



An
Bord
Pleanála

Inspector's Report ABP-315121-22

Question

Whether the construction of an agricultural storage building (92m²) is or is not development or is or is not exempted development.

Location

Rossadillisk, Cleggan, Co. Galway.

Declaration

Planning Authority

Galway County Council

Planning Authority Reg. Ref.

ED22/58

Applicant for Declaration

Tom Termini.

Planning Authority Decision

Is not exempted development

Referral

Referred by

First party.

Observer(s)

None.

Date of Site Inspection

27th June 2023.

Inspector

Barry O'Donnell

1.0 Site Location and Description

- 1.1. The subject site is located in the townland of Rossadillisk, approx. 3.5km west of Creggan in west County Galway. It comprises a rural plot that is in use by the applicant as a beekeeping and honey production operation. It is accessed via an informal, unmade track that also provides access to agricultural land along the seafront.

2.0 The Question

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

'Whether the construction of an agricultural shed for which an appropriate assessment screening report has been carried out, at Rossadillisk, Cleggan, Co. Galway is development and is exempted development.'

- 2.2. The referral is accompanied by a *Screening for Appropriate Assessment* report, prepared by Delichon Ecology.

- 2.3. Section 5 of the Planning and Development Act, 2000, as amended has a clear and narrow focus, allowing for a question to be asked as to whether a given development is or is not development and is or is not exempted development. In including the additional text within the referral question *'for which an appropriate assessment screening report has been carried out'* the referral, in my view, strays into other areas of the planning system that cannot reasonably be encompassed under a Section 5 determination. I therefore propose to reword the question slightly, as follows: -

'Whether the construction of an agricultural shed at Rossadillisk, Cleggan, Co. Galway is development and is exempted development.'

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. The Planning Authority issued a declaration on 24th October 2022, which states that the proposed development is development and is not exempted development.

3.2. Planning Authority Reports

- 3.2.1. An undated Planning Report has been provided, which reflects the Planning Authority's determination. The Planning Authority issued a declaration dated 24th October 2022, which states that the proposed development is development and is not exempted development. The Report states that the proposed building falls within Class 9 of Schedule 2, Part 3 of the Regulations however; the location of the site beside the West Connacht Coast SAC would not satisfy Article 9(1)(a)(viiB) of the Regulations as it relates to the requirement to undertake appropriate assessment.
- 3.2.2. Other Technical Reports
- None.

4.0 Planning History

ED 21/54: The Planning Authority determined on 23rd June 2021 that the proposed construction of an agricultural storage building with a gross floor area of 100m² is development and is not exempted development.

5.0 Policy Context

5.1. Galway County Development Plan 2022 - 2028

- 5.1.1. The site is in a rural, unzoned part of County Galway.

5.2. Natural Heritage Designations

- 5.2.1. The site is not located within any designated European site, the closest such site being West Connacht Coast SAC (Site Code 002998), which lies within c.25m to the north.
- 5.2.2. Aughrusbeg Machair and Lake pNHA (Site Code 001228) encroaches to within c.400m to the south and west.

5.1. Environmental Impact Assessment

- 5.1.1. The proposed development comprises an agricultural shed with a stated gross floor area of 92m². 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

- Class 9 of Schedule 2, Part 3 of the Regulations provides an exemption for construction of an agricultural barn, store or other structure not having a gross floorspace exceeding 300m².
- Compliance with all conditions attached to the exemption is demonstrated.
- The proposal is not located within a European site. Further there is no deleterious run-off or effluent produced.
- The Planning Authority's decision is not valid as it does not outline the reasons for its decision.
- Planner's Report
 - Article 9(1)(a)(viiB)
 - It appears that the determination is based on the understanding that undertaking an appropriate assessment screening exercise is sufficient to de-exempt. This is illogical and is inconsistent with the Habitats Directive.
 - Guidance provided by the European Commission on the AA methodology states that screening is the Stage 1 assessment. An appropriate assessment screening report was provided with the application, which establishes that appropriate assessment is not required.
 - Article 9(1)(a)(vi)
 - In order for a de-exemption to apply, there should be a specific objective in relation to protection of the landscape. No such objective was identified in the Report and, as such, it cannot use a landscape designation to de-exempt the proposal.

- There are examples in the area of similar sheds and a number of photographs are provided as part of the referral. In this context, it is difficult to see how it can be argued that the development interferes with the landscape.
- The provision of an agricultural storage shed is consistent with Section 7(a) of the development plan, which relates to the Creggan area.

6.2. Planning Authority Response

6.2.1. None received.

6.3. Observations

6.3.1. None received.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

- 7.1.1. Section 3(1) of Planning and Development Act 2000, as amended, states – 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.
- 7.1.2. Section 2 (1) of the act states - “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.

7.2. Planning and Development Regulations, 2001

7.2.1. Article 6 - Exempted Development

6. (1) Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that

such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

7.2.2. Article 9 – Restrictions on Exemption

Article 9(1)(a)(viiB) - Development to which article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would 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)(a)(vi) - Development to which article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation, conservation or protection of which is an objective of a development plan or local area plan for the area in which the development is proposed or, pending the variation of a development plan or local area plan, or the making of a new development plan or local area plan, in the draft variation of the development plan or the local area plan or the draft development plan or draft local area plan.

7.2.3. Schedule 2, Part 3 – Exempted Development

CLASS 9: 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.

Conditions and limitations

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.

8.0 Assessment

8.1. The Board's Jurisdiction to Determine this Referral

- 8.1.1. The Board will be aware that the Planning Authority has previously made a determination on a Section 5 application for a 100m² agricultural storage shed at the site, under Reg. Ref. 21/54, whereby it determined that the proposal is development and is not exempted development.
- 8.1.2. The proposal the subject of this referral has a reduced gross floor area (92m²) but it is again proposed for agricultural storage.
- 8.1.3. From a comparison of the drawings provided with the current referral and the previous Section 5 application, I am satisfied that the structure identified in both applications is identical, measuring 7.6m x 12.1m internally and with an external ridge height of 7.9m. The difference in the stated area of the structure appears to be related to the external footprint, 8m x 12.4m = 99.2sqm, and the internal floor area, 7.6m x 12.1m = 91.96sqm.
- 8.1.4. I would also advise the Board that the structure has been partially constructed on the site (a portal frame had been erected, together with raised timber floor joists on the date of my site inspection) and available Google Earth aerial photography appears to indicate that the structure was in place prior to the Planning Authority's determination of Reg. Ref. 21/54.
- 8.1.5. In view of the foregoing, I consider the judgement in *Narconon Trust v An Bord Pleanala* (2021, IECA 307) requires consideration.

- 8.1.6. In the *Narconon* judgement, 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.”

- 8.1.7. This judgement is important to the subject 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 any change in the planning facts or circumstances since the previous determination was made.

(1)

- 8.1.8. As I have already outlined, the structure on the site is partially constructed on the site and is identical in terms of appearance and scale to that which was the subject of the Planning Authority’s determination on Reg. Ref. 21/54.

- 8.1.9. In view of the above, I consider the question asked within this referral is the same, or substantially the same, and in respect of the same land as that asked under Section 5 application Reg. Ref. 21/54.

(2)

- 8.1.10. I am satisfied that there has been no change in the planning facts or circumstances since the previous determination was made.
- 8.1.11. Therefore, in the context of the Narconon judgement, it is my professional opinion that the Board is precluded from making a determination on this referral. The Planning Authority has previously made a determination that the development is not 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.

9.0 Recommendation

- 9.1. I recommend that the Board notify the parties to the referral as follows: -

The subject referral is the same, or substantially the same, and in respect of the same land as a Section 5 determination dated 23rd June 2021 (Planning Authority Reg. Ref. 21/54), and there is no evidence of any change in the planning facts or circumstances underpinning the application. In these circumstances, the Board is precluded under Section 50(2) of the Planning and Development Act, 2000, as amended, from making a determination on this referral.

Barry O'Donnell
Planning Inspector

17th August 2023.