Sheehan Planning

44 Balnagowan, Palmerston Park, Dartry, Dublin 6

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The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 2

26th October 2021

Dear Secretary,

RE: RESPONSE TO WEXFORD COUNTY COUNCIL SECTION 5 REFERRAL: WHETHER THE USE OF AN AGRICULTURAL SHED FOR HOUSING PIGS IS OR IS NOT DEVELOPMENT/EXEMPTED DEVELOPMENT AND WHETHER CERTAIN WORKS TO THAT SHED REQUIRE RETENTION PLANNING PERMISSION. KILLUGER, KILLINICK, CO. WEXFORD.

ABP REF. 311366-21

1.0 INTRODUCTION

Sheehan Planning[1] has been instructed by Mr. Kevin Riordan, Premier Pigs Limited[2] to review advise and reply to the above Section 5 Reference made by Wexford County Council in respect of our client's property at Killuger, Killinick, Co. Wexford.

A letter received from the Board dated 28th September 2021 and attached at Appendix 1 advises that any observations or submissions in relation to the reference can be made within 4 weeks of the date of that letter (i.e. on or before 26th October 2021).

Summary Opinion

It is our professional opinion that the current use of the shed to house pigs does not require planning permission. Even if it represents development, it is exempted development.

We do not consider that the alleged additional works to the shed in 2009 are relevant in terms of our opinion above nor are they appropriate matters for a Section 5 reference.

The basis for this opinion is set out in this submission.[3]

This submission is organised under the following headings:

1.0 Introduction
2.0 Key Considerations
3.0 Discussion
4.0 Conclusion

[1] 44 Balnagowan, Palmerston Park, Dartry, Dublin 6
[2] Premier Pigs Ltd., Bulgan, Glynn, Enniscorthy, Co. Wexford
[3] See also opinion of Stephen Dodd SC (at Appendix 2)

2.0 KEY CONSIDERATIONS

Preliminary Remarks: Without prejudice to our submissions on the substance of the referral, Mr Riordan is concerned that this Section 5 referral has been made to the Board, having regard to previous correspondence with Wexford County Council which forms an important part of the context and background to this referral. Mr Riordan notes that Wexford County Council:

- did not provide his address to the Board in their cover letter;
- did not offer to agree the relevant facts in advance of making the referral; and
- did not offer to agree the nature of the question to be put to the Board in the referral.

2.1 Does the current use of the subject shed (to house pigs) constitute development and if so, does it constitute exempted development?

The Council's Cover Letter of 7th September 2021 refers to a 2008 planning permission for the subject shed and appends extracts from that permission. That record shows that the **'proposed development'** was described as 'construction of **a new agricultural shed** and ancillary site works.'

An attached schedule listed 5 conditions. None of the conditions restricted the use of the agricultural shed in any way.

2.2 Do certain works to the subject shed, not covered by planning permission, require that retention planning permission be applied for?

The Council's letter alleges that the shed is larger than permitted in 2008. We note that Condition No. 1 required that the structure be built strictly in accordance with the relevant plans and particulars.

We have not measured the shed but are advised that it was completed in 2009, save for the later addition of a ramp and internal slatted tanks, which were added later. We note, in passing, that any 2009 works (even if unauthorised) are out of time for enforcement.

We presume, in raising the 2009 development at this juncture, that the Council is attempting to link the planning status of the development with the exempted development provisions. Inviting the Board to determine whether retention planning permission is required is not a proper question for a Section 5 Reference, in our opinion. This is discussed at Section 3.0 and, importantly, in the attached legal opinion of Stephen Dodd SC.

2.3 Relevant Statutory Provisions

It is considered that the following excerpts from the *Planning and Development Act, 2000 (as amended)* are relevant (emphasis added):

Section 2 (1) of the ***Planning and Development Act, 2000*** *(as amended)* states that:

"agriculture" *includes horticulture, fruit growing, seed growing, dairy farming, the* ***breeding and keeping of livestock (including any creature kept for the production of food****, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and* ***"agricultural" shall be construed accordingly****".*

"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."

"use", in relation to land, does not include the use of the land by the carrying out of any works thereof"

*"exempted development" has the meaning **specified in section 4**"*

Section 3(1) of the Act provides that '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 of use of any structures or other land.

Section 4(1)(a) of the Act provides that the following is exempted development:

*"development consisting of the use of any land for the purpose of **agriculture and development consisting of the use for that purpose of any building occupied together with land so used**".*

Section 4(1)(h) of the Act provides that the following is exempt:

*"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"*

Section 4(4) of the 2000 Act provides that:

*"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.**"*

Section 39(2) of the Act states that:

*"where permission is granted under this Part for a structure, the grant of **permission may specify the purposes for which the structure may or may not be used**, and in case the grant specifies use as a dwelling as a purpose for which the structure may be used, the permission may also be granted subject to a condition specifying that the use as a dwelling shall be restricted to use by persons of a particular class or description and that provision to that effect shall be embodied in an agreement under section 47."*

3.0 DISCUSSION

3.1 The Use of the Shed

- The agricultural shed (including the later slatted unit and access ramp) is in use for housing pigs at present.
- 'Agriculture' as defined in Section 2 of the 2000 Act includes the keeping of livestock (including any creature kept for the production of food). The keeping of pigs comes within that definition.
- Use for housing of pigs is not inconsistent with any planning conditions attached to the grant of permission.
- Section 4(1)(a) of the Act provides that the use of agricultural buildings for agricultural uses is exempted development.
- Whereas Section 4(4) provides that development shall not be exempted if an environmental impact assessment or an appropriate assessment is required, we are advised that the scale of activity on the farm is significantly below the EIA threshold for rearing of pigs. In order for section 4(4) to apply an EIA must actually be required for the activities on the farm and it is not sufficient merely that a screening for EIA to be undertaking. However, there is no evidence that EIA or AA would be required for the activities on the farm.

For these reasons it follows that even if the use is development, it is exempted development under the relevant section 4(1)(a) of the 2000 Act.

3.2 Is Retention Permission Required for Works in Excess of those Permitted?

The Planning Authority has stated that the constructed shed is larger than that permitted and has invited the Board's opinion as to whether retention permission is required. As it was constructed in 2009 it would be out of time for enforcement (even were it unauthorised).

The later works comprised internal works (installation of the slatted tank – which raised the internal floor level) and external works (the access ramp). These later works clearly fall under the provisions of s.4(1) (h) of the Act, 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

Presumably, the Council is inviting the Board to consider whether the purported 'unauthorised but immune' status of the original shed has a bearing on the Section 4 exemptions claimed in respect of the later works (the slatted tanks and ramp) or indeed on the exemptions claimed regarding use.

However, there is nothing in the Act to suggest that the exemptions therein are in any way constrained, either by the status of the 2009 development or by the provisions of secondary legislation such as the Planning and Development Regulations. In support of this position, we have attached a legal opinion from Mr. Stephen Dodd SC, whose conclusion includes the following statement:

> *"While there is an express exclusion of reliance on exempted development classes under Article 9 and 10 of the 2001 Regulations, this only applies to exempted development classes under the Regulations; it has no application to exempted development under statute. However, even if the exempted development provisions of section 4(1) are subject to a similar limitation, in the present instance the shed has not been established to be unlawful or amounting to unauthorized development. It is further clear that the Board has no jurisdiction to make a determination in a section 5 referral that any development is unauthorized development."*

In our opinion the later works (slatted tank and access ramp) are exempt in accordance with s.4(1)(h) of the Act insofar as they are works for the maintenance and improvement of the shed which affect only the interior of the structure or which do not materially affect the external appearance of the structure (a farm shed situated within a farmyard context).

In our opinion the planning status of the 2009 shed is not relevant to the exemptions claimed, as the exemptions derive from statute and are not constrained by anything within that statute or by the provisions of the Planning and Development Regulations, which is secondary legislation.

This opinion is supported by the attached legal opinion from Stephen Dodd SC.

4.0 CONCLUSION

In our professional opinion the use of the shed for housing pigs does not require planning permission as it is exempt under s.4(1)(a), the later works are exempt under s.4(1)(h); the planning status of the 2009 shed is not relevant in terms of those exemptions and the question as to whether the 2009 shed or the later works may or may not *require retention planning permission* is not a proper matter for the Board's consideration.

We would be happy to provide further information to the Board to assist in this referral, if desired.

Yours faithfully,

John Sheehan.

(John Sheehan)
Sheehan Planning
Encl.

Appendix 1: Letter received from the Board dated 28th September 2021

Appendix 2: Opinion of Mr. Stephen Dodd SC, 22 October 2021

APPENDIX 1: LETTER RECEIVED FROM THE BOARD DATED 28th SEPTEMBER 2021

Our Case Number: ABP-311366-21

Planning Authority Reference Number: 20081365

An Bord Pleanála

Premier Pigs Limited
C/o Kevin Riordan
Bulgan
Glynn
Enniscorthy
Co. Wexford

Date: 28 September 2021

Re: Whether
i. the current use of the existing agricultural shed to house pigs is a change of use and
ii. the additional floor area, the construction of slatted tanks, the raised ground level and the addition of concrete ramp
is or is not development or is or is not exempted development.

Killugger Farm, Killugger, Killinick, Co. Wexford

Dear Sir / Madam,

Enclosed is a copy of a referral under the Planning and Development Act, 2000, (as amended).

In accordance with section 129 of the Planning and Development Act, 2000, (as amended), you may make submissions or observations in writing to the Board in relation to the referral within a period of 4 weeks beginning on the date of this letter.

Any submissions or observations received by the Board outside of that period shall not be considered and where none have been validly received, the Board may determine the referral without further notice to you.

Please quote the above referral number in any further correspondence.

Yours faithfully,

Rory Kelledy

Rory Kelledy
Administrative Assistant
Direct Line: 01-8737163

BPRL05

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APPENDIX 2: LEGAL OPINION MR. STEPHEN DODD SC, DATED 22ND OCTOBER 2021

-OPINION-

AGENT : *Sheehan Planning, 44 Balnagowan, Palmerston Park, Darty, Dublin 6*

SUBJECT: *Section 5 reference: re Agricultural Shed*

QUERIST: *Premier Pigs*

I Preliminary

1. I have been requested to consider the question of whether reliance can be placed on a statutory provision under the Planning and Development Act 2000 as amended, concerning the exempted development of certain internal works to an agricultural shed, in circumstance where the shed may have been constructed in excess of the plans and particulars lodged with the planning application for the shed.

II BACKGROUND

2. The planning history of the site includes three planning permissions granted for the construction of an "agricultural shed" and associated site works which comprises planning reference numbers: 2010/00598; 2008/1365 and 2003/2095. The planning permissions require that the development be carried out in accordance with the plans and particulars lodged. There is no condition of such planning permissions which limit the type of agriculture for which the sheds may be used.

3. The shed was constructed in 2009. The Council claim in the section 5 referral to the Board that the shed as constructed is approximately 677. Sq. larger than the shed granted permission and the ground level has been raised by approximately 2 metres. It is not clear what significance the Council are purporting to attach to such a statement. In particular it is unclear whether the Council are alleging that because the shed was constructed in excess of the plans lodged with the permission, that the no reliance can be placed on any exempted development. This is not stated in the Council's referral.

4. Section 4(1)(h) of the 2000 Act provides:

> *"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."

In the present instance, the installation of the slatted tanks affects only the interior of the agricultural shed. The installation of the tanks does not affect the exterior of the agricultural shed. It would also appear that the installation could be described as an "alteration" to interior of the structure as described. Also considering the scale of even the permitted shed it is also difficult to see how the installation of an external ramp (which is minor alteration) materially affects the exterior appearance of the structure so as to render it inconsistent with the character of the structure or of neighbouring structures. It would therefore appear to follow that that installation of the slatted tanks and access ramp would fall within section 4(1)(h) of the 2000 Act.

5. The only express exception to reliance on the statutory exempted development provision in section 4(1) is contained in section 4(4) of the 2000 Act which provides that development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required. I am not aware of any evidence to indicate that an EIA or Appropriate Assessment was required and so section 4(4) would appear inapplicable in the present instance.

6. The Planning and Development Regulations 2001 as amended, de-exempt certain development from reliance on categories of exempted development contained in the Regulations including on the basis that the underlying development is unauthorised. Thus Article 9(1)(viii) states:

   "Development to which article 6 relates shall not be exempted development for the purposes of the Act—

   (viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,

   There is also a similar de-exemption relating to use classes under Article 10(1)(d) of the Planning and Development Regulations 2001.

7. Article 6 of the 2001 Regulation 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.

(2) (a) Subject to article 9, development consisting of the use of a structure or other land for the exhibition of advertisements of a class specified in column 1 of Part 2 of Schedule 2 shall be exempted development for the purposes of the Act, provided that—

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

(ii) the structure or other land shall not be used for the exhibition of any advertisement other than an advertisement of a class which is specified in column 1 of the said Part 2 and which complies with the conditions and limitations specified in column 2 of the said Part 2 opposite the mention of that class in the said column 1.

8. The de-exemption provision of Article 9 therefore only applies to classes of exempted development contained in Schedule 2. It has no application to exempted development classes which are contained in section 4(1) of the 2000 Act as amended. Furthermore, it is well established that a Regulation made by a Minister cannot amend a statutory provision. Thus there is no equivalent to Article 9(1)(viii) of the 2001 Regulations which is applicable to section 4(1) exemptions.

9. It would involve reading in some implied limitation to reliance upon the exemptions under section 4(1). One possible basis would be reliance on the "illegal but immune" concept. This is the notion that even where a development is immune from enforcement, it remains afflicted with certain disadvantages. The main source of this proposition in Ireland is the case of *Dublin County Council v Mulligan*, Unreported, High Court, Finlay P. May 6, 1980, which was an enforcement action. The comments in that case were however *obiter*. The legislative provision dealt with in that case (the then section 27 of the 1976 Act) did not place any time limitation on taking injunction proceedings and so there was no question of any immunity existing. Finlay P stated:

> "There is nothing contained in Section 27 nor in any other section of the Act of 1976 in any way restricting the time during which a planning authority or other interested person may apply to the Court under that section for an order. Had the legislature in 1976 intended to imply into Section 27 of that Act a time limit similar to that contained in Section 31 of the Act of 1963 it seems to me an inescapable conclusion that they would have expressly done so".

10. Moreover, that case has nothing to say about whether reliance can be placed on exempted development provisions in a statute where the development is unauthorized.

11. The issue was also considered in *Dunnes Stores v Dublin City Council* [2017] IEHC 48, where reference was made to *Mulligan* and also a passage from Simons on Planning. However, that case concerned an awning which was erected without planning permission which was in breach of a condition of a furniture licence that there must be a grant of permission. Again that case did not involve the question of whether works to an unauthorized development can rely on exempted development provisions under a statute. It should also be noted that in England, there is some divergence with the concept as promulgated in Ireland where the Courts have held that the unauthorised but immune development gives rise to "existing use rights". See *Hartnell v Minister for Housing* [1965] AC 1134 and *Hughes v. Doncaster Metropolitan Borough Council* [1990] UKHL J1213-2. These matters have not fully been considered by the Irish Courts.

12. Thus there is no clear case law to support reading in a limitation to reliance upon an exemption under the statute. The Planning Code is a statutory code and the Board itself is a creature of statute and must therefore apply the statutory provisions. In *Element Power v An Bord Pleanala* [2017} IEHC 550, Haughton J commented at para. 49:

> "The Board must operate within the four corners of the statutory framework established under European law and the relevant domestic legislation, particularly the 2000 Act and planning regulations, existing statutory guidelines, and local policy as set out in existing county development plans".

The four corners of the Planning Acts do not provide that works to a development in excess of the particulars for planning permission, means that no reliance can be placed on any statutory exempted development provisions contained in section 4(1) of the 2000 Act.

13. However, there is a more fundamental issue of jurisdiction of the Board in the context of a section 5 referral. Thus, even if an unlawful or unauthorised nature of development means that reliance cannot be placed on section 4(1)(h) in respect of any works to the unauthorized development, the shed in this case has not been established to be unauthorized development and the Board simply has no jurisdiction in the context of a

section 5 referral to make such a determination. The Council have previously issued an enforcement notice but the mere issuing of an enforcement notice, does not mean that a development is unauthorized where there has been no determination of the same by a Court. The Court of Appeal in *Krikke v Barranfaddock* [2021] IECA 217, recently addressed the question of the jurisdiction of the Board to determine whether a matter is unauthorized development in the context of a section 5 referral. Donnelly J stated at para. 45:

> "I consider it important to go back to the meaning of the relevant statutory provisions. On the face of it, s. 5 of the Act of 2000 is clear in its terms. It refers to a decision on development or on exempted development. Both of those terms have themselves specific statutory meanings under the Act of 2000. Unauthorised development has a separate statutory meaning. The legislation therefore does not provide in clear or direct terms that the declaration to be made under s. 5 by An Bord Pleanála or the Planning Authority is one concerning unauthorised development.
>
> 46. If the declaration under s. 5 is to include a finding that the development was unauthorised, it is highly surprising that the section does not state this expressly.
>
> ....
> **There is nothing either in the language or purpose of the section that suggests that it confers on a planning authority or on An Bord Pleanála any power to determine whether a particular development is authorised by a particular planning permission or not.** Moreover, s. 160 grants the power of injunction to the courts in respect of unauthorised developments. Conversely, there is no enforcement power granted to the planning authority or An Bord Pleanála under s. 5 of the Act. Indeed, An Bord Pleanála has no enforcement powers at all under the Act, and if it has the power to determine that a development is unauthorised then separate enforcement proceedings would have to be taken under s. 160 or elsewhere. This would lead to the incongruity that An Bord Pleanála could determine whether the development was authorized.

It is therefore clear that insofar as the Council have raised an issue about the shed being constructed in excess of the planning permission, this a matter on which the Board have no jurisdiction in a section 5 to make any findings, in particular, a finding that this amounts to unauthorized development.

III CONCLUSION

14. The works to the shed are interior works and appear to fall within the exempted development provisions of section 4(1)(h) of the 2000 Act. The external ramp falls under the same exemption. While there is an express exclusion of reliance on exempted development classes under Article 9 and 10 of the 2001 Regulations, this only applies to exempted development classes under the Regulations; it has no application to exempted development under statute. However, even if the exempted development provisions of section 4(1) are subject to a similar limitation, in the present instance the shed has not been established to be unlawful or amounting to unauthorized development. It is further clear that the Board has no jurisdiction to make a determination in a section 5 referral that any development is unauthorized development

STEPHEN DODD SC

22 October 2021