EIA and/or AA Screening process of the outcomes.
- It does not assess the likely significant effects the Clarecastle loading will impact on the section of the River Fergus SAC between the Clareabbey discharge point and the existing Clarecastle discharge point in a river currently rated to be of poor quality.
- There have been three previous referrals regarding queries around elements of these proposed works:
 - RL19-39 by B. Barry did not consider the issue of current loading on the Clarecastle WWTP and did not take cognisance of the requirements of section 5(7). The AA screening carried out is clearly flawed. The appeal was deemed invalid by ABP.
 - Mr. Barry made a second referral in the hope that the PA would use its discretion under section 5(4) and refer directly to ABP. Instead, the PA decided on the second referral as exempted development. The referral could not be appealed to the Board in the basis of its previous decision regarding the first appeal.
 - In 2021 IW made a similar referral (R21-61) but did not ask about the treatment of additional wastewater in the Clareabbey WWTP. The question posed by IW is considered project splitting. IW did not ask whether the likely impacts on the SAC would have a bearing on its exempted development status.
- Reference to PA AA screening under R19-39 and its validity.

- Reference to project splitting and O'Grainna [2014] IEHC 632. In this instance the pipeline on its own serves no function without connection to an overloaded plant.
- Project splitting and reference to 'Ballycumber case'.
- Procedural matters and duties post Declaration under Article 7 of SI No. 296/2018 – European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018. (Refer to Appendix A of the grounds of appeal).
- Clareabbey WWTP in breach of its Discharge License as it is operating beyond its design capacity.
- It is a material contravention of Objective V3(a)(18) Volume 3.

It is requested that the Board overturn the Declaration of the PA and make its own Declaration that EIA, AA and planning permission is required for this development based on proper process, proper planning and sustainable development grounded in the Development Plan, National Legislation and European Regulation.

Appeal documentation includes:

Appendix A – Extracts from legislation.

Appendix B – Extracts from application of Clare County Council to EPA for discharge license D0199-01. Details form PP06/642, PP08/12, PP08/1978, PP18/1007, PP19/8003 and List of Clare County Council s.5 Declarations.

6.2. Planning Authority Response

Response received 10th August 2022 which included the following:

- Planning history
- Regarding land ownership:
 - The majoring of the works are located along the R458 regional road.
 - The final section of the sewer is in greenfield lands parallel to the N85 national secondary road, appeals to be partly owned by Clare County

Council and a Third party (CPO confirmed by ABP on 22/05/2019 refers and a Notice to Treat submitted to the landowner (Brian Barry).

- The applicant's legal interested in any of the aforementioned lands has not been disclosed, save to say he has an 'environmental interest' (I draw the Board's attention that this refers to Michael Duffy, the referrer in the current case before the Board).
- The planning authority issued a declaration on the 30th June 2022.

6.3. Owner/ occupier's response

A response from Irish Water/Uisce Eireann was received by An Bord Pleanála on the 10th October 2022, points of note include inter alia:

- IW commenced works on the Clarecastle sewerage scheme, to end the discharge of raw sewerage into the River Fergus from Clarecastle. The scheme provides for the installation of a new below ground infrastructures at the site of the existing Quay Road Pump Station, new rising main pipeline along Quay Road, Barrack Street and the Ennis Road, to transfer sewerage from Quay Road pumping station for treatment at the existing Clareabbey wastewater treatment plant.
- Works commenced in spring 2022. These works are being carried out as exempted development under Class 58 of the Planning and Development Regulations (2001) as amended as confirmed by Clare County Council in their Section 5 Declarations Ref. R21-61(2021), R19-62 (2021) and R19-39 (2019).
- Reference to the extensive section 5 Declaration history associated with the works and it is submitted that the current appeal relates to matters which have already been determined by way of Section 5 Declaration.
- The development which was the subject to R21-61 included a minor amendment relating to the extent of land required at the pumping station to accommodate the development. It is submitted that the changes to the development were minor, compared to what was considered in the original section 5, IW, being prudent, sought an additional section 5 Declaration to

ensure that the slightly amended development remain exempted. This was supported by an AA Screening report and EIA Screening report. Clare CC determined the development was exempted development, did not required an AA or EIA and did not constitute project splitting having regard to the definition of same.

- None of the Section 5 Declarations under Ref. R21-61(2021), R19-62 (2021) and R19-39 (2019) were the subject of judicial review.
- It is submitted that the applicant current question posed under R22-1 is the exact same question as in the second section 5.
- It is submitted that while IW submitted a section 5 in November 2021 to consider the proposed minor changes to the development, the question posed by the section 5 are all the same items that were considered and determined by Clare County Council in 2019, 2021, 2021, and 2022. And that there has been no substantive change to the nature of the development.
- Clare County Council in its decision on the 30th June 2022 referenced the Court of Appeal conclusion on Narconon Trust v An Bord Pleanála. Irish Water are of the view that the same principle apply in this instance.
- IW at the time of writing the response had begun construction of said development and had completed c.90% of the pipeline and c.25% of the pumping station, works carried out in good faith under exempted development following numerous section 5 Declarations.

6.4. Further Responses

None.

7.0 Referral database and relevant case law

Relevant Referrals:

ABP 308071-20. Whether the laying underground cables in an SPA from Mauricetown Windfarm, Mauricetown, Ashford, Ballagh, Co. Limerick to the

substation at Dromdeeveen for grid connection purposes is or is not Development or is or is not Exempted Development at Mauricetown Windfarm, Mauricetown, Ashford, Ballagh, Co. Limerick. Refers to a March 2021 Determination. The Board is making its Determination noted that Narconon Trust V An Bord Pleanála was on appeal.

ABP 309922-21. Whether works for the completion of apartments to be used for the care of protected persons and all related services/facilities is or is not development or is or is not exempted development tat The Rock Centre, Ballinamore, Co. Leitrim. refers to a June 2023 split decision. The Board was precluded under section 50(2) from making a determination on items (i), (ii) and (iii). Item (iv) addressed.

ABP-310385-21 refers to a January 2022, dismissal of a referral relating to Whether the proposed use of part of a golf course as a proposed GAA playing pitch is or is not development or is or is not exempted development on the basis of the nature of appeal/any previous permission S.138(1)(b)

ABP 313815-22. Whether the change of use of the fifth floor from offices to Embassy office is or is not development or is or is not exempted development at 23 Shelbourne Road, Ballsbridge, Dublin 4. Refers to a December 2023 dismissal of a referral under section 138.

Case law:

Narconon Trust v An Bord Pleanála IECA 307 (2021). Court of Appeal

Judgement following 2019/16/JR. Heslin J concluded that the Board was precluded from determining a section 5 referral in circumstance 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 planning facts and circumstance since the planning authority's determination. It had jurisdiction to receive the referral and to commence it 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 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.

ABP-313815-22 (formerly ABP-305471-19) (Spectre v An Bord Pleanála) [2021] IEHC 745 is relevant as it addresses (1) the relevance of previous referrals on the same question (2) the importance of addressing the question asked of the planning authority or the board and not another question, that has not been asked.

8.0 Statutory Provisions

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

Section 2(1)

In this Act, except where the context otherwise requires:

“exempted development” has the meaning specified in section 4;

“unauthorised development” means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use.

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

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

(b) Development which is the subject of a permission granted under part IV of the Act of 1963 or under section 34 or 37G of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject.

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

Section 3(1) defines “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(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The principal regulations made under this section are the Planning and Development Regulations, 2001.

Section 4 was amended by the Environmental (Miscellaneous Provisions) Act 2011 such that section 4(4) provides that: Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

Section 5(1) of the Act, which is the basis for this referral, states that: If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

Section 5 (3) (A) states the following: "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 a fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of issuing the declaration."

Section 138.—(1)(b)(ii) The Board shall have an absolute discretion to dismiss an appeal or referral— (b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to— (ii) any previous permission which in its opinion is relevant.

8.2 Planning and Development Regulations, 2001 8.3.

Article 6 (1) of the Planning and Development Regulations states as follows: "Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such

development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said Column 1.” The following classes of development are listed:

Schedule 2 Part 1

Column 1 Description of Development	Column 2 Conditions and Limitations
<p>Class 58</p> <p>Development by Irish Water, for the purpose of provision of water services, consisting of one or more of the following:</p> <ul style="list-style-type: none"> (a) The inspection, maintenance, repair, renewal or removal of pipes, cables, water mains, sewers, including associated accessories, service connections, boundary boxes, kiosks, intakes, overhead wires, meters and other apparatus, including the excavation of any street or other land for that purpose; (b) The installation of either or both – <ul style="list-style-type: none"> (i) Underground pipes, cables, water mains, sewers, including associated accessories, service connections, boundary boxes and meters, and; (ii) Above ground kiosks, meters and other apparatus and overhead wires; 	

<p>Including the excavation of any street or other land for that purpose;</p> <p>(c) The construction or erection of either or both –</p> <p>(i) Below ground pumping or booster stations and, where appropriate, above ground kiosks, and</p> <p>(ii) Below ground holding tanks or reservoirs;</p> <p>(d) The provision of telemetry and telecommunications apparatus in the form of a free-standing pole or antenna to the top or side of an existing building or structure within an existing water services site (being a site of not less than 0.1 hectare used for the provision of water services);</p> <p>(e) the provision of structures for sampling, testing or odour abatement within the curtilage of existing water services sites;</p> <p>(f) the carrying out of remedial works in respect of existing water services infrastructure in order to comply with conditions of licences and certificates issued under the Waste Water Discharge (Authorisation)</p>	<p>The volume above ground level of any such kiosk, meter or other apparatus shall not exceed 13 cubic metres in rural areas (being areas as defined in Article 6(3)) or 2 cubic metres in other areas, measured externally.</p> <p>1. The volume of any such below ground level pumping or booster station and any such holding tank or reservoir shall not exceed 500 cubic metres, measured externally.</p> <p>2. The volume above ground level of any such kiosk, meter or other apparatus shall not exceed 13 cubic metres in rural areas (being areas as defined in Article 6(3)) or 2 cubic metres in other areas, measured externally.</p> <p>Any such pole or antenna shall not exceed 10 metres in height or 0.60 metres in diameter.</p> <p>The capacity of any such structure shall not exceed 50 cubic meters and the height of any such structure shall not exceed the current height of existing structures on the site.</p>
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<p>Regulations 2007 (S.I. No. 684 of 2007);</p> <p>(g) the upgrade of existing water or waste water structures, or both, within existing site boundaries or the alteration or repair of any structure or its replacement with a similar structure;</p> <p>(h) the installation of plant or equipment within the curtilage of an existing water services site only in so far as is necessary to avert serious risks to public health or critical failure of infrastructure;</p> <p>(i) the carrying out of any emergency work on an asset owned by Irish Water in order to ensure the continued supply of essential water and waste water services;</p> <p>(j) such fencing, gates, CCTV equipment and signage as are required to prevent unauthorised access to sites owned by Irish Water and ensure public safety or health and safety within the site;</p> <p>(k) test drilling for public water supplies</p>	<p>The upgrading of any such structure shall not increase the existing floor area by more than 10% and the height of the upgraded structure shall not exceed the current height of existing structures.</p> <p>The height of any such fencing shall not exceed 2.5 metres and the type of such fencing shall be consistent with existing development in the vicinity.</p>
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Article 9(1)(a) sets out restrictions on exemptions for development to which Article 6 relates.

The following sub-articles are listed:

(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,

Article 9(1)(c) states that development to which Article 6 relates shall not be exempted development “if it is development to which Part 10 applies, unless the development is required by or under any statutory provision (other than the Act or these Regulations) to comply with procedures for the purpose of giving effect to the Council Directive.”

9.0 Assessment

It should be noted that the purpose of Section 5 referrals is not to determine the acceptability or otherwise of works which are the subject of a referral but whether the matter in question constitutes development, and if so, falls within the scope of exempted development.

At the outset, I consider it prudent to draw the Boards attention to Section 138(1) which provides that the Board shall have an absolute discretion to dismiss an appeal or referral-

(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to—

- (i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or
- (ii) any previous permission which in its opinion is relevant.

9.1. Context

The referrer in this instance has set out comprehensive 'grounds of appeals' and included supporting documentation. The purpose of this report is to review the question posed under section 5 of the Planning and Development Act 2000 (as amended) and not consider whether or not works/development carried out is authorised or compliance with relevant planning permissions, or potential material contravention of a Development Plan. This is a matter for Clare County Council to pursue and consider through the relevant channels.

The question before Clare County Council was:

Whether the replacement of the Clarecastle wastewater treatment plan by diverting water arising through a new sewer to the Clareabbey wastewater treatment plant, which discharges to an SAC, is or is not development and is or is not exempted development.

9.2 The Board's Jurisdiction to Determine the Question.

Having reviewed the documentation submitted by the referrer (Michael Duffy), the planning authority and the owner (Uisce Eireann) and also the site's referral history, it is my view that a key issue to be addressed at the outset is the Board's jurisdiction to make a decision on this referral with reference to *Narconon Trust v An Bord Pleanála* Court of Appeal judgement, where Clare County Council made a determination on a similar worded Section 5 Referral under R19 62 in 2021 and under R21 61 and R19 39 albeit without specific reference to European sites in the wording. In *Narconon Trust v An Bord Pleanála* (2021, IECA 307), the Court of Appeal granted an Order of Certiorari quashing two decisions by the Board under Section 5 of the Planning and Development Act 2000 (as amended), 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:

“The Board was precluded from determining a section 5 referral in circumstance 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 planning facts and circumstance 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 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.”

This judgement is relevant to the current referral as it requires two issues to be addressed by the Board prior to a determination being made:

- 1) Is the question referred the same, or substantially the same, and in respect of the same land and
- 2) Has there been a change in the planning facts or circumstances since the previous determination was made.

I address these in turn below:

Is the question referred the same, or substantially the same, and in respect of the same land and

The referral refers to the same lands (ie Uisce Eireann infrastructure at Clarecastle and Clareabbey, Co. Clare and ancillaries.

There is a history of Section 5 Referrals relating to this development which I set out below and wording of question posed:

PA Ref R 21-61 refers to a Section 5 referral by Irish Water relating to:

“Whether the construction of a new underground pumping station grounds to the south of the existing Quay Road pumping stations, diversion of existing wastewater sewers to a new pumping station, internal revision to the existing Quay Road pumping station, and the installation of a new rising main connection to the existing Clareabbey wastewater treatment plant is development and if so is exempted development”. Clare CC determined that the works constituted development which is exempted development.

PA Ref. R19-62 refers to a Section 5 referral by Brian Barry relating to:

“whether development of a sewer to transport wastewater arising in the agglomeration of Clarecastle for treatment in the Clareabbey WWTP and which discharges to waters in and/or connected to European sites from Clarecastle to Clareabbey, Ennis, Co. Clare is or is not development and is or is not exempted development”. Clare CC Determined that the works constitute development which is exempted development. ABP 309691 refers an appeal relating to this Section 5 to ABP by Brian Barry which was deemed invalid on the 10/03/2021.

PA Ref. R19-39 refers to a Section 5 referral by Brian Barry relating to:

“Whether the installation of a rising main sewer transporting raw sewerage from Clarecastle to Clareabbey WWTP at Clareabbey, Clarecastle, Co. Clare is or is not development and is or is not exempted development”. Clare CC Determined that the works constitute development which is exempted development.

The current appeal by Michael Duffy before the Board refers to a Determination by Clare CC under R22-1 on *“Whether the replacement of the Clarecastle wastewater treatment plan by diverting water arising through a new sewer to the Clareabbey wastewater treatment plant, which discharges to an SAC, is or is not development and is or is not exempted development.”*

In my view the questioned posed to Clare County Council on which it made a Determination under section 5 which forms the basis of this appeal is substantially the same as those adjudicated under R19-39 (which specifically refers to European sites), R19-62 and R21-61,

Has there been a change in the planning facts or circumstances since the previous determination was made.

Having reviewed the contents of R21-61, R19-39 and R19-62, it is my view that there has been no substantial change in information submitted and there has been no substantial change to the planning facts or circumstances in the interim period since the last determination was made on the 19th November 2021.

Therefore, in the context of *Narconon Trust v An Bord Pleanála* judgement, it is my opinion that the Board is precluded from making a Determination on the question which is the subject of the Determination by Clare County Council which has been appealed "*Whether the replacement of the Clarecastle wastewater treatment plan by diverting water arising through a new sewer to the Clareabbey wastewater treatment plant, which discharges to an SAC, is or is not development and is or is not exempted development.*" As Clare County Council has previously make a determination it is development is exempted development and it is not within the Board's jurisdiction to revisit this decision, where there has been no material change in the planning facts or circumstances.

Section 138 (1) provides that the Board shall have an absolute discretion to dismiss an appeal or referral-

(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to—

- (i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or
- (ii) any previous permission which in its opinion is relevant.

In this instance I would consider the relevance of subsection (1)(b)(i), where the question raised in the referral has been addressed three times by Clare County Council in three separate declarations as detailed in this report and to the time which has passed since those declarations were made. In these circumstances, I consider that the referral could be dismissed by reference to section 138(1)(b)(i) of the Planning & Development Act, 2000 (as amended).

9.3 Appropriate Assessment screening

Having regard to the reasoning set out above and my recommendation that the referral could be dismissed by reference to section 138 of the Planning & Development Act, 2000 (as amended) an AA Screening has not been carried out. In the event the Board is of a mind not to dismiss this referral and proceed with a Declaration I note that Clare County Council under the previous Declaration on this question carried out AA Screening and made a Determination on this matter. Therefore, in my opinion, it is prudent to consider this matter also in the context of *Narconon Trust v An Bord Pleanála*.

10.0 Recommendation

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 replacement of the Clarecastle wastewater treatment plant by diverting wastewater arising through a new sewer to the Clareabbey wastewater treatment plant, which discharges to an SAC, considered to be development and if so, is it exempted development.

AND WHEREAS Michael Duffy requested a declaration on this question from Clare County Council; and the Council issued a declaration on the 30th June 2022 stating that the matter was development and was exempted development:

AND WHEREAS Michael Duffy referred this declaration for review to An Bord Pleanála, on the 27th 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, (as amended)
- (c) Section 4 of the Planning and Development Act, 2000 (as amended),
- (d) Section 138(1)(b)(i) of the Planning and Development Act 2000 (as amended),
- (e) Article 10 of the Planning and Development Regulations, 2001 (as amended),
- (f) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001 (as amended) – and in particular, Class 58
- (g) Relevant case law, and in particular the Judgment of Heslin J in *Narconon Trust v. An Bord Pleanála & Others*,
- (j) the precedent section 5 declarations under R19 62, R19 39 and R21 61 issued by Clare County Council in relation to these lands;

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the Judgement of Heslin J in *Narconon Trust v An Bord Pleanála & Others*, does have applicability in the instance of this referral
- (b) previous determinations of Clare County Council in relation to Is the replacement of the Clarecastle wastewater treatment plant by diverting wastewater arising through a new sewer to the Clareabbey wastewater treatment plant, which discharges to an SAC, considered to be development and if so, is it exempted development at this site, being declared exempted development, are of relevance;
- (f) the Board is satisfied that, in the particular circumstances, the referral should not be further considered by it.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 138(1)(b)(i) of the Planning and Development Act, 2000 (as amended), hereby dismisses this referral.

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.

Dáire McDevitt
Senior Planning Inspector

17th June 2024