



An  
Bord  
Pleanála

## Inspector's Report ABP-314631-22

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<b>Question</b>	Whether construction/change of use of an agricultural farm building from an orchard machinery store to a cider brewery
<b>Location</b>	Boherkyle Goresbridge, Co. Kilkenny
<b>Declaration</b>	
Planning Authority	Kilkenny County Council
Planning Authority Reg. Ref.	DEC710
Applicant for Declaration	Lance O'Brien
Planning Authority Decision	Is development and is not exempted development.
<b>Referral</b>	
<b>Referred by</b>	Lance O'Brien
<b>Owner/ Occupier</b>	Lance O'Brien.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	19 <sup>th</sup> April 2023.

**Inspector**

Peter Nelson

## **1.0 Site Location and Description**

1.1. The site is located approximately 3.2 km southwest of Goresbridge, on the corner of the Powerstown East local road and a secondary local road. The subject site includes a shed containing brewing equipment, which was not in operation during the inspection. The overall site includes a dwelling house and numerous commercial and agricultural sheds. The subject building is located directly to the west of the other sheds, including those granted permission under planning permission reg.ref.: 05/1796. At the time of site inspection, there were several motorhomes on site and repair was taking place on one of the motorhomes. The applicant states that the landholding includes 9.7 hectares of apple orchard.

## **2.0 The Question**

2.1. Is the construction/change of use of an agricultural farm building from an orchard machinery store to a cider brewery is development which is exempted development?

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

The Planning Authority issued a declaration on 23rd August 2022, stating that the construction/change of use of an agricultural farm building from an orchard machinery store to a cider brewery at Boherkyle, Goresbridge is development and is not exempted.

In making this Declaration, the Planning Authority had regard, particularly to:

- (a) Section 2, 3 & 4 of the Planning and Development Act 2000
- (b) Article 9 of the Planning and Development Regulations 2001 as amended, with particular reference to 9 (1) (i) & (iii),
- (c) Planning permission history and other development use on the site,
- (d) The plans and particulars submitted.

## 3.2. Planning Authority Reports

### 3.2.1. Planning Reports

The report of the Planning Officer dated 19th August 2022 outlines the legislative context and the planning history of the site, as well as an overview of the background to the question at hand. The assessment conclusion can be summarised as follows:

- It was considered that the proposed activities relating to a cider brewery constitute a change of use of development that is material having regard to Section 3(1) of the Planning and Development Act 2000 and which gives rise to planning and environmental issues relating to a new activity, such as traffic, odour, alcohol licensing, increased water usage, surface water/wastewater management and health and safety etc. that requires planning permission.
- The proposal contravenes Article 9(1)(i) &(iii) of the Planning and Development Regulations 2001 as amended because it constitutes a use of development that would be inconsistent with existing agricultural use specified in planning permission reference No. P05/176, and combined with existing access design and available sightlines, give rise to traffic intensification and hazard endangering public safety and obstructing other road users.

### 3.2.2. Other Technical Reports

None

## 4.0 Planning History

**P.A. Ref:** 05/1796

Permission granted to construct two farm-type buildings of 99.75 meters squared and 148.46 meters squared floor space and all associated works subject to 5 no. conditions.

Condition No. 4 states:

4. The development shall be used for agricultural purposes only.

Reason: In the interests of proper planning and sustainable development.

## **5.0 Policy Context**

### **5.1. Natural Heritage Designations**

No designations apply to the subject site.

River Barrow and River Nore Special Area of Conservation is located to the northeast and is approximately 2.2km at its closest point.

## **6.0 The Referral**

### **6.1. Referrer's Case**

6.1.1. The referrer's case can be summarised as follows:

- The change of use of the land from arable farming to fruit farming is exempted development within the meaning of the Planning and Development Act 200 (as amended)
- The construction of the apple shed is also exempted development, as the shed is on the farm/orchard and is surrounded by the orchards it supports. The apple shed is exempted development under class 9 exemptions of the 2001 Planning Regulations.
- The value conversion of the apple crop into apple juice, cider, perry or spirit is a natural progression of and ancillary to the business as an apple farmer.
- The materiality of fruit farming and its value conversion is intertwined with using the apple crop to make beverages.
- The proposed use of the shed for apple juice or cider production will not create undue additional traffic movements, odour, water usage or issues with surface water/wastewater.

## 6.2. Planning Authority Response

A submission from the Planning Authority was received on 12<sup>th</sup> October 2022, the contents of which can be summarised as follows:

- The Kilkenny Roads Design section has reviewed the appeal submission.
- Traffic generation from the development in combination with vehicle garage/motor home business use on-site, poor conditioned access design and restricted sightlines would endanger public safety by reason of traffic hazard and give rise to obstruction of road users rendering the development not exempted by virtue of Article 9(i)(a)(iii) of the Planning and Development Regulations 2001-2022.
- The site is being used as a motor home business, with 10no. mobile homes on-site at the time of inspection.
- The shed does not have the benefit of planning permission.
- A brewery is considered more than an ancillary use to apple fruit growing/distribution and cannot be construed as solely agricultural.
- The brewery undertakes an 'industrial process' as defined by Article 5 of the Planning and Development Regulations.
- The fermentation tanks and other associated plant and their installation would constitute 'development' in accordance with the provisions of sections 2(1) and (3) of the Planning and Development Act.
- The odour issues and the impact of surface water and wastewater are not adequately addressed and/or covered under existing planning permission conditions and/or exempted regulation limitations.
- Having regard to Section 3(1) of the Planning and Development Act 2000, the proposed activities/structures represent an industrial process which is a material change of use.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

#### Section 2 – Interpretation

"Agriculture" includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of the land as grazing lands, meadow land, osier land, market gardens and nursery grounds and agricultural shall be constructed accordingly.

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

"Works" includes any Act or operation of the construction, excavation, demolition, extension, alteration, repair or renewal.

#### Section 3 – Development

(a) Section 3 (1) - 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 - Exempted Development

(b) Section 4 (1) The following shall be exempted developments for the purposes of this Act-

a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used.

### 7.2. Planning and Development Regulations, 2001 (as amended)

## PART 2 - Exempted Development

### Article 5(1)

In this Part –

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

"Light industrial building" means an industrial building in which the processes carried on or the plant and machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust, or grit.

"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.

"Industrial undertaker" means a person by whom an industrial process is carried on and "industrial undertaking" shall be construed accordingly.

Schedule 2 Class 9. Classifies the following development as being exempt:



Works consisting of the provision of any store, barn, shed, glass house or other structure, not being of a type specified in class 6, 7 or 8 of this Part of this Schedule, and having a gross floor space not exceeding 300 square metres.

Provided the following conditions and limitations have been met:

1. No such structure shall be used for any purpose other than the purpose of agriculture or forestry, but excluding the housing of animals or the storing of effluent.
2. The gross floor space of such structures together with any other such structures situated within the same farmyard complex or complex of such structures or within 100 metres of that complex shall not exceed 900 square metres gross floor space in aggregate.
3. No such structure shall be situated within 10 metres of any public road.
4. No such structure within 100 metres of any public road shall exceed 8 metres in height.
5. No such structure shall be situated within 100 metres of any house (other than the house of the person providing the structure) or other residential building or school, hospital, church or building used for public assembly, save with the consent in writing of the owner and, as may be appropriate, the occupier or person in charge thereof.
6. No unpainted metal sheeting shall be used for roofing or on the external finish of the structure.

#### Article 10: Changes of use

10(1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not—

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

- (b) contravene a condition attached to a permission under the Act,
- (c) be inconsistent with any use specified or included in such a permission, or
- (d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

10 (2) (a) (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.

## 8.0 Referrals Database

I have examined the Board's database of references and referrals. The following case is relevant in the context of the issues raised in the current referral:

**304215-19** –The question arose as to whether the use of part of the Kerry Mineral Water Supply Company Limited building as a craft brewery at Flesk Road, Killarney, County Kerry, is or is not exempted development. The Board decided that the said use as a craft brewery is development and is not exempted development.

Conclusions underpinning the decision included:

Insufficient information to satisfy the Board that the pre-1964 industrial use had not been abandoned. Further, the original established use for brewing-related activities was extinguished by either the partial implementation of a permission for office use or the change of use to office without the benefit of planning permission.

Since 2002 the building had been used for uses, including warehousing and office, neither of which come within the scope of Class 4 (Use as light industrial building), Part 4, Schedule 2 to the Regulations.

The resumption of a light industrial use was considered to be a change of use that was material.

## 9.0 Assessment

### 9.1. Preliminary Considerations

- 9.1.1. The agricultural building is located further east of the development that was granted planning permission under planning permission file ref. P05/1796. There is no record of planning permission for the subject building. The agricultural building currently houses brewing equipment.
- 9.1.2. The referral question asks: 'Is the construction/change of use of an agriculture farm building from an orchard machinery store to a cider brewery is development which is exempted development?'
- 9.1.3. I consider that there are two elements to this question. Firstly, is the agricultural building as constructed, development which is exempted development and secondly, is the change of use of this agricultural building from an orchard machinery store to a cider shed exempted development?

### 9.2. Agricultural Building: Is or Is Not Development?

- 9.2.1. The question put forward by the referrer relates to the construction of an agricultural farm building. The referrer's case states that the shed can be considered exempted development under the provisions of Class 9, Part 3, Schedule 2 of the Planning and Development Regulations, which sets out the conditions and limitations to the exemptions applied to agricultural structures.
- 9.2.2. The first question to consider is whether or not the proposal constitutes development under the definitions contained in the Planning Act. Section 3(1) of the Act defines 'development' 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". In terms of determining whether development has occurred, the relevant tests to apply are to establish whether 'works' were carried out and/or whether there was a material change in the use of the structure or land.
- 9.2.3. Within Section 2, (1) of the Planning Act, 'works' are defined as 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'

The construction of the agricultural building would involve the carrying out of works as defined in the Act and would therefore constitute development.

### 9.3. **Agricultural Building: Is or is not exempted development.**

The building was previously used as a fruit crop store and orchard machinery store and the brewery use has not yet commenced, therefore, I consider that Class 9, Part 3, Schedule 2 of the Planning and Development Regulations applies. Class 9 states that '*Works consisting of the provision of any store, barn, shed, glass house or other structure, not being of a type specified in class 6, 7 or 8 of this Part of this Schedule, and having a gross floor space not exceeding 300 square metres.*' are exempted development subject to conditions and limitations. The floor area of the agricultural shed is 262.5 square meters.

9.3.1. Under Class 9 for a development to be considered exempt development a number of conditions and limitations have to be met.

9.3.2. There are a number of existing buildings within this farmyard complex. While it appears that some of these structures are in commercial uses, they are similar agricultural structures. It should be noted that the applicant has not supplied details of the floor areas of the structures on site. Using the Ordnance Survey map provided, I consider that the gross floor area of the subject building taken with the other such structures situated within the same farmyard complex or within 100 metres of that complex exceeds 900 square metres. Therefore, the agricultural building does not meet condition no.2 of Class 9.

9.3.3. I consider that as the building does not meet all the Conditions and Limitations of that Class 9, Part 3, Schedule 2 of the Planning and Development Regulations the agricultural building is not exempted development.

### 9.4. **Change of Use of Agricultural Building to Brewery**

9.4.1. The second issue of this referral is the change of use of the building for use as a cider brewery. The applicant states that the previous use of the building was for storing orchard machinery.

- 9.4.2. I consider that as the building is going from an agricultural storage uses to a brewery which includes a production process and machinery is a change of use.
- 9.4.3. As the change of use involves a production process, I consider that the proposed use of the building will potentially impact the proper planning and development of the area. Due to likely issues arising from increased water usage, surface water runoff, traffic generation and odour, I consider that the use of the building as a brewery represents a material change of use from the existing agricultural use.

### **9.5. Is the change of use exempted?**

- 9.5.1. In the submitted grounds of appeal, the applicant makes the case that the use of the land for fruit farming is exempted development under Section 4(1)(a) of the 200 Planning and Development Act, which states development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used is exempted development. While this may be the case, the relevant question is whether a brewery is an agricultural use or not.
- 9.5.2. Section 4 (1) (a) refers to the exempted development for buildings associated for the purposes of agriculture or forestry as being occupied together with land so used for agriculture or forestry. Section 2 of the Act includes a definition of 'agriculture', which includes 'horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of the land as grazing lands, meadow land, osier land, market gardens and nursery grounds and agricultural shall be constructed accordingly'.
- 9.5.3. As can be seen, the definition of agriculture includes fruit growing; it does not, however include fruit processing and brewing. The applicant contends that the value conversion of the apple crop into apple juice, cider, perry or spirit is a natural progression of and ancillary to the business of apple farming.
- 9.5.4. Article 5(1) of the Planning and Development Regulations interprets "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" is defined as any process which is carried on in the course of trade or business other than agriculture. As the process of creating apple juice, cider, perry or spirits is not included in the definition of agriculture and is carried out in the course of trade or business, I consider brewing as proposed to be an 'industrial process'. I consider the scale of the brewing process proposed not to be ancillary to the business of apple farming and therefore Article 10 (2) (a) of the Planning and Development Regulations does not apply.

- 9.5.5. While it is recognised that a brewery is a progression of apple farming, the processes involved are industrial and I consider the use of the building would become light industry. I am satisfied that the proposed use of the building cannot be considered as agricultural, and Article 10 (1) of the Planning and Development Regulations does not apply. Therefore, I consider that the proposed change of use is not exempt development.

## **10.0 Appropriate Assessment**

- 10.1. Having regard to the nature and scale of the proposed development, which consist of an agricultural building and its change of use to a brewery and the nature of the receiving environment together with the proximity to the nearest European site, no Appropriate Assessment issues arise, and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

## **11.0 Conclusion & Recommendation**

### **11.1. Conclusion**

Having regard to the above, I am satisfied that the general question raised in this referral can be determined as follows:

The work, being the construction of an agricultural building at Boherkyle, Goresbridge, Co. Kilkenny is development.

Having regard to the existing buildings on site that the agricultural building is not exempted development under Condition No.2 of Class 9 of Part 1 of Schedule 2 of the Planning & Development Regulations, 2001.

The proposed change of use from an orchard machinery store to a cider brewery is a material change of use.

The proposed change of use from an orchard machinery store to a cider brewery is not exempted development.

## 11.2. 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 construction and change of use of an agricultural farm building to a cider brewery is or is not development or is or is not exempted development:

**AND WHEREAS** Lance O'Brien requested a declaration on this question from Council, and the Council issued a declaration on 23rd August 2023 stating that the matter was development and was not exempted development:

**AND WHEREAS** referred this declaration for review to An Bord Pleanála on 16th September 2016:

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

- (a) Section 2(1), 3(1) and 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (b) Article 5 (1) and 6(1) of the Planning and Development Regulations, 2001, as amended,

- (c) Class 9 Parts 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (d) the pattern of development in the immediate vicinity of the subject building.

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

- (a) The agricultural building constitutes development as defined under Section 2 (1) of the Planning and Development Act 2000 (as amended) by virtue of the carrying out of works,
- (b) The agricultural building taken with the existing buildings does not meet the conditions and limitations of Class 9, Part 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended.
- (c) The proposed change of use to a brewery is a change of use and is a material change of use.
- (d) The proposed change of use to a brewery is not an agricultural use as defined in PART 2 - Exempted Development, Article 5(1) of the Planning and Development Regulations, 2001, as amended.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the agricultural farm building is development and is not exempted development and the change of use of the building from an orchard machinery store to a cider brewery is a material change of use 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.

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Peter Nelson  
Planning Inspector

8<sup>th</sup> August 2023