



An
Bord
Pleanála

Inspector's Report RL61.RL3488.

Question	Whether the mooring of a passenger barge for short term tourist accommodation at Old Mud Dock, Long Walk, Galway below the high water mark is or is not development or is or not exempted development.
Referrer	Captain Sam Field Corbett
Planning Authority	Galway City Council
Planning Authority Register Reference	DK/LB/3/8/16
Date of Site Inspection	16 September, 2016.
Inspector	Jane Dennehy

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1.0 Question

Whether the mooring of a Passenger barge for sort term tourist accommodation at Old Mud Dock (Long Walk), below the high water mark is or is not development and is or is not exempt development.

2.0 Background

- 2.1. The site subject of the question is at the Old Dock on Long Quay and within the Dun Aengus development for which permission was granted following appeal in 1996 under P. A. Reg. Ref 95/438. This application included provision for renovation of the old dock including provision and a tide sill and part filled area of dock for winter storage of boats and this element of the development which included office and residential development was not implemented.
- 2.2. The barge subject of the question is a 36.6 meters long motor barge "Katriana" (1910) which was moored in the Old Mud Dock for eight years to 2007 according to the details available on file. The applicant plans to restore and fit out the barge float it out into the Old Mud Dock as a "Heritage Barge" for use as overnight luxury (marine themed) tourist accommodation. It is to be moored to the dock with ropes tied to three existing bollards. Access between the barge and the land is to be via a light weight wheeled gangway. No land based works or structures are required and the barge is to be self-sufficient for services with on board facilities for waste water, water and electricity supply.
- 2.3. At the time of inspection, some other boats were moored and tied with ropes to bollards fixed to the ground in the adjoining land.
- 2.4. Further to enforcement investigations and a request from the owner, the planning authority issued a section 5 declaration that the mooring of the boat for the purposes of tourist accommodation is a material change of use and requires planning permission. In addition, it is stated that the mooring cannot be de-exempted

because it has not been established that the development is in compliance with the Habitats Directive.

- 2.5. The owner through his agent McCarthy Keville O'Sullivan referred the declaration to the Board on 8th June, 2016.

3.0 Statutory Designations

- 3.1. It is noted that the planning officer in his observations states that the cill walls of The Mud Dock are included on the record of protected structures under Item 8501. No specific structures are provided in the description for Item 8501. There is a heading; "Rivers Waterways; *including bridges, weirs, walls, embankment piers and other associated infrastructure*". (Appendix 1 refers.)
- 3.2. The Mud Dock, according to section 7.2 and Figure 7.4 and is within the area of the Long Walk Architectural Conservation Area. (ACA) which is one of eight designated ACAs.
- 3.3. The Galway Docks adjacent to the Galway Bay Complex SAC (Site Code 0268)

4.0 The Referrer's Question

- 4.1. According to the Referral received on 27th June, 2016:
- The City Council declaration is based on the premise that the mooring of the barge is development. The mooring does not constitute development within the meaning of the Planning and Development Acts as no use of land and or structures is involved. The boat is to be floated into position. The barge is to be moored to the existing dock by ropes to bollards in the water but below the watermark and outside the boundaries of terrestrial control with access via a wheeled gangway and will not be dependent on shore based services.
 - The mooring does not involve the carrying out of works on, in or over land or any material change of use of structures or other land.

- The use for the barge for commercial purposes does not constitute a material change of use. The commercial nature of the Old Dock which was constructed for mooring boats is demonstrated by its location within the functional jurisdiction of the Galway Port Company...

4.2. An Appropriate Assessment Screening report is included with the submission in which it is concluded that the mooring is not likely to have a significant effect on European Sites. (This document was not submitted to with the initial request to the planning authority.)

5.0 The Planning Authority

5.1. According to the submission received on 7th July, 2016:

- The location is part of the overall Dun Aengus development permitted Under P.A. Reg. Ref 95/438. The grant of permission included, "*renovation of old dock including provision of tide sill and part filled area of dock for winter storage of boats*". This element and the overall office and residential development permitted was not implemented.
- There is no evidence that the barge was moored at the location for eight years prior to 2007 which was some years prior to the acquisition of the Mud Dock in 2013/2014 by the Referrer.
- The submission at this stage of the Appropriate Assessment Screening report constitutes significant additional information that was not available at the initial stages and this prejudiced the planning authority assessment. The planning authority is not making an assessment on it but has the following observations:

5.2. The content of the screening report does not change the planning authority's view that a grant of permission is required because:

insufficient details are provided on the proposed pumping into a wastewater treatment facility, means of electricity supply, fuels and noise which are important considerations and,

No reference is made to other projects of which there are many including one strategic infrastructure development to facilitate assessment of in combination effects on European sites.

- 5.3. The gang plant providing access to the boat during operation will be on lands outside the ownership of the applicant.
- 5.4. The claims that there is no material change of use because the boat is not moored on land and but below the high water mark in the functional area of the Harbour Authority is not relevant because the Harbour Acts do not confer planning rights or exemptions.
- 5.5. The site area is within the jurisdiction and functional area of the City Council as demonstrated in the description of the Eyre Square Ward and shown maps in S.I. No 34/1986 and in correspondence issued to the Referrer.
- 5.6. The Appellant contends that as the mooring is on the Foreshore planning permission is not required. Section 225 (1) (a) and (b) of the Planning and Development Acts states that planning permission is required, under Part III of the Act if the location adjoins the functional area of a planning authority or any reclaimed land adjoining such functional area as that part of the foreshore shall be deemed to be within the functional area.
- 5.7. Attached to the submission is a copy of an email issued to the owner occupier in which contentions as to inaccuracies of the boundaries of the functional area of Galway City Council are refuted.

6.0 Further Submission of the Referrer

- 6.1. A submission was received from the Referrer on his own behalf on 26th July, 2016 attached to which are six appendices. The referrer claims that the planning authority continues to misunderstand the unique and unprecedented situation. According to the submission:

- 6.2. The Old Dock was filled with 9000m³ of construction and domestic waste during the construction of the Dun Aengus development without consent of the Foreshore authorities.
- 6.3. The infill has been declared to be in breach of European Regulations and constitutes dumping at sea.
- 6.4. The sill which contains a 30" an active sewer outflow was created by the local authority which enables the Dock to retain a level of water. This took place prior to ownership of the Referrer's purchase of the dock walls in 2007.
- 6.5. The local authority should have no difficulty in establishing the Referrer's ownership since 2009 of the Dock and evidence of the mooring of the Barge which was use as residential accommodation by the previous owner during the eight years prior to the purchase of the Old Dock. (Google earth images in Appendix 1 refer).
- 6.6. Excellent evidence was provided prior to and with the lodgement of the request for the referral to establish that no impact on the SAC would occur. The entrenched concerns of the planning authority about ecological impact are unreasonable. Waste will be store in holding tanks on board and periodically taken ashore by tanker. Two other vessels in the Old Dock use a similar arrangement. (Compliance certificates are in Appendix 2) Electricity is to be generated by on board solar panels and there will be no internal combustion.
- 6.7. The gangway will be on land in the Referrer's ownership. This comprises two metres of the quay side surrounding the Old Dock (Map is in Appendix 3).
- 6.8. For centuries mariners, have been permitted to use the Old Dock which is well within the jurisdiction of the Port Company. The Old Dock continues to be a working dock.
- 6.9. The City Council's ownership over the foreshore is refuted. The enforcement notice issued by the City Council is *ultra vires*. Counsel's Opinion (Appendix 5 refers.)
- 6.10. The barge is movable accommodation like a cruise ship and not a habitation vessel with a crew member on board at all times. This a requirement of the Port Bye Laws (Appendix 6 refers)
- 6.11. There is more than ample parking available on adjacent GalwayPort lands.
- 6.12. The historic dock (built in 1760) is 120 mm x 40 m. The space within 40 m x 40 6 is illegally filled with rubbish leaving 80 x 40 m of watered space within the quay walls.

It is sufficient to accommodate the vessel as demonstrated in the google image from 2007. (Appendix 1 refers) This historic use and commercial activity over 250 years highlights the historic use for the proposed vessel.

- 6.13. There are several commercial permanent vessels nationwide: PV Riasc PV Cadhla (Grand Canal Dublin), MV CillAirne, SV Jeanne Johnston, PV Spirit of Docklands Liffey Dublin) SV Dubroady (New Ross). None of these have been views as development by respective planning authorities or have required planning permission.

7.0 Assessment

- 7.1. Prior to determining the Question as to whether the mooring and use of the barge for short term heritage tourism accommodation is development within the meaning of the Planning and Development Acts, 2000-2015, (The Acts) it is necessary to establish whether the location in the Old Mud Dock at Long Walk is within the administrative or functional area of Galway City Council and therefore within the planning remit of Galway City Council.
- 7.2. Secondly, if the location is established to be within the remit of the City Council, it is then necessary to establish whether the mooring and use of the barge for short term heritage tourism accommodation in the Old Mud Dock is development or is not development within the meaning of the Planning Acts.
- 7.3. Finally, should it be determined that the mooring and the use as described above is development within the meaning of the Planning Acts, it will then be necessary to establish whether the mooring and the use is exempt development or is not exempt development.
- 7.4. These issues are considered below:
- 7.4.1. Whether the location is within the functional area of Galway City Council and therefore within its planning remit?

The Referrer contends that application of the planning framework to the mooring of the barge in the Old Mud Dock by the planning authority is *ultra vires* it's powers on

grounds in that the location not in the functional area of Galway City Council is on the foreshore and under the control of the Galway Port Company.

The documents provided in submissions made on behalf of the Referrer have been reviewed. However, it has been concluded that the Old Mud Dock is within the jurisdiction and functional area of the City Council as demonstrated in the description of the Eyre Square Ward and shown maps in S.I. No 34/1986 provided in the Planning Authority's submission

The location is considered to come within the area over which Galway City Council as a planning authority, and in turn, An Bord Pleanála having regard to Section 1 of the Foreshore Act, 1933 according to which “the word “*foreshore*” means “the bed and shore, below the line of the high water of ordinary or medium tides, of the sea and every tidal river and tidal estuary and of every channel, creek and bay of the sea and of any such river or estuary....”

Part XV of the Planning and Development 2000 – 2016. (the Act) extends the functional area of the planning authority to the area of the foreshore so defined. According to section 224:

“Foreshore” has the meaning assigned to it by the Foreshore Act, 1933, but includes *land between the line of high water of ordinary or medium tides and land within the functional area of the planning authority concerned that adjoins the first-mentioned land*

Accordingly, section 225 provides that: “*permission shall be required under Part III in respect of development on the foreshore not being exempted development, in circumstances where, were such development carried out, it would adjoin—*

(a) the functional area of a planning authority, or

(b) any reclaimed land adjoining such functional area, and accordingly, that part of the foreshore on which it is proposed to carry out the development shall for the purposes of making an application for permission in respect of such development be deemed to be within the functional area of that planning authority.

The Old Mud Dock is land filled with water but may, according to the submissions made in connection with the Referral also contain fill comprising construction and demolition waste and domestic refuse. It is of note that there is to be a direct connection for access and egress via a wheeled gangway in addition to the tying by ropes to the land.

The map that accompanies S.I. No 34/1986 provided in the submission of the planning authority is considered to be satisfactory documentary confirmation as to the functional area.

- 7.4.2. Whether the mooring and use of the barge in the Old Dock for use as a Heritage Barge providing short term heritage tourism accommodation is development within the meaning of the Act.

The barge is to be moored on the water in the Old Mud Dock and therefore the proposed location comes within the description of land provided for Section 2 of the Act according to which:

“land” includes any structure and any land covered with water (whether inland or coastal);

“Development” within the description in Subsection (1) of Section 3 of Act, 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.*

The first consideration is whether the carrying out of “**works**” is required.

The information provided on behalf of the Referrer is not fully persuasive as to the claim that no works to the dock are required to facilitate the mooring of the barge on the water within the dock in that the barge appear to be of significant size and weight at thirty-six metres in length. It is noted that it is contended that unauthorised filling in of the dock with of domestic refuse and C and D waste took place.

It be open to the Board to consider a request for further information with respect to the boat size and weight and the capacity for the Old Mud Dock to support it without works being required.

It appears that works to the barge whereby it is adapted and upgraded for its proposed use as tourist accommodation will take place elsewhere before it is moored in the Old Mud Dock. It can be assumed that no structure moored the Mud Dock and the Mud Dock itself will be subject to “works” within the meaning of the Act in that it is solely intended:

- to moor the barge using ropes tied to existing fixtures in the adjoining land;
- to provide access between the barge land by a wheeled gangway plank and,
- to service it on an on-board independent self-sufficient basis whereby there is no direct connection to water supply or waste water systems and on board arrangements for electricity generation.

It is concluded that “**works**” to the Mud Dock to facilitate the mooring of the barge may be required and that such works would come within the meaning of development in section 3 of the Act unless it can be established that such works are not required.

7.4.3. The second consideration is as to “a **material change of use**” is required.

As regards the statements on behalf of the Referrer that that the Galway Docklands are in commercial use it is considered that the nature of the commercial use is materially different from the use intended for the barge when moored in the Old Mud Dock.

The former use of the barge when it was previously moored in the Mud Dock may have included use for private residential purposes by the former owner or an associate of the former owner according to the Referrer’s submission. The removal of the barge circa 2006-2007 from the Old Mud Dock, and subsequent sale is suggestive of a cessation of use of the moored barge in the Old Mud Dock for human habitation purposes. In addition, it can reasonably be assumed that the Mud Dock was and has a current use for mooring and temporary storage and sheltering of boats used for leisure purposes including human habitation on a temporary or long term basis and in connection with fishing and recreation.

Use of a specially fitted out barge for commercial use as luxury tourist accommodation, inclusive of twelve bed spaces in six bedrooms rooms is hospitality use of a commercial nature or commercial hotel use. Such a use constitutes a profoundly different commercial use in the hospitality sector when compared to the commercial use of a heavy industrial nature of docklands waters in which vessels are temporarily moored for a period during which cargoes are loaded and unloaded with some ancillary activities and servicing taking place irrespective of any ancillary on board crew accommodation.

It has been concluded that use of the barge when moored in the Old Dock as a Heritage Barge providing short term heritage tourism accommodation **constitutes a material change of use** of the Mud Dock within the meaning of “development”

within the Act. According to section 3 (3) of the Act use land will be taken to have materially changed if it “*is used for the keeping of tents, vans or other objects for camping, habitation or the sale of goods*”. It therefore constitutes “development within the meaning of the Acts.

- 7.4.4. Whether the use of the barge when moored in the Old Dock as a Heritage Barge providing short term heritage tourism accommodation is exempt development or is not exempt development.

Article 6 (1) the Planning and Development Regulations, 2001 – 2016, (The Regulations) made under for under Section 4 (2) of the Act, subject to exclusions specified in Article 9 of PDR provides for certain classes of exempt development subject to conditions and limitations.

The use of the barge when moored in the Old Dock as a Heritage Barge providing short term heritage tourism accommodation does not come within the meaning of descriptions for any of the Classes of Development provided for in Schedule 2, Part 1 of the Regulations.

The use of the barge when moored in the Old Dock as a Heritage Barge providing short term heritage tourism accommodation would therefore not be exempted development.

Summary and conclusion, in view of the foregoing, the project location comes within the functional area of the planning authority, and the project constitutes works and a material change of use within the meaning of development in the Act and would not be exempt development.

A draft order is set out overleaf.

7.5. Appropriate Assessment

In the appropriate assessment screening report submitted with the Referral of the Declaration it is concluded that Stage 2 Assessment is not warranted and has been taken into consideration for reference purposes.

7.6. The following special Areas of Conservation (SAC) and Special Protection Areas (SPA) are within 15 kilometres of the site location. They are:

The Galway Bay Complex SAC (000268)	adjoins the site location
The Inner Galway Bay SPA (004031)	adjoins the site location
The Lough Corrib SAC (000297)	approx. 500km upstream
The Connemara Bog Complex SAC (002034)	circa 12 kilometres
Lough Corrib SPA (004042)	circa 4 kilometres
Inner Galway SPA (004042)	circa 2.1 kilometres
Creganna Marsh SPA (004142)	circa 7 kilometres.

7.7. The Galway Bay Complex SAC (000268) and the Inner Galway Bay SPA (004031) adjoining the site location and area. Due to the small size of the proposed project and the distance from the other identified European comprehensive screening for these sites has not been conducted.

7.8. The Inner Galway Bay SPA (004031) is of major ornithological importance and interest which includes breeding birds and wintering wetland birds, divers, grebes, cormorants, dabbling duck sea duck and waders. The qualifying interest comprise several Annex 1 bird species.

7.9. Two species are of international importance and sixteen of national importance. It also provides good habitat for the Otter an Annex 2 species. There are no imminent threats to birds but potential threats are sewage effluent and detritus of aquaculture could threaten benthic communities and there is potential pressure from urban expansion and recreational activity.

7.10. The Galway Bay SAC (000268) has a diversity of marine, coastal and terrestrial habitats on Annex 1 of the Habitats Directive that are of high scientific importance.

And they include the following priority habitats: Coastal lagoons, turloughs, orchid rich calcareous grasslands and alkaline *cladium* Fens.

- 7.11. Among the species and habitats supported are breeding otters (Annex II), six Annex 1 Birds species and four red data plant species. Potential threats include sewage effluent and detritus of aquaculture which could affect benthic communities, eutrophication, compaction by machinery and drainage and there is potential pressure from urban expansion and recreational activity.
- 7.12. The project is the mooring of a barge in the dock which has been converted for commercial use as short term accommodation for tourists. While it indicated that the barge would be independently serviced and that no works are required to facilitate the mooring of the barge within the Mud Dock and that access is to be via a wheeled gangway the capacity of the dock to accommodate the barge without prior works is a source of concern. To this end, it is queried as to whether it would be necessary for some of the fill material within the dock to be removed to facilitate the mooring.
- 7.13. Potential source pathway linkage is effluent and waste and pollutant materials associated with use of machinery and equipment that could enter the water by accident and impact on habitats on which species are dependent in the adjacent areas of the SAC and SPA and noise and human activity at the location would be intensified and disturb species.
- 7.14. The project is a small scale project in the docklands area and due to the proximity between the source and the receptor environment of the qualifying species and conservation objectives of the two sites it is concluded that there is insufficient information available to enable a competent authority to conclude, applying the precautionary principle, owing to the location immediately adjacent to the two European Sites that the project individually or in combination with other plans and projects would not be likely to have a significant effect on European sites. Unless further information on the project is made available to facilitate appropriate assessment screening, a Stage 2 Appropriate Assessment would be required.

8.0 Conclusion and Recommendation.

- 8.1. The mooring and use of a barge (Katriana) in the Old Mud Dock, Long Walk, Galway for use as a Heritage Barge providing short term heritage tourism accommodation is development within the meaning of section 3 of the Act because it constitutes works and a material change of use.

A draft order is set out overleaf.

WHEREAS a Question has arisen as to whether the mooring of a barge (Katriona) in the Old Mud Dock, Long Walk, Galway for use as a Heritage Barge providing short term tourist accommodation is development or is not development and is exempt development or is not exempt development.

AND WHEREAS Captain Sam Field Robert of 28 Mount Drummond Road, Dublin 6 requested a declaration on the said question from Galway City Council and the said Council issued a declaration on, 12th May, 2016 stating that the mooring and use of vessel is development and is not exempt development.

AND WHEREAS the said **Captain Sam Field Robert** referred the declaration for review to An Bord Pleanala for review on 8th June, 2016

AND WHEREAS An Bord Pleanala in considering the Referral had regard particularly to:

- (a) Sections 2 and 3 of the Planning and Development Act, 2000 as amended,
- (b) Article 6 of the Planning and Development Regulations 2001 as amended
- (c) The planning history for the site location
- (d) The scale, nature of the project and the former use of the barge.

AND WHEREAS An Bord Pleanala concluded that the proposed mooring of the vessel in the Old Mud Dock constitutes works and that the proposed use is a commercial hospitality use which is a material change of use in the Old Mud Dock is development and is not exempt development.

NOW THEREFORE, An Bord Pleanála in exercise of the powers conferred on it by section 5 (3) (a) of the Planning and Development Acts as amended decides that the said mooring of a barge (Katriana) in the Old Mud Dock, Long Walk, Galway for use as a Heritage Barge providing short term tourist accommodation is development and is not exempt development.

Jane Dennehy
Senior Planning Inspector
18th October, 2016.