



An
Bord
Pleanála

Inspector's Report ABP-319064-24

Question

Whether works undertaken to maintain/improve the wastewater treatment system is or is not development or is or is not exempted development.

Location

Armada Hotel, Spanish Point, Miltown
Malbay, Co. Clare

Declaration

Planning Authority

Clare County Council

Planning Authority Reg. Ref.

R24-06

Applicant for Declaration

Armada Hotel Holdings Ltd

Planning Authority Decision

No declaration

Referral

Referred by

Clare County Council

Owner/ Occupier

Armada Hotel Holdings Ltd

Observer(s)

None

Date of Site Inspection

31st January 2025

Inspector

Ciara McGuinness

1.0 Site Location and Description

- 1.1. The referral site is located at the Armada Hotel, Spanish Point, Co. Clare. The hotel is located on a coastal site, to the south of the R482 Regional Road and to the north of Spanish Point beach. The Hotel is in a prominent location overlooking the beach. The Hotel is a 3-storey building, with surface car-parking areas located at the east and west side of the building, and a grassed area to the south. The referral relates to the waste water treatment plant associated with the hotel, which is located within the grassed area to the south west of the hotel building. The waste water treatment plant is surrounded by mesh fencing and screened by a low wall and hedging.

2.0 The Question

- 2.1. The referrer has sought a determination as to “Whether works undertaken to maintain/improve the existing wastewater treatment system at Armada Hotel are considered development and if so is it exempted development? The maintenance/improvement works comprised of the replacement of the wastewater treatment plant”.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority has not made a declaration and has referred the case to An Bord Pleanála.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Planner’s Report (dated 15/02/24) notes that there is an open and active unauthorised development file in relation to the property and development. It is considered appropriate that this Section 5 application be referred to An Bord Pleanála for determination.

3.2.2. Other Technical Reports

None.

4.0 Planning History

Planning Application History

PA Reg Ref 20/84 – Permission granted to construct/install a cabin to be used as short-term tourist accommodation ancillary to the existing Armada Hotel Complex and to install a waste water storage tank along with associated site works.

PA Reg Ref 19/849 – Permission granted for the following

- a) to construct an extension and outside winter garden area to the bar/dining room area on the south elevation
- b) to construct an extension and outside terrace area to the pre-wedding reception area on the south elevation along with associated site works.

PA Reg Ref 18/89 – Permission granted to retain indefinitely the existing Snug and Covered Smoking Area to the front of the building. To retain indefinitely the existing Store on the West side of the building and for permission to alter to incorporate an external door. For permission to Construct two new Stores, one on the West side and one on the East side and to extend the existing ground storey offices.

PA Reg Ref 13/386 – Permission granted to alter the existing building to incorporate 2 no. shops, in place of 2 no. bedrooms, including all associated works including new shop fronts and entrances, and to provide signage and lighting externally at the Armada Hotel.

PA Reg Ref 08/293 – Permission granted to reposition some of the car parking proposed under Permission No.P04/2697 from the area south of the hotel to a location to the east of the hotel including all works associated with construction of the new car park and to alter the layout to integrate the new car park with the existing.

PA Reg Ref 08/15 – Permission granted to change the proposed Sewage Treatment System from that approved under existing Permission No. P04/2697. It is now proposed to retain the existing Sewage Treatment Plant and to construct an additional Treatment Plant to serve the additional proposed bedrooms and part of the existing Hotel and to construct a new Sand Polisher Filter and Percolation System in a new location to serve the additional Treatment Plant.

PA Reg Ref 04/2697 – Permission granted to construct an extension to Burke's Armada Hotel. The works will include construction of a 3 storey extension to provide 28 no. additional bedrooms with ancillary accommodation including a laundry, linen store, cleaners store and boiler house together with alterations to the existing building to connect to the extension. The acc. on the top storey will be partly contained in the roof space. Works will also inc. altering & ext. car parking areas & the storage yard & ext. the sewerage treatment & percolation systems.

PA Reg Ref 95/991 – Permission granted to alter and extend the Armada to change it to a Hotel.

Section 5 History

R23/79 A question has arisen as to whether the installation of 156kw solar panel on the roof of the Armada Hotel is or is not development and is or is not exempted development. Clare County Council decided that the development is development and is exempted development.

R21/38 A question has arisen as to whether a full upgrade/replacement of an existing waste water treatment plant at the Armada Hotel Spanish Point is or is not development or is / is not exempted development.

The Planning Authority determined that:

- (a) The proposed full upgrade/replacement of an existing waste water treatment plant constitutes both works and development, as defined in Section 2 and 3 of the Act.
- (b) Section 41(g) of the Planning and Development Act allow for renewal of apparatus. However, this exemption only refer to statutory undertakers and does not refer to a private developer carrying out such works within a business premises.
- (c) Section 41(g) of the Act does not expressly refer to 'replacement' of apparatus, like for like as being exempt development.
- (d) The Planning and Development Regulations 2001 as amended relating to works with the curtilage of a business premises (Class 56 relates only to renewable energy technologies and not to wastewater treatment units.

- (e) There are no other exemptions that can be availed of under the planning Act or the Planning Regulations which would render the development to be exempted development.

The Planning Authority determined that the full upgrade/replacement of an existing waste water treatment plan constitutes development which is not exempted development.

R24-42 /ABP-319791-24 A question has arisen as to whether works undertaken to replace the wastewater treatment system at Armada Hotel is or is not development or is or is not exempted development. No declaration was issued by Clare County Council. The referral is currently with An Bord Pleanála for determination.

UD History

UD 22-031 – File open in relation to; 1. the installation of a Wastewater Treatment/ Plant without the benefit of Planning Permission. 2. The provision of an outdoor dining area including canopy structure, food truck and coffee bar together with all associated seating, tables signage and ancillary structures.

UD23-065 – File open in relation to; 1. Carrying out works to RPS-025, Spanish Point House (formerly Mother McAuley House) 2. Operating a guest house 3. Operating a café and bar. 4. Creating and extending parking/hardstanding.

5.0 Policy Context

5.1. Clare County Development Plan 2023-2029

The site is located within the settlement boundary of Spanish Point. The settlement plan for Spanish Point is set out in volume 3d of the Development Plan. The site is zoned for 'Commercial (COM 3)'. This type of zoning provides for *"the use of the lands for commercial and business uses including offices, service industry, warehousing and the facilitation of enterprise/retail/office type uses as appropriate."*

- 5.1.1. The settlement plan notes the following in relation to waste water;

"There is currently no public wastewater treatment plant serving Spanish Point. In the event of future development proposals within the village the EPA Code of Practice for Wastewater Treatment Systems must be strictly adhered to in order to

ensure that there are no significant long-term effects on the Annagh River which flows along the southern boundary of the settlement and is currently at 'poor status'. Any future development including alterations to existing commercial or employment generating development, will require private wastewater treatment subject to suitable site-specific conditions and must ensure they comply with the EPA Code of Practice for On Site Wastewater Treatment Systems."

5.1.2. The following development plan objective is considered relevant;

Wastewater Treatment and Disposal CDP 11.32 states the following;

It is an objective of Clare County Council: i) To permit the development of treatment systems for small businesses/community facilities in unserved areas where they are in single ownership and where it is demonstrated to the satisfaction of the Planning Authority that the proposed wastewater treatment system is in accordance with Wastewater Treatment Manuals Treatment Systems for Small Communities, Business, Leisure Centres and Hotels, EPA (1999) or any future versions;.

5.2. **Natural Heritage Designations**

Carrowmore Point to Spanish Point and Islands SAC – c.20m to the south of the site

Carrowmore Point to Spanish Point and Islands pNHA – c.20m to the south of the site

Mid-Clare Coast SPA – c.20m to the south of the site

6.0 **The Referral**

6.1. **Referrer's Case**

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

- The wastewater treatment system at the subject site was installed in 1997 on foot of planning permission PA Reg Ref 95/991 and operates under a discharge license issued by Clare County Council (Ref: WP 096).

- The performance of the treatment plant was deteriorating resulting in performance issues in the wider treatment system and subsequently resulting in breaches of the terms of the discharge license.
- In order to address the performance issues, the applicant replaced the wastewater treatment plant in January 2022.
- Under the previous Section 5 application, a tender document was submitted which framed the works as being intended to facilitate the future expansion of the hotel and referred to alterations to the existing percolation area.
- The use of the plant remains the same and has not been intensified in that it simply caters for the existing demand arising from the hotel use and does not cater for an expansion of the hotel as was the case in the previous section 5 application.
- The present Section 5 declaration request relates to the replacement of one particular element of the wastewater treatment system i.e. the wastewater treatment plant. The pre-existing pipework connecting the plant to the wider system, as well as the polishing filter have all been retained.
- It is considered that the waste water treatment system comprises a structure per the definition set out in Section 2 of the Act.
- As the entirety of the wastewater treatment system comprises a structure, it is considered that any works undertaken to maintain or improve this structure are capable of amounting to exempted development under the provisions of Section 4(1)(h) of the Act.
- The nature of the works undertaken predominantly relate to underground elements. The overground elements comprise 3 no. overground control units are not visible from the public road and are entirely screened by the existing hedgerow and therefore do not materially affect the appearance of the structure or of neighbouring structures.

6.2. Planning Authority Response

None.

6.3. Further Responses

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,

“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, and—

(a) where the context so admits, includes the land on, in or under which the structure is situate;

“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)(h)** of the Act states -

development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

- 7.1.4. **Section 138. Board may dismiss appeals or referrals if vexatious, etc.**

(1) The Board shall have an absolute discretion to dismiss an appeal or referral—

(a) where, having considered the grounds of appeal or referral or any other matter to which, by virtue of this Act, the Board may have regard in dealing with or determining the appeal or referral, the Board is of the opinion that the appeal or referral—

(i) is vexatious, frivolous or without substance or foundation, or

(ii) is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducement by any person,

or

(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.

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:

The following class is noted;

Miscellaneous

CLASS 41g

the carrying out of remedial works in compliance with an advisory notice issued under section 70H(5) of the Water Services Act 2007 (as inserted by section 4 of the Water Services (Amendment) Act 2012).

8.0 Relevant Referrals and Case Law

8.1. Relevant Referrals

- 8.1.1. **ABP-314209-22** – Whether the replacement of the Clarecastle Wastewater Treatment Plant by diverting wastewater arising through a new sewer to the Clareabbey Wastewater. The Board concluded that the Judgement of Heslin J in *Narconon Trust v An Bord Pleanála and Others* has applicability in the instance of the subject referral case. The Board noted that the previous determinations of Clare County Council in relation to substantially the same question and in respect of the same land have been declared as development which is exempted development and there has been no change in the planning facts or circumstances since the previous determinations were made that would have relevance to the referral case now before the board. The referral should not be further considered.
- 8.1.2. **ABP-309387-21** - Whether or not replacement of the existing wastewater treatment plant at Potters Point, Brittas Bay, County Wicklow is or not development or is or is not exempted development. The board concluded that the provisions of Section 4(1)(h) are not applicable as the development involves the replacement of an existing wastewater treatment plant with a new wastewater treatment plant.
- 8.1.3. **ABP-305218-19 and ABP-302930-18** - Both cases asked whether the refurbishment of a timber house and associated infrastructure at The Chalet, Furbo Hill, Spiddal, County Galway is or is not development or is or is not exempted development. The Board declared that the development involving the repair/upgrade of a septic tank and the provision of a percolation area, if the subject of an advisory notice under Section 70(H)(5) of the Water Services Act 2002, as amended, would be exempted development under Class 41(g) of Part 1 of the Second Schedule to the Planning and Development Regulations, 2001, as amended, but as no evidence of the service of such notice has been supplied as part of this referral, the development in question is not exempted development.

8.2. Relevant 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 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.

9.0 Assessment

- 9.1.1. 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 Board's 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.

9.2. The Board's Jurisdiction to Determine the Question

- 9.2.1. Having reviewed the documentation submitted by the applicant and the planning authority and also the site's section 5/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 application under Reg Ref R21/38 in 2021.

- 9.2.2. 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. The conclusion of the court is set out in Section 8.2 of this report above.

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;

There is a previous Section 5 declaration which relates to the same lands at the Armada Hotel (Reg Ref R21/38). I have set out the previous question below;

“A whether a full upgrade/replacement of an existing waste water treatment plant at the Armada Hotel Spanish Point is or is not development or is / is not exempted development.”

The current referral by Clare County Council before the Board reads as follows;

“Whether works undertaken to maintain/improve the existing wastewater treatment system at Armada Hotel are considered development and if so is it exempted development? The maintenance/improvement works comprised of the replacement of the wastewater treatment plant”.

I also note that there is another live referral for the same site currently with the Board for determination under ABP-319791-24. The question again relates to whether

works undertaken to replace the wastewater treatment system at Armada Hotel is or is not development or is or is not exempted development.

In my view the question posed to Clare County Council, on which it made no declaration, and forms the basis of this referral is substantially the same as the one adjudicated under Reg Ref R21/38.

I note that the applicant in their documentation has framed the development as being only one element in the overall maintenance/improvement of the overall waste water treatment system. However, the element of maintenance/improvements works in question comprise the replacement of the wastewater treatment plant, which is the same question as was determined in the previous Section 5 declaration.

I have viewed the documentation on file, visited the site and taken careful note of the planning history as noted in the history section above, including in relation to previous section 5 applications on site and I consider that the question currently poised presents a case/scenario that is substantially the same to that already considered and determined by Clare County Council under Reg Ref R21/38.

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

Having reviewed the documents submitted by the applicant and Planning Authority, it is my view that there has been no substantial change to the planning facts or circumstances in the interim period since the previous determination was made on 16th July 2021.

I acknowledge that the applicant contends that the matters in relation to which a determination is sought in this instance, are materially different to those in relation to which the previous Declaration was sought from Clare County Council under Reg Ref R21/38. The applicant contends that the tender document submitted with the previous Section 5 application framed the works as being intended to facilitate future expansion of the hotel. In contrast, the works the subject of this referral were not/are not intended to facilitate expansion/upgrade of the system capacity to service potential future development projects that may be associated with the existing hotel.

I do not consider this to be a material change to the planning facts or circumstances. The Planner's Report makes referenced to the description of works set out in the

tender document in so far as it relates to the definition of 'works' set out in Section 2 of the Act, which would comprises some 'excavation' to take out the existing system and would include for 'renewal' by replacing the existing system with the new one. The Planner's Report has also highlighted the inconsistencies between the description in the AA Screening Report and the Tender document. No other reference is made to the tender document or to any possible intensification of use. I am satisfied that a possible intensification of use was not a determining factor in the Council's declaration.

In this regard, it is again important to emphasise that the referral is not for the purpose of deciding on the merits of the development at issue but rather is confined to determine if the works themselves amounts to development and whether or not it is exempted by reference to the legislative provisions. I am satisfied that there been no material change in the planning facts or circumstances since the previous determination was made.

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 referral by Clare County Council, as Clare County Council has previously made a determination it is development which 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.

9.3. Appropriate Assessment

- 9.3.1. 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

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

WHEREAS a question has arisen as to whether works undertaken to maintain/improve the existing wastewater treatment system at Armada Hotel is or is not development or is or is not exempted development? The maintenance/improvement works comprised of the replacement of the wastewater treatment plant.

AND WHEREAS Armada Hotel Holdings Ltd requested a declaration on this question from Clare County Council and the Council did not issue a declaration:

AND WHEREAS Clare County Council referred this declaration for review to An Bord Pleanála on the 16th day of February, 2024:

AND WHEREAS An Bord Pleanála, in considering the nature of the question is satisfied that the referral should not be 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 dismiss the said referral under subsection (1)(b)(ii) of section 138 of the said Act, based on the reasons and considerations set out below.

Reasons and Considerations

Under Section 138(1) of the Planning and Development Act 2000 (as amended), the Board has absolute discretion to dismiss a referral where the Board is satisfied that, in the particular circumstances, the referral

should not be considered having regard to the nature of any referral or any previous section 5 declaration/referral in its opinion is relevant. The referral relates the replacement of the wastewater treatment plant which was previously deemed not to be exempted development under Planning Authority Reference R21/38. The Board note that the previous determination of Clare County Council in relation to substantially the same question and in respect of the same land has been declared as development which is not exempted development and there has been no change in the planning facts or circumstances since the previous determination was made that would have relevance to the referral case now before the board. The Board is, therefore, satisfied that, in particular circumstances, the referral should not be further considered by it.

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

27th March 2025