



An
Bord
Pleanála

Inspector's Report ABP-321246-24

Question

Whether the provision of a hard surface within the curtilage of the industrial building and the installation of plant and machinery to the rear of the industrial building in connection with the industrial process in the building is or is not development or is or is not exempted development.

Location

Ballymorris Lower, Aughrim, Co.
Wicklow

Declaration

Planning Authority

Wicklow County Council

Planning Authority Reg. Ref.

EX84/2024

Applicant for Declaration

Stephen Kavanagh

Planning Authority Decision

Is not exempted development

Referral

Referred by

Stephen Kavanagh

Owner/ Occupier

Stephen Kavanagh

Observer(s)

None

Inspector

Gillian Kane

1.0 Site Location and Description

- 1.1.1. The subject site is located approx. 2.2km east of the Wicklow Village of Aughrim. Currently on site is a single storey cottage, set back from the open road frontage. To the rear of the cottage, the steeply sloping land bank has been cut away, a retaining wall erected and a steel container has been placed on site and connected to the cottage. To the front of the cottage the open area is used for car parking and plant.
- 1.1.2. A single storey cottage lies to the immediate west. To the south of the site is the River Aughrim.

2.0 The Question

- 2.1.1. Whether (1) the provision of a hard surface within the curtilage of the industrial building and (2) the installation of plant and machinery to the rear of the industrial building in connection with the industrial process in the building is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On the 21st October 2024, the Planning Authority issued an order stating:

The provision of a hard surface within the curtilage of the industrial building is development and is not exempted development and

The installation of plant and machinery to the rear of the industrial building in connection with the industrial process in the building is development and is not exempted development.

3.2. Planning Authority Reports

- 3.2.1. **Planning Report:** Proposal constitutes works and therefore constitutes development. Having regard to article 9(a)(viii) the use of the existing structures on site for industrial use is unauthorised. Provision of hard surface and the installation of plant and machinery to the rear of the buildings falls outside the scope of Schedule 2, Part 1 of the regulations. Subject proposal is development and is not exempted development as it would constitute the extension of and alteration of an unauthorised structure.

4.0 Planning History

- 4.1.1. **PL27.5.69561** (78/2735) permission granted for development of a fish farm, subject to five conditions. Condition no. 1 states:

“1 No operation other than fish rearing and all activities essential thereto shall be carried out on site.

Reason: To protect the amenities of the area and to prevent traffic hazard.”

- 4.1.2. **PL27.5.43952** (85/1187) permission granted for “extension and change of use from a house to a smokehouse and provision of a treatment tank”, subject to four conditions.
- 4.1.3. **Planning Authority reg. ref. 24/16:** Permission refused for the retention of excavation works, retaining wall and placement of container (34sq.m.) on the grounds of incompatibility with the character of the rural environment, consolidation of unauthorised development and serious traffic hazard.

5.0 Policy Context

5.1. Wicklow County Development Plan

- 5.1.1. Of relevance to the subject referral are:

- Chapter 9 Economic Development Rural, policies CPO9.32, CPO9.34, CPO9.35 and CPO9.36
- Appendix 1 Development and Design Standards, section 4.3 Commercial development in rural areas.

5.2. Natural Heritage Designations

- 5.2.1. The subject site is 12.68km from the Buckroney-Brittias Dunes and Fen SAC (000729), 11km from the Vale of Clara (Rathdrum Wood) SAC (000733) and 11.4km from the Wicklow Mountains SAC (002122), the Wicklow Mountains SPA (004040) and 13.5km from the Slaney River Valley SAC (000781).

6.0 The Referral

6.1. Referrer's Case

6.1.1. The submission of the referrer can be summarised as follows:

- The site has planning permission since 1978: **78/2735** permission granted by An Bord Pleanála for a fish farm and **85/1187** permission granted by An Bord Pleanála for a change of use to smokehouse, extension to premises and treatment tank.
- The subject development is still a fish processing unit, smaller than the original and with less staff – producing 12 tons of oyster meat a year.
- It is submitted that these permissions were not taken into account.
- It is submitted that the excavation and provision of a hard surface within the curtilage of the industrial building falls within the meaning of 'any works' in class 21(b) of schedule 2.
- The cleaning of the rear of the premises to remove the mud slide and other issues which were compromising compliance with health regulations fall under class 21(b).
 - Planning history conforms that industrial / commercial is approved on site.
 - The Planning Authority report confirms that the site is industrial in nature.
- Regarding the installation of plant and machinery to the rear of the industrial building, it is submitted that this falls under class 21(iii) being "the installation or erection by way of addition or replacement of plant or machinery, or structures of the nature of plant or machinery".
 - Planning history conforms that industrial / commercial is approved on site.
 - photos submitted. Showing powder process plant, existing premises, samples of similar sized plant and machinery containers.

- It is common for plant to be put inside 40ft containers due to sound proofing, protection from the elements and / or containment or control of plant.
- The container subject of the referral is a powder handling plant unit. It has been connected to the building for public health and safety and as part of biosecurity policy which is an FDA requirement for goods exported to the USA.
- Chapter 1, part 2 (a) of Regulation EC852/2004 states that “the layout, design, construction, siting and size of food premises are to (a) permit adequate maintenance, cleaning and / or disinfection, avoid or minimise air borne contamination, and provide adequate working space to allow for the hygienic performance of all operations”.
- The powder handling plant has been installed to facilitate the safe production of products and as such is critical plant and machinery for the operation of the business and so is exempted development.

6.2. Planning Authority Response

6.2.1. The Planning Authority response can be summarised as follows:

- No details of the ‘powder extraction plant’ and ‘powder machinery’ were submitted to the Planning Authority with the S5 request, other than labelled plans and drawings. Under plan ref. 24/16, prior to the S5, the subject structure was labelled ‘store’.
- The submitted drawings show the construction of a 3m high retaining wall and significant excavation to create the hard surface and the area onto which the ‘plant and machinery’ was placed.
- Where the Board consider that the powder extraction plant and powder machinery structure is plant or machinery and therefore within the scope of Class 21(a)(iii), the Planning Authority consider the significant retaining wall and excavation works to facilitate the plant / machinery would not fall under Class 21(a)(iii).

- Similar consideration applies to the hard surface area, therefore class 21(b) does not apply.
- It is not evident that the permission granted under 78/2735 confers an industrial / commercial status on the existing structures on site, as that permission refers to a fish farm on a much larger site.
- Condition no.s 1 and 2 of that permission restricted any processes on site, other than fish farming.
- The permission granted under 85/1187 for the subject structure was for a smokehouse. Insufficient material has been submitted to assess if the use is materially different to the current use. However, drawings showing 'gutting', 'processing' and 'smoking' support fish processing use.
- No information regarding compliance with condition no. 4 of 85/1187 has been submitted. This is relevant for the assessment under Article 9 in terms of traffic hazard.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. The following statutory provisions are relevant in this instance.

7.1.2. Section 2(1): In this Act, except where the context otherwise requires

"**works**" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...;

"**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 this context so admits, includes the land on, in or under which the structure is situated".

7.1.3. **Section 3(1):** in this Act, "**development**" means, except where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land.

7.1.4. **Section 4(1):** sets out developments that shall be exempted development for the purposes of this Act.

- 7.1.5. **Section 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.
- 7.1.6. **Section 5(3)(a)** Where a declaration is issued under this section, any person issued with a declaration under subsection (2) (a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration. (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).
- 7.1.7. **Section 5(4):** Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

7.2. Planning and Development Regulations, 2001

- 7.2.1. Part 2 of the Planning and Development Regulations, 2001 refers to Exempted Development. Of relevance to the subject proposal:
- 7.2.2. "Subject to Article 9 development of a class specified in Column 1 and Part 1 of Schedule 2 shall be exempted development for the purposes of the Act".

CLASS 21

(a) Development of the following descriptions, carried out by an industrial undertaker on land occupied and used by such undertaker for the carrying on, and for the purposes of, any industrial process, or on land used as a dock, harbour or quay for the purposes of any industrial undertaking—

1. Any such development shall not materially alter the external appearance of the premises of the undertaking.
2. The height of any plant or machinery, or any structure in the nature of plant or machinery, shall

- (i) the provision, rearrangement, replacement or maintenance of private ways or private railways, sidings or conveyors, not exceed 15 metres above ground level or the height of the plant, machinery or structure replaced, whichever is the greater.
 - (ii) the provision, rearrangement, replacement or maintenance of sewers, mains, pipes, cables or other apparatus,
 - (iii) the installation or erection by way of addition or replacement of plant or machinery, or structures of the nature of plant or machinery.
- (b) Any works for the provision within the curtilage of an industrial building of a hard surface to be used for the purposes of or in connection with the industrial process carried on in the building.

CLASS 22

Storage within the curtilage of an industrial building, in connection with the industrial process carried on in the building, of raw materials, products, packing materials or fuel, or the deposit of waste arising from the industrial process.	The raw materials, products, packing materials, fuel or waste stored shall not be visible from any public road contiguous or adjacent to the curtilage of the industrial building.
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7.2.3. Article 5 of the Regulations includes the following definitions:

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

“industrial process” means any process which is carried on in the course of trade or business, other than agriculture, and which is

- (a) for or incidental to the making of any article or part of an article, or

(b) for or incidental to the altering, repairing, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article, including the getting, dressing or treatment of minerals,

and for the purposes of this paragraph, "article" includes-

(i) a vehicle, aircraft, ship or vessel, or

(ii) a sound recording, film, broadcast, cable programme, publication and computer program or other original database;

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

8.0 Assessment

- 8.1.1. The purpose of this referral is not to determine the acceptability or otherwise of the above proposal in terms 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.

8.2. Is or is not development

- 8.2.1. As per section 3(1) of the Act, "development" is the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land. The excavation carried out and the construction of a retaining wall constitutes works on and in land and is therefore development as per section 3(1) of the Planning and Development Act 2000, as amended. The placing of a container with plant and machinery on land is works and is therefore "development" as per section 3(1) of the Planning and Development Act 2000, as amended development.

8.3. Is or is not exempted development

- 8.3.1. The referrer submits that permission exists for an industrial / commercial use on site and that the subject wall and container are exempt under class 21 of Part 1 of schedule 2 of the Regulations.
- 8.3.2. Class 21 refers to development carried out by an industrial undertaker for the purposes of any industrial undertaking. Section 21(a) (iii) refers to the installation or erection by way of addition or replacement of plant or machinery, or structures of the nature of plant or machinery and section 21(b) refers to any works for the provision

within the curtilage of an industrial building of a hard surface to be used for the purposes of or in connection with the industrial process carried on in the building.

- 8.3.3. The appellant submits that the powder processing plant is an industrial undertaking that is exempt under class 21(a)(iii). The container on site, to the rear of the cottage contains / houses plant and machinery used for powder processing, but the container itself is neither plant nor machinery. Nor is it a “structure for the nature of plant or machinery”. Nor is it addition of or replacement of plant or machinery. It is a steel container accommodating plant and machinery. I am satisfied that the container does not fall under the exemption provided in class 21(a)(iii).
- 8.3.4. The retaining wall does not fall under the exemption provided for under class 22(b), nor does the excavation undertaken before the wall was erected. The hard surface on which the container stands, in isolation, would fall under class 22(b), subject to there being no restrictions on exemption.

8.4. Restrictions on exempted development

- 8.4.1. A key argument of the referrers submission is that the use on site is authorised by reason of the permissions granted in 1979 and 1985.
- 8.4.2. I draw the Boards attention to condition no.1 of the 1979 permission (PL27.5.43952) which states that “no operation other than fish rearing and all activities essential thereto shall be carried out on site”. The current operation is not fish rearing or an activity essential to fish rearing. I concur with the Planning Authority that the current use is not authorised by the permission granted in 1979. Nor does the permission granted in 1985 (PL.5.69561) which granted permission for change of use from a house to a smokehouse, confer permission for the current operation.
- 8.4.3. The current development on site contravenes a condition attached to PL27.5.43952 and is inconsistent with the use specified in that permission. Therefore the provision of a hard surface within the curtilage of the industrial building and the installation of plant and machinery to the rear of the industrial building in connection with the industrial process in the building is not exempted development under article 9(1)(a) of the Planning and Development Regulations 2001, as amended
- 8.4.4. The Board may wish to consider the container which extends the existing cottage to be subject to Article 9(1)(a)(viii), which provides that development to which article 6 relates shall not be exempted development if it consists of or comprises the

extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.

- 8.4.5. I draw the Boards attention to RL2385, wherein the Board concluded that the storage of containers on a site was development which came within the scope of section 3(1) of the Act and that as the containers were not considered to be in the nature of plant or machinery that the development would not come within the scope of the exempted development provisions of class 21(a)(iii) of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001.

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 provision of a hard surface within the curtilage of the industrial building is development and is not exempted development and the installation of plant and machinery to the rear of the industrial building in connection with the industrial process in the building is development and is not exempted development.

AND WHEREAS Stephen Kavanagh requested a declaration on this question from Wicklow County Council and the Council issued a declaration on the 21st day of October, 2024 stating that the matter was development and was not exempted development:

AND WHEREAS Stephen Kavanagh referred this declaration for review to An Bord Pleanála on the 14th day of November, 2024:

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) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (d) Parts 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (e) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The provision of a hard surface within the curtilage of the industrial building is development and is not exempted development and
- (b) The installation of plant and machinery to the rear of the industrial building in connection with the industrial process in the building is development and is not exempted development.

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 provision of a hard surface within the curtilage of the industrial building is development and is not exempted development and the installation of plant and machinery to the rear of the industrial building in connection with the industrial process in the building is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Gillian Kane
Senior Planning Inspector