



An
Bord
Pleanála

Inspector's Report ABP-315039-22

Question

Whether the proposed development will be within the scope of planning permission reference 20/394 (ABP-308931-20) and therefore is or is not development and is or is not exempted development.

Location

Eircom Exchange, Haggard Road,
Kells, Co. Kilkenny

Declaration

Planning Authority

Kilkenny County Council

Planning Authority Reg. Ref.

DEC714

Applicant for Declaration

Doreen and Peter Thomson

Planning Authority Decision

No declaration

Referral

Referred by

Doreen and Peter Thomson.

Owner/ Occupier

Eircom Ltd.

Observer(s)

None.

Date of Site Inspection

19th April 2023.

Inspector

Peter Nelson

1.0 Site Location and Description

- 1.1. The site is located in the village of Kells, approximately 15km south of Kilkenny City. The site is on the western side of Haggard Road and contains an existing Eircom exchange building, a flat-roofed single-storey structure. The site backs onto No.4 Priory Grove. There is a recently erected ESB pole to the front of the site. The site has a boundary stone wall. To the site's rear are incomplete foundations consisting of a support structure and reinforcement bars. No concrete foundation pad is present.
- 1.2. The area adjoining the site consists of primarily detached residences of varying design and height. Adjacent to the eastern side of the exchange building is a single storey detached dwelling, while to the west is a vacant traditional cottage. The lands to the north (rear) of the site rise in level and comprise a small residential estate, Priory Grove. Further to the southeast, c.150m, is another residential estate, Burgess Court.

2.0 The Question

- 2.1. Whether:
 1. The telecommunication support structure foundation proposed to be constructed between 200mm and 300mm above the permitted level and
 2. The telecommunication support structure foundation proposed to be constructed with dimensions of 3.4m (length) x 3.4m (width) x 1m (depth) rather than the permitted dimensions of 4m (length) x 4m (width) x 1.4m (depth):will be within the scope of planning permission reference 20/394 (ABP ref: PL 308931-20) and therefore immaterial or de minimis deviations and not development, or are the differences material, development and not exempted development?

3.0 Planning Authority Declaration

3.1. Declaration

The planning authority considered on the 21st of October 2022 that the ground of the referral related to detailed compliance with the terms of permission 20/394 (ABP PI 20-308931-12). Notwithstanding the provisions of Article 9(1)(a)(i) of the Planning and Development Regulations and the fact that a declaration issued under Dec Ref 694, the Planning Authority considered that consideration of these compliance matters does not fall within the remit for a Section 5 and are matters for Planning Enforcement which cannot be further considered under this section of the Act.

In accordance with Section 5(3)b of the Planning and Development Act 2000 (as amended, Kilkenny County Council issued no declaration on this matter.

3.2. Planning Authority Reports

3.2.1. The Planning Report dated the 13th of October 2022 is the basis for the Planning Authority's decision, and the main points raised can be summarised as follows:

- The telecommunications support structure, including its foundations as constructed, constitutes development which is not exempted development.
- The question relates to levels and extents, which are very specific and may fall within the realm of de minimis regarding potential impact, which is not a matter for consideration under Section 5 of the Act but rather an issue for planning enforcement.
- Recommends that the referral should not be considered further, having regard to the nature of the referral.

3.2.2. Other Technical Reports

None

4.0 Planning History

4.1. Planning Applications

P.A. Reg. 20/394 ABP. Ref. PL-308931-20

Planning Permission was granted on the 17th of June 2021, on first-party appeal on this current referral site for the replacement of an existing 10m wooden pole for a 15m high free-standing communications structure with its associated antennae, communication dishes, ground equipment and all associated site development works.

Six conditions were attached to the grant of permission.

Condition No. 1 stated:

The development shall be carried out and completed in accordance with the plans and particulars lodged with the application except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interest of clarity.

The current referral relates to this grant of planning permission.

4.2. Section 5 Referrals

There have been two previous Section 5 Referrals on this site.

Referral: P.A. Reg. DEC 694

This referral relates to a structure in the same location as the incomplete foundations currently on site.

On the question of whether the telecommunication support structure, including its foundation, with the foundation constructed to an overall height of c.15.771 meters above ground level, is within the scope of planning permission reference 20/394 (ABP ref.PI10.308931) and, therefore the deviation in height of c.0.771 meters and in design are not development or whether the deviations are development and not

exempted development, Kilkenny County Council on the 31st May 2022 declared that the development was development and was not exempted development.

Referral: P.A. Reg. DEC 666 ABP. Ref. 312538

This referral related to the telecommunications structure foundation/base to the rear of the Eircom Exchange Building, which was in a different location than the current incomplete foundations on site.

On the question of whether works involved in developing a telecommunications structure foundation/base in its current location and the laying of cables (including fibre optic cables), wire, tube, pipe, duct or similar thing, from the road and/or Eircom Exchange Building to the telecommunications structure foundation/base is or is not development or is or is not exempted development the Board dismissed the referral appeal on the 16th March 2022 stating:

- The grounds of the referral relate to matters of compliance with conditions attached to the permission granted by An Bord Pleanála under appeal reference number ABP-308931-20. These are compliance matters, and the resolution of these matters does not come within the remit of the Board. The Board is therefore satisfied that, in this particular circumstance, the referral relates to matters of compliance with conditions by it, having regard to the nature of this referral.

4.3. Enforcement

P.A. Reg. ENF211112

An enforcement Notice was served relating to the telecommunication support structure, including its foundation.

5.0 Policy Context

5.1. Development Plan

The Kilkenny City and County Development Plan 2021-2027 is the operative Development Plan for the area. This plan came into effect on the 15th of October 2021.

Objectives

- 10I To support and facilitate the delivery of high-capacity Information Communications Technology Infrastructure, broadband connectivity, and digital broadcasting, throughout the County, in order to ensure economic competitiveness for the enterprise and commercial sectors and in enabling more flexible work practices, e.g., remote working subject to other relevant policies and objectives of the Plan.
- 10J To set up and maintain a register of approved telecommunications structures which will provide a useful input to the assessment of future telecommunications developments and would also be useful from the point of view of maximising the potential for future mast sharing and co-location.

5.2. Natural Heritage Designations

The site is located 0.26km from the River Barrow and River Nore Special Area of Conservation.

6.0 The Referral

6.1. Referrer's Case

The referrer has appealed the decision of the Planning Authority, and the issues raised can be summarised as follows:

- The Council was inconsistent and incorrect in its decision.

- The Council previously issued a declaration concerning the same development where they allowed the Section 5 procedure to determine whether work was within the scope of the planning permission.
- Case Law found that Section 5 jurisdiction does allow for the interpretation of planning permission.
- The appellant fundamentally disagrees with the Board's determination on PI.308931, which dismissed the referral as it related to compliance matters.
- The Construction Management Plan submitted as part of an Enforcement Notice and agreed by the Local Authority allows for the deviation of the size and height of the foundation structure.
- Nowhere in the Planning and Development Act and Regulations is there provision for a planning authority to agree to or permit a developer to knowingly deviate from the permitted plans and particulars before carrying out the works.
- The proposed foundation detailed in the Construction Management Plan and associated drawings will not achieve compliance with condition no.1 of planning permission 20/394 is development and is not exempt development.

6.2. Planning Authority Response

- In their email dated 3:58 p.m. on 22nd November 2022, Kilkenny County Council had no further comments.

6.3. Further Responses

Comments were received from the applicant, which relates to the correspondence sent to the Local Authority after the decision from the Authority not to consider the referral further.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 5 – Declaration and referral on development and exempted development.

5.—(1) 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.

(3) (b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

Section 138 - Board may dismiss appeals or referrals.

138.— (1) 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.

(2) A decision made under this section shall state the main reasons and considerations on which the decision is based.

8.0 Relevant Legal Cases

8.1. Court of Appeal 2020/232 Narconon Trust v ABP

A challenge to two ABP decisions pursuant to s.5 PDA 2000 whereby ABP decided that change of use from a nursing home to a residential drug rehabilitation centre was development and was not exempted development.

ABP decision quashed (High Court judgment upheld).

The basis for decision to quash:

The court held that ABP was precluded from determining a s.5 referral in circumstances where a planning authority has previously determined substantially the same question in respect of the same land and where there is no evidence of a change in planning facts and circumstances since the planning authority's determination.

Supreme Court 2021/133 Krikke and Barranafaddock Sustainable Electricity Limited

The residents appealed to the Supreme Court against a decision of the Court of Appeal delivered on the 30th July 2021, which allowed the respondent's appeal against the judgment of the High Court, which was delivered on the 6th December 2019, and his order made on the same date. The High Court found in the resident's favour, but the Court of Appeal overturned that decision. The High Court judge decided that certain wind turbines "as built" were not authorised by planning permission, and were therefore unauthorised development, and he made an order pursuant to s. 160 of the Planning and Development Act 2000 ("the 2000 Act") restraining the use of the turbines pro tem. The Supreme Court dismissed the appeal and upheld the Court of Appeals findings.

Mr Justice Woulfe's conclusions on three questions arising were as follows:

- (i) The increase in rotor diameter was agreed in writing with the planning authority pursuant to condition 3 of the 2011 permission.

- (ii) The appellants cannot now challenge the validity of any such a decision or act by the planning authority on EU law grounds, in the light of s. 50 of the 2000 Act.
- (iii) The s. 5 decision should be construed as not extending to a determination of unauthorised development, and therefore it is not necessary to decide whether any such purported determination would have been binding on the High Court on a subsequent s. 160 application.

9.0 Assessment

- 9.1. An incomplete foundation has been constructed with a metal support structure and reinforcement bars. No concrete foundation pad is present.

The foundations and support structure are to be constructed between 200mm and 300mm above that granted permission under planning permission P.A. Reg. 20/394 ABP. Ref. 308931-22.

The foundation is also proposed with dimensions 3.4m length x 3.4m width x 1m depth rather than the permitted dimensions of 4m x 4m x 4m; therefore, a reduction in size to that which was granted permission.

The applicant states that the changes have been approved in the construction management plan and drawings submitted on foot of an Enforcement Notice.

A letter submitted on file by the applicant from Kilkenny County Council dated the 25th August 2022 states the method statement (received 5th July 2022), further Construction Management Plan and drawings represent a reasonable way towards compliance with the requirements of permission PL Reg Ref 20/394 (ABP-308931-20).

- 9.2. The appellant references case law, which found that Section 5 justification does allow for the interpretation of a planning permission. I note that the following cases mentioned: *Palmerlane Ltd v Dublin Corporation* [1999] I.E.H.C. 92, *Grianan an Aileach Centre v Donegal County Council* [2004] 2 I.R. 625. and *Heaton Ltd v Offaly County Council* [2013] IEHC 261 relate to material change of use and I consider that these are not particularly relevant in this instance.

I consider the *Krikkle v Barranafaddock Sustainability Electricity Ltd* Supreme Court case law more relevant. In this case, Mr Justice Woulfe's considered as part of the appeal the question of whether the s.5 Decision should be construed as extending to a determination of unauthorised development and if so, whether any such determination is binding on the High Court on a s. 160 application. In Mr Justice Woulfe's judgement he stated: *'that unlike the situation where the question of whether there has been a material change of use arises (where a material change of use amounts to development), the question of whether the development comes within the scope of the planning permission, i.e. whether it was authorised, is not an issue that the planning bodies have jurisdiction to decide.'* Mr Justice Woulfe held that the s. 5 decision should be construed as not extending to a determination of unauthorised development, and therefore it was not necessary for him to decide whether any such purported determination would have been binding on the High Court on a subsequent s. 160 application.

I note the previous referral to the Bord, Ref. 312538, on this site. Where on the question of whether works involved in developing a telecommunications structure foundation/base in its current location is or is not development or is or is not exempted development, the Board dismissed the referral appeal, stating that it related to matters of compliance with conditions. While the telecommunication support structure foundation of the above referral was in a different location than the current referral, I considered that it is worth noting the legal case *Narconon Trust v ABP*, where the court held that ABP was precluded from determining a s.5 referral in circumstances where a planning authority has previously determined substantially the same question in respect of the same land and where there is no evidence of a change in planning facts and circumstances since the planning authority's determination.

I considered that the current referral also relates to compliance issues, which may or may not be de minimis, and the resolution of this issue is, therefore, a compliance matter for the Local Authority and does not come within the remit of the Board. Therefore, I recommend that this appeal should not be further considered by having regard to the nature of the appeal.

10.0 Recommendation

10.1. I recommend that the referral be dismissed under subsection(1)(b)(i) of section 138 of the Act in accordance with the following draft order.

WHEREAS a question has arisen as to whether the telecommunication support structure foundation proposed to be constructed between 200mm and 300mm above the permitted level: and the telecommunication support structure foundation proposed to be constructed with dimensions of 3.4m (length) x 3.4m (width) x 1m (depth) rather than the permitted dimensions of 4m (length) x 4m (width) x 1.4m (depth) will be within the scope of planning permission reference 20/394 (ABP ref: 308931-20) and therefore immaterial or de minimis deviations and not development, or are the differences material, development and not exempted development is or is not development or is or is not exempted development:

AND WHEREAS Doreen and Peter Thomson of 4 Priory Gove, Kells, County Kilkenny, requested a declaration on this question from Kilkenny County Council and the Council issued no declaration issued by the planning authority.

AND WHEREAS Doreen and Peter Thomson of 4 Priory Gove, Kells, County Kilkenny referred this declaration for review to An Bord Pleanála on the 3rd day of November 2022:

AND WHEREAS An Bord Pleanála, having considered the nature of the question, is satisfied that 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) of the Planning and Development Act 2000, as

amended, hereby dismisses the referral under subsection(1)(b)(i) of section 138 of the Act, based on the reason and considerations set out below.

REASONS AND CONSIDERATIONS

The grounds of the referral relate to matters of compliance with conditions attached to the permission granted by An Bord Pleanála under appeal reference number ABP–308931–21. These are compliance matters, and the resolutions of these matters do not come within the remit of the Board. The Board is therefore satisfied that, in this particular circumstance, this referral should not be further considered by it, having regard to the nature of 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.

Peter Nelson
Planning Inspector

30th August 2023