



An
Bord
Pleanála

Inspector's Report ABP-318452-23

Question

Whether the use of lands, in the ownership of KPK properties Limited, that was subject to ABP Ruling Ref No: ABP-307488-20 at Reenagappul, Kenmare, County Kerry, shaded in Yellow on the map attached, currently being used by Irish Water/Uisce Eireann, as a works compound in conjunction with KCC PA PL reg No: 22/55 is or is not development and is or is not exempted development.

Location

Lands at Reenagappul, Kenmare, Co. Kerry

Declaration

Planning Authority

Kerry County Council

Planning Authority Reg. Ref.

EX1125

Applicant for Declaration

Martin Arthur

Planning Authority Decision

Is exempted development

Referral**Referred by**

Martin Arthur

Owner/ Occupier

KPK properties Limited

Observer(s)

None

Date of Site Inspection21st June 2024**Inspector**

Ciara McGuinness

1.0 Site Location and Description

- 1.1. The lands the subject of this referral are located in the townland of Reenagappul, Kenmare, Co. Kerry. The lands are situated c. 650m to the south-west of the Main Street in Kenmare. The Kenmare Wastewater treatment plant is located directly to the north-west of the lands, with an existing quarry to the south-west and an agricultural shed and farmlands to the east. The Kenmare stone circle, a National Monument, is situated circa 150m to the north-west of the lands. The subject lands are accessed from a private road which is gated and accessed from Market Street.
- 1.2. The subject lands comprise a construction compound associated with the permitted Kenmare Wastewater Treatment Plan upgrade works (PA Reg Ref 22/55/ABP-313364-22 refers). This area is gravelled and fenced and currently accommodates portacabins, construction machinery, equipment and materials. At the time the site visit was undertaken, the compound was in active use.
- 1.3. The site location map submitted with the referral relates to a wider landholding in the area. The location of the construction compound is more accurately shown on the drawings submitted by the referrer which appears to have been taken from the CEMP for the Kenmare WWTP upgrade works. The location of the compound adjoins the Kenmare Wastewater Treatment Plant but is outside of the red line boundary for the application.

2.0 The Question

- 2.1. The refer has sought a determination as to “whether the use of lands, in the ownership of KPK properties Limited, that was subject to ABP Ruling Ref No: ABP-307488-20 at Reenagappul, Kenmare, County Kerry, shaded in yellow on the attached map, currently being used by Irish Water/Uisce Eireann, as a works compound in conjunction with KCC PA PL reg No:22/55 is or is not development and is or is not exempted development”.
- 2.2. The purpose of this referral is not to determine the acceptability or otherwise of the construction compound in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority made the following declaration on the 13th October 2023.

“It is considered that the Kenmare Wastewater Treatment Plant works compound forms part of the development permitted by way of planning permission ref no. 22/55 and An Bord Pleanála Ref. No. 313364-22. Accordingly, it is considered that the compound constitutes development and is not exempt development as it is permitted by the planning permission 22/55 An Bord Pleanála Ref. 313364-22.

Please note that it is further considered that a temporary works compound of the nature outlined, at this location, if it did not form part of planning permission 22/55 An Bord Pleanála Ref. 313364-22, would constitute development and be exempted development by way of Schedule 2, Part 1, Class 16 of the Planning and Development Regulations 2001, as amended.”

3.2. Planning Authority Reports

3.2.1. Planning Reports

A Memo Report dated (4th October 2023) prepared by the planner considers that the subject of this referral forms part of and was permitted by way of the Kenmare WWTP upgrade permission (PA Reg Ref 22/55/ ABP-313364-22). The report also considers a more ‘hypothetical’ question of whether or not a compound (not permitted by way of PA Reg Ref 22/55/ABP-313364-22) constitutes development/exempt development. It is considered that a compound at this location falls within the scope of Schedule 2, Part 1, Class 16 of the Planning and Development Regulations 2001, as amended which states ‘The erection, construction or placing on land, in, over or under which, or on land adjoining which, development consisting of works (other than mining is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant, or machinery needed temporarily in connection with that development during the period in which it is being carried out’. As such it is considered that a temporary works compound as outlined at this location would constitute development and be exempt development.

3.2.2. Other Technical Reports - None

4.0 Planning History

Referral Site

ABP-313364-22 / PA Reg Ref 22/55 – Permission granted for upgrades to and increased capacity of the existing Wastewater Treatment Plant (WWTP) and Cromwell's Bridge Pumping Station (PS) in Kenmare County Kerry.

Adjoining Sites

ABP Ref RL08.307488/ PA Reg. Ref. EX 833 - The Board found that the alleged unauthorised quarrying activity constitutes development and is not exempted development, as it does not come within the scope of any exemption under Section 4 of the Planning and Development Act 2000, as amended, or any exemption provided for under Article 6 and Schedule 2 of the Planning and Development Regulations 2001, as amended.

ABP Ref RL08.311192/ PA Reg. Ref. EX 931 – The Board found that the stripping back and removal of all of the topsoil and trees on lands to create an alleged unauthorized extension of 2.75 hectare to the existing unauthorized quarry, and the importation of broken stone from the quarry extension for storage in the existing quarry at Reenagappul, Kenmare, is development and is not exempted development as it does not come within the scope of any exemption under Section 4 of the Planning and Development Act 2000, as amended, or any exemption provided for under Article 6(3) and 8C and Class 11 of Part 3 of Schedule 2 of the Planning and Development Regulations 2001, as amended.

Relevant Decisions

I have searched and examined the Board's database for referrals of a similar nature. There is an extensive list of Section 5 Referrals on the Board's database that relate to similar issues. Whilst the circumstances of each case differ, I consider the following and most recent referrals, to be relevant to the subject referral;

RL06D.314387 – The Board found that the provision of temporary on-site structures used as site offices would constitute development and was not exempted development under Class 16 and Class 17, Part 1 of the Second Schedule to the

Planning Regulations, as the land on which the site offices and associated compound are located does not constitute land adjoining the land on which the development is being carried out as it is physically separated from that land by a distance of approximately 180m.

RL15.301780 – The Board found that in relation to Class 16 of Part 1 of the Second Schedule to the Planning Regulations 2001, as amended, that the lands subject to the referral did not comprise a development site as no development consisting of works pursuant to a permission or exempted development were currently being undertaken.

RL3607 – The Board found that the change of use of the site to a construction compound would constitute development and was not exempted development under Class 16, Part 1 of the Second Schedule to the Planning Regulations as the land on which the construction compound is located does not constitute land adjoining the land on which the development is being carried out as it is physically separated from that land by a distance of approximately 76m.

RL3312 – The Board found that the erection of a temporary storage shed and a portacabin on lands in connection with construction works at Finnstown House, Lucan, a Protected Structure, was development and was not exempted development due to the separation distance from the permitted site and the intervening uses, including a Protected Structure, and the absence of any development works associated with the grant of permission.

5.0 Policy Context

5.1. Kerry County Development Plan 2022-2028

Kenmare is identified as a Regional Town within the County Development Plan.

Kenmare Municipal District Local Area Plan 2024-2030

The site is zoned P1 Agriculture in the Plan. The Plan notes that the Kenmare Wastewater Treatment Plant Upgrade includes works to accommodate recent and future growth in the catchment. Construction is underway and anticipated to be completed in December 2025.

5.2. **Natural Heritage Designations**

Kenmare River SAC (002158) - located c.40m to the north of the construction compound.

6.0 **The Referral**

6.1. **Referrer's Case**

The main points of the referrer's case are summarised below;

- The referrer is not satisfied with the outcome of the Section 5 application to the Planning Authority and considers that Irish Water/Uisce Eireann do not have permission for the subject construction compound.
- The referrer has requested that the enforcement team seek a fresh application from Irish Water/Uisce Eireann with revised boundaries, to include a landowner's consent letter from the adjacent landowner.
- The referrer contends that correspondence from KCC on the 24th October contradicts their decision on the 13th October.
- There is no mention of a construction compound in the development description.
- The reason for the referral is to seek clarification on the Section 5 declaration.

6.2. **Planning Authority Response**

None

7.0 **Statutory Provisions**

7.1. **Planning and Development Act, 2000**

7.1.1. **Section 2 (1)** of the Act states: - In this Act, except where the context otherwise requires -

“development” has the meaning assigned to it by Section 3,

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

7.1.2. **Section 3(1)** of the Act 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.

7.1.3. **Section 4(1)(a)-(i)** set out what is exempted development for the purpose of the Act.

7.1.4. **Section 4(2)(a)** of the Act states –

The Minister may by regulations provide for any class of development to be exempted development for the purpose of the Act.

7.1.5. **Section (4)(4)** of the Act states –

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.

7.1.6. **Section 5(1)** of the Act states –

If any question arises as to what, in any 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 a 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.

7.2. **Planning and Development Regulations, 2001**

7.2.1. **Article 6 (1)** of the Regulations states:

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. **Part 1 of Schedule 2** sets out exempted development to which Art 6(1) refers:

Temporary structures and uses

Class 16 The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant or machinery needed temporarily in connection with that development during the period in which it is being carried out.

Conditions and Limitations

Such structures, works, plant or machinery shall be removed at the expiration of the period and the land shall be reinstated save to such extent as may be authorised or required by a permission under the Act.

Class 17 The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development (other than mining) is being, or is about to be carried out, pursuant to any permission, consent, approval or confirmation granted under the Act or any other enactment or as exempted development, of temporary on-site accommodation for persons employed, or otherwise engaged, in connection with the carrying out of the development, during the period in which it is being carried out.

Conditions and Limitations

Such accommodation shall be removed at the expiration of the period and the land shall be reinstated save to such an extent as may be authorized or required by the permission, consent, approval or confirmation granted under the Act or any other enactment.

7.2.3. **Article 9(1)** of the Regulations sets out the circumstances whereby development to which article 6 relates shall not be exempted development for the purposes of the Act.

8.0 Assessment

8.1. Is or is not development

- 8.1.1. The first matter to consider is whether the use of lands in question as a construction compound comprises development. I can confirm that, on the occasion of the site inspection that the site was in active use as a compound.
- 8.1.2. Section 3(1) of the Planning and Development Act 2000, as amended ('the Act'), states that 'development' means 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 2 of the Act defines 'works' as 'includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'
- 8.1.3. The placing of temporary structures, such as the portacabins, on the site is an act or operation of construction and constitutes works, which by definition, is development. I note the land has previously been disturbed and was used for stockpiling material related to the adjoining quarry. The use of the site as a construction compound would represent a material change of use in the land, and as such, is also considered development.

8.2. Is or is not exempted development

- 8.2.1. Section 4(1) of the Act sets out provisions in relation to exempted development. The use of the land as a construction compound does not comply with any of these provisions.
- 8.2.2. Section 4(2) of the Act provides that the Regulations can make provision in respect of exempted development. This is done by Article 6, which provides that development of a class specified in Schedule 2 of the Regulations shall be exempted provided that the conditions and limitations attached to those various classes are met.
- 8.2.3. Class 16 relates to - *The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant or machinery*

needed temporarily in connection with that development during the period in which it is being carried out.

- 8.2.4. Class 17 relates to - *The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development (other than mining) is being, or is about to be carried out, pursuant to any permission, consent, approval or confirmation granted under the Act or any other enactment or as exempted development, of temporary on-site accommodation for persons employed, or otherwise engaged, in connection with the carrying out of the development, during the period in which it is being carried out.*
- 8.2.5. I am satisfied that the use of the site as a construction compound can be considered under Class 16, and that the use of the site as a compound is in connection with development being carried out on the Kenmare Wastewater Treatment Plant pursuant to a permission granted under ABP-313364-22/ PA Reg Ref 22/55. I can confirm from my site visit, that the compound is used for structures, works, plant and machinery needed temporarily in connection with the WWTP upgrade works.
- 8.2.6. I am also satisfied that the temporary structures (e.g. Portacabins) on the site can be considered under Class 17 as they provide for temporary on-site accommodation for persons employed, or otherwise engaged, in connection with the carrying out of the Kenmare WWTP upgrade works.
- 8.2.7. In both Class 16 and Class 17 the exemption is specific to the development being carried out on land 'adjoining' which development is being or about to be carried out. The subject site is directly adjoining the wastewater treatment plant, and I have no concerns in this regard. Furthermore, I have no reason to believe the subject development will not comply with the conditions and limitations for each of the respective Classes, which requires the lands to be reinstated on expiration of the development period.
- 8.2.8. In conclusion, I consider that the development constitutes exempt development under Class 16 and Class 17 of Schedule 2, Part 1 of the Planning Regulations.

8.3. Restrictions on exempted development

- 8.3.1. Article 9 of the Regulations sets out a number of restrictions on exempted development. I have reviewed these restrictions in relation to the subject

development. Should the Board consider that the development is exempted under Class 16 and Class 17, I am satisfied that none of the restrictions apply directly to the subject proposal. The restriction of exemption due to the requirement for Environmental Impact and Appropriate Assessment arises in Section (4)(4) of the Act. I have considered these issues separately below.

Environmental Impact Assessment

See Form 1 (Appendix 1) on file. The development is not a class for the purposes of EIA.

Appropriate Assessment

The restriction of exemption due to the requirement for Appropriate Assessment arises in Section (4)(4) of the Act (and Article 9(1)(a)(viiB) of the Regulations). See Appendix 2 on file for AA screening determination. In accordance with Section 177U of the Planning and Development Act 2000 (as amended) and on the basis of the information considered in this AA screening, I conclude that the proposed development would not result in likely significant effects on any European Site and is therefore excluded from further consideration. Appropriate Assessment is not required.

This determination is based on:

- The nature and extent of the works, including scale and duration
- Intervening land uses and indirect connections to the European sites
- The lack of impact mechanisms that could significantly affect a European Site
- Taking into account screening determination by LPA

No mitigation measures aimed at avoiding or reducing impacts on European sites were required to be considered in reaching this conclusion. The provisions of Section (4)(4) of the Act do not apply.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether the use of lands, in the ownership of KPK properties Limited, that was subject to ABP Ruling Ref No: ABP-307488-20 at Reenagappul, Kenmare, County Kerry, shaded in yellow on the attached map, currently being used by Irish Water/Uisce Eireann, as a works compound in conjunction with KCC PA PL reg No:22/55 is or is not development and is or is not exempted development.

AND WHEREAS Martin Arthur requested a declaration on this question from Kerry County Council and the Council issued a declaration on the 13th day of October 2023 stating that the matter was development and was exempted development:

AND WHEREAS Martin Arthur referred this declaration for review to An Bord Pleanála on the 8th day of November, 2023:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(2) and 4(4) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Class 16 and Class 17, Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The works/material change of use, that being the development of a construction compound, is development under section 3 of the Planning and Development Act 2000 (as amended).
- (b) Having regard to the nature of the development, which comprise a construction compound used for structures, works, plant and machinery needed temporarily in connection with the Kenmare WWTP upgrade works on the adjoining lands, the Board is satisfied that the development comes within the scope of Class 16, Part 1 of Schedule 2 of the Planning and Development Regulations, 2001,
- (c) The placing on lands of portacabins, provides for temporary on-site accommodation for persons employed, or otherwise engaged, in connection with the carrying out Kenmare WWTP upgrade works on the adjoining lands, and therefore, come within the scope of Class 17, Part 1 of Schedule 2 of the Planning and Development Regulations, 2001,
- (d) based on the documentation on file, the development would not be likely to have significant effects on the Kenmare River SAC (Site Code 002158) in view of the sites' conservations objectives. In coming to this conclusion, the Board took account of the limited extent and duration of the works, the lack of a pathway between the development and the European site, the distance to any qualifying interests and to the nature of those qualifying interests, and accordingly, considers that an appropriate assessment is not required in relation to the development the subject of this referral. Accordingly, the de-exemption provisions of section 4(4) of the Planning and Development Act, 2000, as amended, do not apply:

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 construction compound is development and is 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.

Ciara McGuinness
Planning Inspector

3rd October 2024

Appendix 1 - Form 1

EIA Pre-Screening

[EIAR not submitted]

An Bord Pleanála Case Reference			
Proposed Development Summary	Construction Compound		
Development Address	Lands at Reenagappul, Kenmare, Co. Kerry		
1. Does the proposed development come within the definition of a 'project' for the purposes of EIA? (that is involving construction works, demolition, or interventions in the natural surroundings)		Yes	✓
		No	No further action required
2. Is the proposed development of a class specified in Part 1 or Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) and does it equal or exceed any relevant quantity, area or limit where specified for that class?			
Yes		Class.....	EIA Mandatory EIAR required
No	✓		Proceed to Q.3
3. Is the proposed development of a class specified in Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) but does not equal or exceed a relevant quantity, area or other limit specified [sub-threshold development]?			
		Threshold	Comment (if relevant)
No	✓	N/A	No EIAR or Preliminary Examination required
Yes			Proceed to Q.4

4. Has Schedule 7A information been submitted?

No		Preliminary Examination required
Yes		Screening Determination required

Inspector: _____ **Date:** _____

Appendix 2 - AA Screening Determination

Screening the need for Appropriate Assessment Finding of no likely significant effects

Appropriate Assessment Screening Determination (Stage 1, Article 6(3) of Habitats Directive)

I have considered the construction compound in light of the requirements of S177U of the Planning and Development Act 2000 as amended.

A screening report for Appropriate Assessment was not submitted with this referral. However, in the Local Authority assessment of the referral, Appropriate Assessment Screening was undertaken by Kerry County Council as part of their assessment and a finding of no likely significant effects on a European Site was determined. Kerry County Council concluded the proposed development would not require the preparation of a Natura Impact Statement and Appropriate Assessment was not carried out.

It is noted that the compound is located on previously disturbed ground and would be in use for a temporary period associated with the construction of the permitted Kenmare WWTP upgrade works. It is further noted that permission was obtained for the Kenmare WWTP project under ABP-313364-22 / PA Reg Ref 22/55 for which Appropriate Assessment was undertaken.

The site is circa 40m away from the Kenmare River/Bay waterbody at its nearest point. The site does not contain any water courses. No nature conservation issues were raised in the referral.

European Sites

The Kenmare Bay SAC is located c.40m to the north of the construction compound.

Other European sites in the wider area are excluded from further consideration in the because there is no hydrological or other connectivity, and because of the distances involved.

European Site	Qualifying Interests (summary)	Distance	Connections
Kenmare River SAC	Habitats: Large shallow inlets and bays, Reefs, Perennial vegetation of stony banks, Vegetated sea cliffs of the Atlantic and Baltic coasts, Atlantic salt meadows (<i>Glauco-Puccinellietalia maritimae</i>), Mediterranean salt meadows (<i>Juncetalia maritimi</i>), Shifting dunes along the shoreline with <i>Ammophila arenaria</i> (white dunes), Fixed coastal dunes with herbaceous vegetation (grey dunes), European dry heaths, <i>Juniperus communis</i> formations on heaths or calcareous grasslands, Calaminarian grasslands of the <i>Violetalia</i>	c.40m to the north of the site	Indirect

	<p>calaminariae, Submerged or partially submerged sea caves</p> <p>Species: <i>Vertigo angustior</i> (Narrow-mouthed Whorl Snail), <i>Rhinolophus hipposideros</i> (Lesser Horseshoe Bat), <i>Phocoena phocoena</i> (Harbour Porpoise), <i>Lutra lutra</i> (Otter), <i>Phoca vitulina</i> (Harbour Seal)</p>			
<p>Likely impacts of the project (alone or in combination with other plans and projects)</p> <p>The proposed development will not result in any direct effects such as a habitat loss of any European Site.</p> <p>There is potential for surface water run-off from construction/operation works resulting in changes to environmental conditions such as water quality/ habitat degradation. It is noted however that there are no watercourses within or adjoining the works area. Due to the nature of the development and the presence of a buffer area between the site and Kenmare River SAC, with no direct ecological connections and distance from receiving features connected to Kenmare River SAC make it highly unlikely that the proposed development could generate impacts of a magnitude that could affect European Sites.</p> <p>The setting up and use of the compound may generate light, noise and disturbance of a temporary nature. However, due to the distance from the SAC and intervening land uses, it is unlikely that significant effects would occur in relation to otter/seal. Construction works for the project will be limited to during the day (normal working hours), when otters and lesser horseshoe bat are not active.</p> <p>Having regard to this the nature, scale and extent of the proposed works, the absence of a direct hydrological link, and implementation of standard construction techniques, significant effects on the European site are unlikely.</p> <p>Likely significant effects on the European site(s) in view of the conservation objectives set out for the qualifying features including:</p> <p>The construction or operation of the proposed development will not result in impacts that could affect the conservation objectives of the SAC. Due to distance and lack of meaningful ecological connections there will be no changes in ecological functions due to any construction related emissions or disturbance. There will be no direct or ex-situ effects from disturbance on mobile species including otter during construction or operation of the proposed development.</p> <p>In combination effects</p> <p>It is considered that adequate measures are provided as part of the Kenmare WWTP project, to ensure in combination effects are unlikely to occur. I am not aware of any other projects or plans that could have the potential to have in-combination effects on a European Site when considered alongside the proposed development.</p>				
<p>Overall Conclusion</p> <p>Screening Determination</p> <p>In accordance with Section 177U of the Planning and Development Act 2000 (as amended) and on the basis of the information considered in this AA screening, I conclude that the proposed development would not result in likely significant effects on any European Site and is therefore excluded from further consideration. Appropriate Assessment is not required.</p>				

This determination is based on:

- The nature and extent of the works, including scale and duration
- Intervening land uses and indirect connections to the European sites
- The lack of impact mechanisms that could significantly affect a European Site
- Taking into account screening determination by LPA

No mitigation measures aimed at avoiding or reducing impacts on European sites were required to be considered in reaching this conclusion.