Sheehan Planning

44 Balnagowan, Palmerston Park, Rathmines, Dublin 6

| 087 900 6525 |

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1



11th November 2024

Dear Secretary,

**RESPONSE TO INVITATION TO PROVIDE GENERAL OBSERVATIONS UNDER S131 AND (SEPARATELY) TO PROVIDE SPECIFIC INFORMATION UNDER S132 OF THE PLANNING AND DEVELOPMENT ACT, 2000**

**KILRUGGER FARM, KILUGGER, KILLINICK, CO. WEXFORD**

**ABP REF. 320954-24**

Sheehan Planning[1] has been instructed by Premier Pigs Limited[2] to reply to the Board's letters dated 24th October 2024 inviting submissions, up to 13th November 2024 on the above case, further to the quashing of a decision previously made under appeal reference 311366-21. Copies of the Board's letters are at Appendix 1.

Section 1 of this response addresses the requirement to submit specific information to the Board pursuant to the s.132 letter.

Sections 2-4 of this response address the s.131 letter invitation to provide general observations.

**<u>Response to Board's Request for Specific Further information (s.132 letter)</u>**

## 1. Specific Information

The Board in its letter has requested:

> *"Further information regarding the actual use of the shed and verified information as to the number of pigs being stored in same".*

In response to the use of the shed we confirm that it is used as a finishing unit for production pigs (over 30 kilograms). If this doesn't answer the question to the Board's satisfaction can the Board please clarify what precisely is needed in this regard?

In response to the request for verified information on the number of pigs, we have attached a letter from Mr. Gerard McCutcheon, Teagasc Pig Advisor, Teagasc, who carried out an inspection of the premises on 7th November 2024. Mr McCutcheon counted 1,636 pigs, which

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[1] John Sheehan, Sheehan Planning, 44 Balnagowan, Palmerston Park, Rathmines, Dublin 6

[2] Premier Pigs Limited, c/o Kevin Riordan, Bulgan, Glynn, Enniscorthy, Co. Wexford.

we understand from our client is about the maximum ever held in the shed, and Mr McCutcheon calculated that a maximum of 1,792 pigs could be accommodated:

> *"..I have looked at your buildings and based on the measurements of the pens and a sensible space allowance per finisher pig (of a production pig over 30kg live-weight) calculate that you can accommodate a maximum of 1792 production pigs on this farm. You had 1,636 pigs on the farm yesterday (on the day I visited).*
>
> *Your company does not exceed the threshold requiring an Industrial Emission licence as it does not have more than 750 sow places or 2000 places for production pigs (ie pigs with a liveweight in excess of 30kg). Therefore no Industrial Emissions licence is required as was verified in the letter you received from the EPA (dated 1/11/2023)..."*

A copy of that (Teagasc) letter is at Appendix 2 and we ask the Board to note its contents, not just in relation to the number of pigs (sub-threshold for a mandatory EIA or an Industrial Emissions licence) but also with regard to the proper running of the facility, in accordance with relevant regulations, noting in particular that it states:

> *"...I also noted that you manage your manure in compliance with the Good Agricultural Practices for the Protection of Water Regulations (SI 113 of 2022), and that any wastes generated in the process of producing pigs are managed in compliance with all required regulations..."*

**Response to Request for General Observations (s.131 letter)**

**2. Observations on Third Party Submissions – Material Errors of Fact**

Premier Pigs was not circulated with a copy of third-party submissions[3] but we nevertheless note that there are multiple errors and/or issues with those submissions as follows:

a) Reliance is placed on the conclusions of previous s.5 Declaration EXD00824 in relation to the use of the shed which held that there was a change of use that was not exempted development.

| Comment: |
|---|
| Declaration EXD00824 is fundamentally flawed – the Council's Report underpinning the Declaration misinterpreted relevant legislation and conflated use with works. This is effectively admitted in correspondence attached at Appendix 9 to the third party submission of Marian & Thomas Boggan date stamped 1st October 2021 where Tom Banville on behalf of the Council[4] stated that: *"...Let me address the issue of the Section 5 – Exempt Development Application EXD00824 – Whilst technically a change of use from class 6 to 7 would require planning permission, the planning permissions granted on the subject site did not limit the agricultural use specifically to Class 6. Therefore, in this instance* ***planning permission for a change of use is not required and the use of the sheds for rearing pigs is in accordance with the permissions granted...*** *".* [emphasis added] |

[3] Copy of the same was taken up from the Board's public file.

[4] We understand from a LinkedIn profile that Mr. Tom Banville is the Senior Executive Officer in Planning with Wexford County Council with responsibility for Planning Enforcement and Building Control. See https://ie.linkedin.com/in/tombanville

Despite this correspondence from Mr. Banville, various third-parties nevertheless maintained, incorrectly, that permission for change of use is required.

b) It is asserted in the submission of Peg Wilson & Others date stamped 4th October 2021, *inter alia*, that the farm is in a heavy residential area: *"Ballykelly/Kilugger/Ballyfinogue is a heavy residential area with 40-50 houses within 1km radius of this commercial pig operation, by no means an agricultural setting…"*

**Comment:**

As can be seen from Figure 1 below the shed at Kilugger Farm is clearly not located in a heavy residential area. It is surrounded by fields and is in an agricultural area.


**Figure 1:** Extract from Google Maps with the district of Kilugger (per Google Maps) shown outlined in red. The yard is surrounded by fields and is located in an agricultural area.

c) It is asserted in the submission of Peg Wilson & Others date stamped 4th October 2021 that traffic *"has increased significantly with significant increases in desludging activity associated with commercial scale piggery"*.

**Comment:**

We are advised that the opposite is the case – i.e. road traffic movements have significantly decreased since Premier Pigs took over the operation. This is based on a consultation over the weekend of 9/10th November 2024, between Mr. Kevin Riordan (Premier Pigs) and the previous farm manager.

The decrease arises because the area of farmland (around the Premier Pigs yard) is only 10% of the total farm holding previously operated (the yard and associated land was about

35 acres, whereas the total area farmed was 350 acres) and the yard was isolated from the remainder of the farm.

As a result, the previous farm operation had to transport all associated activities from the yard to the other farm lands. So, all livestock cattle, fertiliser chemical and manure had to be transported from the main yard to the satellite farmlands. Then in turn all fodde bedding and livestock had to be transported back onto farmyard.

This resulted in the weekly traffic movements set out below:[5]

Previous Farm (prior to yard becoming pig farm)

| | |
|---|---|
| Tractor and trailer movements | >50 |
| Teleporter | >25 |
| Tractor manure movements | >15 |
| Livestock lorry (rigid) | >10 |
| Cars (3 staff, other) | >80 |
| **Total per week.** | **>180**. |

Current (pig Farm)

(All pigs on/off farm - articulated lorry; All food stuffs on/off farm - same; All manure off farm - tractor tankers; All waste disposal - rigid trucks.)

| | |
|---|---|
| Articulated truck movements. | c.10 |
| Rigid truck movements. | c. 03 |
| Tractor vaccum tankers. | c. 04 |
| Cars, jeeps | c. 20 |
| **Total per week** | **c. 37** |

d) It is asserted in various submissions that a licence is/may be required for the operation of the piggery from the EPA and/or that the use requires an Industrial Emissions ('IE') licence.

**Comment:**

The letter on the following page, from the EPA dated 1st November 2023 states, *inter alia*, that an IE licence is not required.

[5] Estimated in discussion between Mr. Kevin Riordan and the previous farm manager, Mr. Larry Colemen.

Mr Kevin Riordan
Managing Director
Premier Pigs Limited
Killugger
Killinick
County Wexford

1 November 2023

Dear Mr Riordan

We wish to refer to our letter dated 15 August 2023 and to your response received by the Environmental Protection Agency on 9 October 2023 in relation to Premier Pigs Limited and whether there is a requirement to apply for an Industrial Emissions (IE) licence.

On the basis of the information you submitted, we are to advise you that the EPA's records are being updated to reflect that the activities at Premier Pigs Limited do not fall within the scope of Class 6.2 of the First Schedule of the Environmental Protection Act 1992 as amended and therefore do not require an Industrial Emissions (IE) licence at this time.

**However, should your installation fall within the scope of *any* class in the First Schedule of the EPA Act 1992 as amended, now or at some time in the future, you will be required, in accordance with Section 82 of the EPA 1992 as amended, to obtain an Industrial Emissions (IE) licence or an Integrated Pollution Control (IPC) licence.**

**Furthermore, it is a breach of Section 82(2) of the EPA Act 1992 as amended for a person to carry on a specified or prescribed activity in the absence of such a licence.**

**It should be clearly understood that the onus for lodging an application with the Agency rests with the person carrying on the activity.**

Yours sincerely

Environmental Licensing Programme
Office of Environmental Sustainability

e) It is asserted that an Environmental Impact Assessment Report should be prepared and/or that an EIA should be undertaken.

**Comment:**

A copy of the previous Declaration made by the Council, submitted as part the submission of Marian & Thomas Boggan date stamped 1st October 2021 at Appendix 7 thereof actually shows that the Council had previously determined that EIAR was not required in respect of the use of the shed for housing of pigs (extract below). The Council also noted that: the size of the development was not exceptional in the context of the existing development; that the site is not located on in, adjoining or has the potential to impact on a sensitive site or location; and that the development will not result in the production of any significant waste, or result in emissions or pollutants (see highlighted text).

| | | |
|---|---|---|
| **Planning Number:** EXD00824 | | |
| **Development Description:** Agricultural shed - change of use from class 6 to class 7 | | |
| **Location:** Killugger, Killinick | | |
| **Preliminary Examination Process** **Can likely significant effects on the environment be ruled out at a high level? Yes or No**<br><br>**Yes** - No real likelihood of significant environmental effects – EIAR not required or no notification required<br>**OR**<br>**No** - If such effects can not be immediately ruled out based on nature, scale and location – then continue to Screening Determination. | | |

**Examination**

| | Yes/No/Uncertain | Comment |
|---|---|---|
| Is the size of development exceptional in the context of the existing development? | no | |
| Is the proposed development located on, in, adjoining or have the potential to impact on a sensitive site or location? | no | |
| Will the development result in the production of any significant waste, or result in emissions or pollutants? | no | |

**Conclusion**

**Based on a preliminary examination of the nature, size or location of the development, is there a real likelihood of significant effects on the environment?**

| | | | |
|---|---|---|---|
| There is no likelihood of significant effects on the environment | EIAR not required | ✓ | |
| There is significant and realistic doubt in regard to the likelihood of significant effects on the environment | Stage 2 Screening Determination required. | | |
| | Sch 7A Information required | Yes | No |
| There is a real likelihood of significant effects on the environment | EIAR is required | | |

Planner Date: 12/9/20

Note: A Stage 2 Screening Determination must be carried out if there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development, or Planning permission for the retention of development CANNOT be granted if a Screening Determination is required.

Correspondence from Tom Banville (Wexford County Council) at Appendix 9 to the third-party submission of Marian & Thomas Boggan, date stamped 1st October 2021 (extract below) also records that the Council considered that the use did not meet EIA thresholds.

Let me address the Issue of the Section 5 – Exempt Development Application EXD00824 - Whilst technically a change of use from class 6 to 7 would require planning permission, the planning permissions granted on the subject site did not limit the agricultural use specifically to Class 6. Therefore in this instance planning permission for a change of use is not required and the use of the sheds for rearing pigs is in accordance with the permissions granted.

With regard to the solar panels we have checked the regulations again and its 50% of the total roof area within the overall agricultural holding so currently the site does not meet the limitations and are exempt in this case.

In relation to additional silo's these may require planning but it would be difficult to prove that they hadn't replaced existing silo's that were authorised based on the info we have on file. It is something we can certainly keep an eye on going forward as we can use the more recent inspections as reference points.

Regarding EIA we considered the various thresholds for pig farms and based on the information we have available to us, the piggery at Killugger is not meeting those thresholds at the moment (there were less than 2000 pigs on site at the most recent count). There have been two inspections on this site in the current year, and in both cases the count of pigs on site was less than 2,000 pigs.

The Enforcement Notice issued on the 6th November has a six week response period so we await a response from Premier Pigs Limited in this regard. All development within the relevant site would be considered in the event that a planning application is submitted to resolve the specific unauthorised development.

Further, contrary to suggestions in submissions that EIA is required by reason of the number of pigs on site, verified information in the form of a letter from An Teagasc (copy at Appendix 2) confirms that the number of pigs is well below the 2000 finisher pig mandatory EIA thresholds.

## 3. Basis for the Referral is Flawed – Arguably an Abuse of Process

The referral was made directly to the Board by the Council on or about 8th September 2021 (i.e. it was not an appeal/referral of a previous Declaration). The referral asked, *inter alia*, the following:

> *"Do the development works carried out to this shed including the additional floor area, the construction of slatted tanks, the raised ground level and the additional of a concrete ramp require retention planning permission."*

The Council subsequently, having been circulated with a response to the referral prepared by Sheehan Planning, expanded on/reformulated the question by letter dated 18th November 2021 stating that:

> *"...clarification in relation to the exempted development status of the shed is being sought regardless of the statutory limitation for enforcement action."*

**Comment:**

We have a number of serious concerns in relation to the referral:

- It is inappropriate for the Council under section 5 to ask if a development requires retention permission – please see the legal advice from Stephen Dodd SC previously submitted to the Board on 26th October 2021 by Sheehan Planning (copy at Appendix 3).

- The Board circulated Sheehan Planning's submission of 26th October 2021 on the referral to the Council. The Council then by letter dated 18th November 2021 inappropriately sought to reformulate/alter the referral that had been made to the Board. In so doing it indicated that clarification is being sought regardless of the statutory limitation for enforcement action. Other correspondence attached to Third Party submissions (but not submitted to the Board by the Council and not provided to Premier Pigs) shows the Council was aware, before it made the referral, that planning permission was not required: *"Therefore in this instance **planning permission for a change of use is not required and the use of the sheds for rearing pigs is in accordance with the permissions granted"*** [6] It appears, given these circumstances, that the referral was/is being made to ground enforcement action (which is not the purpose of s.5 of the 2000 Act) and may therefore constitute an abuse of process and/or be vexatious. On such grounds alone the referral should be dismissed.

- A letter on the Board's public file dated 24th September 2021 shows that the Council had, inexplicably, advised one of the third parties (Ms. Alice Clarke) that the referral was being made to the Board by the Council. There is no requirement for the Council to do so and it was inappropriate as Alice Clarke has no legal interest in the lands the subject of the referral and as the referral was made directly pursuant to s.5(4) of the 2000 Act to the Board by the Council.

[6] See correspondence attached at Appendix 9 to the third-party submission of Marian & Thomas Boggan date stamped 1st October 2021 from Tom Banville (Senior Executive Officer) on behalf of Council.

- In its referral letter the Council did not provide the Board with Premier Pig Limited's address as part of its referral. This caused the Board to request submissions by letter dated 16th September 2021 from Mr Gerrard and Phillip Stafford, Drinagh House, Co. Wexford – who are not the owners of the subject site. Premier Pigs and/or its agents actually had to contact the Board to request that a letter issue from the Board inviting Premier Pigs to make a submission on the referral. The letter inviting submissions from Premier Pigs issued on 28th September 2021.

- Correspondence between the Council and third parties (as exhibited to various Third-Party Submissions made to the Board) tends to show that the true purpose of the referral is to try to force Premier Pigs to apply for retention permission and/or as a basis for taking enforcement action and to look at the status of all development on the site as a whole. See in particular the correspondence at Appendix 9 of the submission of Marian & Thomas Boggan date stamped 1st October 2021 (extract at p.6 above).

- One expects candour from public bodies[7] and it is unclear in the circumstances why:

  a) the Council in its referral letter did not provide Premier Pigs address to the Board;
  b) the Council's own correspondence, showing that they knew that the use of the shed did not require planning permission, was not sent to the Board (or separately to Premier Pigs) as part of the Council's referral;
  c) despite the Council having received Senior Counsel's Opinion (copy at Appendix 4) showing that the previous Declaration was flawed, this was not disclosed to the Board by the Council, where the Council forwarded a copy of that Declaration to the Board.
  d) the Council's referral letter of 8th September 2021 purported to set out background information, but certain facts were not included. Omissions include the facts that: a) a Declaration had previously been made by the Council; b) following this an Enforcement Notice issued; c) in response to this Senior Counsel's Opinion was provided to the Council showing that the Declaration was fundamentally flawed and based on a clear misinterpretation and misunderstanding of the relevant legislation – that Opinion advised that development was permitted and/or exempted development under section 4(1)(a) of the 2000 Act and that slatted tanks were exempt under section 4(1)(h) of the 2000 Act; and d) no reference was made in the referral letter to any potentially applicable exemptions (section 4(1))a), 4(1)(h)) that apply to the development, despite the Council being previously advised in the Opinion that s.4(1)(a) and s.4(1)(h) were relevant.

  This case has already been the subject of legal proceedings. The facts and omissions as set out above all tend towards a suspicion the true purpose of this referral is to ground some form of enforcement action and/or to force Premier Pigs Limited to apply for retention permission? If this were proven to be the case it would represent a clear abuse of process.

  It is open to the Board to require the Council to submit information in this regard by issuing a s.132 Notice under the 2000 Act.

[7] https://www.mhc.ie/latest/insights/duty-of-candour-in-public-law-proceedings

## 4. Inspectors Report and Board Order was Flawed

The Board's Senior Inspector prepared a Report dated 21st November 2022. The Board relied on the Inspector's Report. The Senior Inspector stated that the concrete ramp was not exempted development; stated that there was an intensification of use; and stated that there was insufficient information to determine if an EIA and/or AA was required and therefore determined that certain development was not exempted development.

**Comment:**

Comments on some of the findings in the Inspector's Report/Order are set out below:

*Section 4(1)(h) – assertion that ramp was not exempted development*

The concreted ramp is connected to and is attached to the shed structure (see figure 2). It is also functionally linked to the operation of the shed and is therefore clearly an improvement and/or alteration to the shed within the meaning of section 4(1)(h). It is not inconsistent with the character of the structure or surrounding structures. In *Cairnduff v O'Connell* [1986] IR 73 the Supreme Court held that the construction of an external balcony and stairway at the side of a return portion of the defendant's house in Dublin did not alter the character of the house or the neighbouring houses, and therefore it was held to be an exempted development under s.4(1)(g) of the Local Government (Planning & Development) Act, 1963. Section 4(1)(g) was re-enacted in s.4(1)(h) of the 2000 Act. The Inspector and/or the Board erred in holding that the concrete ramp was not exempted development.

**Figure 2:** Photo showing that the ramp is attached to the shed.

*Intensification of Use – assertion that size of shed = intensification*

The use is permitted and/or exempted development under s.4(1)(a) of the 2000 Act. The Inspector purported to find that there was a material intensification of use on the basis of an increase in floor area. An increase in floor area does not in itself give rise to increased impacts of noise, odour, and/or sensitivity of the receiving environment. We are advised that no material intensification of use has occurred - see for example the previous estimate of decreased traffic movements at 2c above.

*EIA/AA – assertion that there was insufficient information before the Board*

The Inspector and/or the Board stated that there was an absence of information to undertake an EIA/AA screening. We note that:

a) an EIA pre-screening document on the Board's public file signed by Ms Aisling Reilly on 5th October 2021, indicates that the development does not fall within a class of development set out in Part 1 or Part 2 of Schedule 5 of the Planning and Development Regulations;

b) the Board's public file shows that in the previous (flawed) section 5 Declaration the Council had determined that there was no likelihood of significant environmental effects;

c) information on the proximity of the site to SACs, SPAs etc. was before the Inspector; and

d) verified information on the number of pigs on the site has now been furnished to the Board (1,636 pigs) which shows that site is clearly sub-threshold for mandatory EIA.

*Finding that of Section 4 agricultural exemption did not apply by virtue of s.4(4)*

Section 4(4) of the 2000 Act only applies where it is concluded that either an AA and/or an EIA is actually required.

Premier Pigs has not been asked to prepare screening reports, did not make the referral and there is insufficient time in the period allowed for submissions to commission an EIA and/or AA screening report. Without prejudice to the above we note[8] that:

The site is c. 1.6 km west of the Wexford Harbour and Slobs proposed NHA;

The site is c. 1.7 km west of Wexford Harbour and Slobs SPA (004076);

The site is c.3.8 km southwest of Slaney River Valley SAC (000781); and

There are no indirect pathways or streams within 100m of the shed that filter to the above sites.

There is a borehole well on the land used by Premier Pigs, tested annually for Bord Bia accreditation and we have attached a copy of the most recent (2023) test results (at Appendix 5) demonstrates that there was no evidence of any contamination. Full annual test results can be provided if required by the Board – we simply have not had time to source it all in advance of the Board's response deadline for submission.

Further, as already outlined in this document in the Declaration made by the Council (submitted as part the submission of Marian & Thomas Boggan date stamped 1st October 2021 at Appendix 7 thereof) the Council had previously determined that EIAR was not required in respect of the use of the shed for housing of pigs (extract below). The Council also noted in this regard that: the size of the development was not exceptional in the

[8] Figure 3 is based on NPWS online mapping.

context of the existing development; that the site is not located on in, adjoining or have the potential to impact on a sensitive site or location; and that the development will not result in the production of any significant waste, or result in emissions or pollutants.

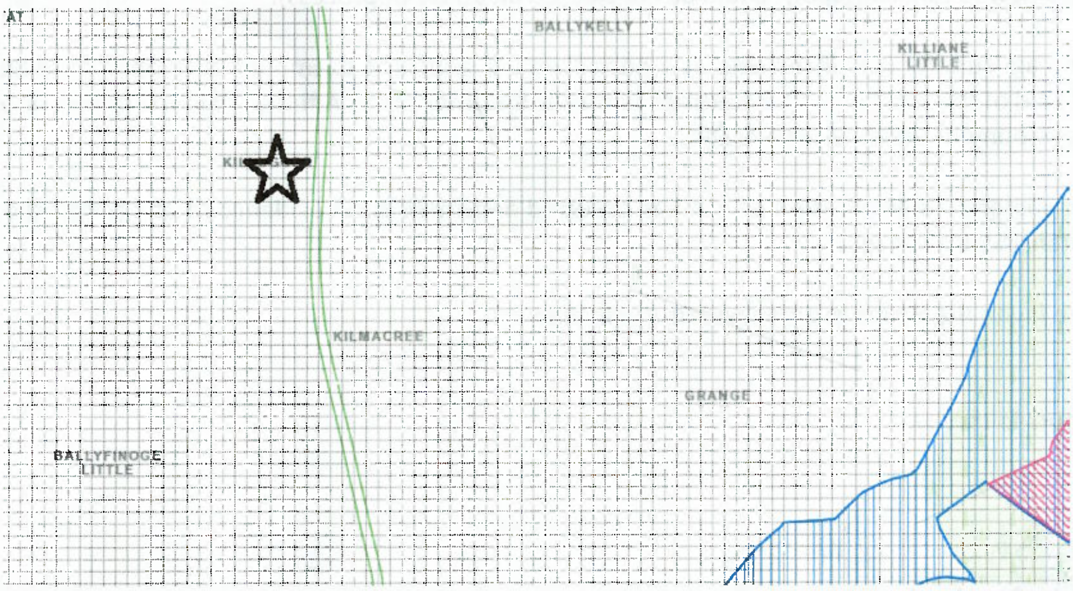


**Figure 3**: Extract from NPWS mapping showing the approximate location of Kilugger Farm (black star) and the location of the closest Natura 2000 sites.

The shed has been in situ since 2010 and is located in an established farmyard complex in an agricultural area.

As noted in the letter of Mr McCutcheon of Teagasc:

*"...I also noted that you manage your manure in compliance with the Good Agricultural Practices for the Protection of Water Regulations (SI 113 of 2022), and that any wastes generated in the process of producing pigs are managed in compliance with all required regulations..."*

There is no evidence in the Board's file that AA or EIA is actually required. Section 4(4) should not have been invoked/relied on by the Board.

*Additional Information*

Premier Pigs does not know what information, if any, the Board needs and would be happy to provide any further information, if desired.

## CONCLUSION

It is evident, in our professional opinion, that the previous Board decision was flawed. This referral is also flawed (and, arguably, could be considered an abuse of process).

The agricultural use of the shed is a permitted use and/or is exempted development under sectio 4(1)(a) of the 2000 Act. The concrete ramp and/or other works referred to in the referral is exempted development under section 4(1)(h).

No material intensification of use has occurred and there is no evidence of any purported material intensification of use.

We invite the Board to agree with our opinion.

Yours faithfully,

John Sheehan

**(John Sheehan)**
**Sheehan Planning**

**Appendices:**

| | |
|---|---|
| Appendix 1: | Copy of letters inviting/requiring information |
| Appendix 2: | Letter from An Teagasc |
| Appendix 3: | Copy of Senior Counsel Opinion previously submitted to the Board |
| Appendix 4: | Copy of Senior Counsel Opinion previously submitted to the Council |
| Appendix 5: | Copy of borehole test results |

**APPENDIX 1: COPY OF BOARD LETTERS INVITING/REQUIRING INFORMATION**

**Our Case Number:** ABP-320954-24

**Planning Authority Reference Number:** 20081365

An Bord Pleanála

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

**Date:** 24 October 2024

**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,

I have been asked by An Bord Pleanála to refer to the above-mentioned referral bearing reference number ABP-320954-24.

An Bord Pleanála had previously made a decision on this referral by order dated 18th April, 2023 and under appeal reference number ABP-311366-21. That decision was quashed by order of the High Court and the case was remitted by that Court back to An Bord Pleanála for a new decision. A copy of the High Court order is attached to this letter for your information.

Having regard to the foregoing the referral has now been reactivated.

Having regard to the High Court Order in this case, the quashing of the previous Board decision and the passage of time, the Board considers that it is appropriate in the interests of justice to now request you under section 131 of the Planning and Development Act 2000 to make any further general submissions/observations you may have on the planning application the subject of this referral.

Any such submissions that you may have in response to this notice must be received on or before 13th November 2024.

The Board cannot consider comments that are outside the scope of the matters in question. Your submission in response to this notice must be received by the Board not later than **5.30 p.m. on the date specified above.**

If no submission or observation is received before the end of the specific period, the Board will proceed to determine the referral without further notice to you, in accordance with section 133 of the 2000 Act.

**Our Case Number:** ABP-320954-24

**Planning Authority Reference Number:** 20081365

An Bord Pleanála

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

**Date:** 24 October 2024

**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,

I have been asked by An Bord Pleanála to refer to the above-mentioned referral.

The Board has examined the referral and is of opinion that certain information is necessary for the purpose of enabling it to determine it.

In accordance with section 132 of the Planning and Development Act, 2000, (as amended), as applied to referrals you are required to submit, on or before 13th November 2024 the following:

> **Further information regarding the actual use of the shed and verified information as to the number of pigs being stored in the same.**

If the information required is not received before the end of the specified period, the Board will dismiss or otherwise determine the referral without further notice to you in accordance with section 133 of the 2000 Act, (as amended), as applied to referrals. Your submission should be received by the Board not later than 5.30 p.m. on the date specified above.

**Please note when making a response/submission only to the referral it may be emailed to appeals@pleanala.ie and there is no fee required.**

Please quote the above referral number in any further correspondence.


| | | |
|---|---|---|
| **Teil** | **Tel** | (01) 858 8100 |
| **Glao Áitiúil** | **LoCall** | 1800 275 175 |
| **Facs** | **Fax** | (01) 872 2684 |
| **Láithreán Gréasáin** | **Website** | www.pleanala.ie |
| **Ríomhphost** | **Email** | bord@pleanala.ie |

64 Sráid Maoilbhríde
Baile Átha Cliath 1
D01 V902

64 Marlborough Street
Dublin 1
D01 V902

## APPENDIX 2: LETTER FROM AN TEAGASC REGARDING VERIFIED PIG NUMBERS

Teagasc
AGRICULTURE AND FOOD DEVELOPMENT AUTHORITY

**Pig Production Development Unit**

Oak Park, Carlow, Co. Carlow,
Ireland.

**Tel:** +353 (0)59 91 83503

**Email:** gerard.mccutcheon@teagasc.ie

**Date** : 8th November, 2024.

Mr. Kevin Riordan,
Premier Pigs Limited,
Killuger Pig Farm,
Drinagh,
Co. Wexford.

Dear Kevin,

I write this letter in response to my recent visit to your farm at Killuger, Killinick, County Wexford. As you know I have worked as a Pig Enterprise Advisor for over thirty years.

I have looked at your buildings and based on the measurements of the pens and a sensible space allowance per finisher pig (or a "production pig" over 30kg live-weight) I calculate that you can accommodate a maximum of 1,792 production pigs on this farm. You had 1,636 pigs on the farm yesterday (on the day I visited).

Your company does not exceed the threshold requiring an Industrial Emissions licence as it does not have more than 750 sow places or **2000 places for production pigs** (ie pigs with a liveweight in excess of 30kg). Therefore no Industrial Emissions licence is required as was verified in the letter you received from the EPA (dated 1/11/2023).

I also noted that you manage your manure in compliance with the Good Agricultural Practices for the Protection of Water Regulations (SI 113 of 2022), and that any wastes generated in the process of producing pigs are managed in compliance with all required regulations.

Should you need any further information please do not hesitate in getting back to me.

Yours sincerely

Gerard McCutcheon

Gerard McCutcheon M.Agr.Sc., M.Sc.
(Teagasc Pig Advisor)

**APPENDIX 3: COPY OF SENIOR COUNSEL OPINION PREVIOUSLY SUBMITTED TO THE BOARD**

**-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 <u>a class specified in column 1 of Part 1 of Schedule 2</u> 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 remain 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. <u>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.</u>
>
> 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.
>
> ....
>
> **<u>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.</u>** 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**

22nd October 2021

## APPENDIX 4: COPY OF SENIOR COUNSEL OPINION PREVIOUSLY SUBMITTED TO THE COUNCIL

**– OPINION –**

**QUERIST:** *Premier Pigs Limited*

**AGENT:** *Sheehan Planning*

**SUBJECT:** *Lands at Killugger, Killinick, County Wexford*

## I. NATURE OF OPINION

1. I have been requested to consider the planning status of the installation of slatted tanks in a shed on Querist's pig farm at Killugger, Killinick, County Wexford. This arises following the service of an enforcement notice by Wexford County Council which refers, *inter alia*, to the alleged unauthorised installation of slatted tanks and requires their removal along with other matters. I have also been requested to consider the procedure which resulted in the service of the enforcement notice.

## II BACKGROUND

2. Querist, purchased a farm and associated farm buildings at Killuger, Killinick, Co. Wexford in 2017. The farm buildings were constructed by a previous owner on foot of planning permissions prior to 2010 and that there are older farm buildings which pre-date planning requirements prior to the 1963 Act.

3. The planning history 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.

4. Subsequent to purchasing the farm, Querist carried out internal works to a shed which is used to house finisher pigs. These works included installation of slatted tanks.

5. On 24th April 2020, Wexford County Council issued a Warning Letter alleging that slatted tanks had been installed in one of the buildings ('Shed A') without the benefit of planning permission, which the Council considered to be an offence under the PDA.

6. On the 7th August 2020, Querist responded in writing that he had legal advice that the installation was of an internal nature to maintain and improve the purpose of building and comprised exempted development under s.4(1)(h) of the Planning and Development Act 2000 as amended.

7. On 11th September 2020, the Council wrote to Querist referring to his letter and stating that that they were now investigating an alleged 'change of use' of an agricultural shed (Shed A) 'from Class 6 to Class 7' and advised that a decision on the enforcement case would be made 'soon following the assessment of all relevant issues'.

8. It appears that at some time after 4th September 2020, the Council copied Querist with a Declaration pursuant to s.5 of the Planning and Development Act 2000, that the alleged change of use referred to above was not exempt.

9. On the 6th of November 2020, the Council issued an Enforcement Notice to Querist alleging that the installation of slatted tanks in Shed A was unauthorised and the change of use of a different shed ('Shed B') was also unauthorised. That Notice requires the removal of the slatted tanks and an external concrete access ramp from Shed A and the cessation of the use of Shed B for storage of waste metal and textiles, all within 6 weeks (i.e. about 17th December 2020).

## III WHETHER INSTALLATION OF SLATTED TANKS IS UNAUTHORISED

10. The basis for the Council issuing the enforcement notice relating to the slatted tanks being unauthorized development appears to be the section 5 declaration which was issued by the Council on the 3rd September 2020. This appears to follow from the content of the letter of 11th September 2020, saying that the Council was investigating the change of use from Class 6 to Class 7. It should be said that it is not apparent that Querist, as the owner of the lands, was notified of the section 5 request prior to issuing the declaration and afforded an opportunity of making submissions thereon. Insofar as

this was the case, this was a clear breach of fair procedures. However, it is proposed to address the substance of the declaration and assessment below.

11. The declaration sought to address the referral as to whether the Change of use from Class 6 to Class 7 of the exempted development Regulations – Rural, and concluded that it constitutes development and is not exempted development. As set out in the planner's report this conclusion was arrived at having regard to the nature of the agricultural practice on site, the gross floor space and the heights of the existing structures on the site.

12. The planner's report set out the terms and conditions for Classes 6 and 7 of Part 3 of Schedule 2 of the 2000 Regulations as follows:

Class 6: "*Works consisting of the provision of a roofed structure for the housing of cattle, sheep, goats, donkeys, horses, deer or rabbits, having a gross floor space not exceeding 200 square metres (whether or not by extension of an existing structure), and any ancillary provision for effluent storage*"

The terms and conditions for this class comprise:

1. No such structure shall be used for any purpose other than the purpose of agriculture.
2. The gross floor space of such structure together with any other such structures situated within the same farmyard complex or within 100 metres of that complex shall not exceed 300 square metres gross floor space in aggregate.
3. Effluent storage facilities adequate to serve the structure having regard to its size, use and location shall be constructed in line with Department of Agriculture, Food and Rural Development and Department of the Environment and Local Government requirements and shall have regard to the need to avoid water pollution.
4. No such structure shall be situated, and no effluent from such structure shall be stored, within 10 metres of any public road.
5. No such structure within 100 metres of any public road shall exceed 8 metres in height.
6. No such structure shall be situated, and no effluent from such structure shall be stored, within 100 metres of any house (other than the house of the person providing the structure) or other residential building or school, hospital, church or building used for public assembly, save with the consent in writing of the owner and, as may be appropriate, the occupier or person in charge thereof.
7. No unpainted metal sheeting shall be used for roofing or on the external finish of the structure.

Class 7: "*Works consisting of the provision of a roofed structure for the housing of pigs, mink or poultry, having a gross floor space not exceeding 75 square metres (whether or not by extension of an existing structure), and any ancillary provision for effluent storage.*"

1. No such structure shall be used for any purpose other than the purpose of agriculture.
2. The gross floor space of such structure together with any other such structures situated within the same farmyard complex or within 100 metres of that complex shall not exceed 100 square metres gross floor space in aggregate.
3. Effluent storage facilities adequate to serve the structure having regard to its size, use and location shall be constructed in line with Department of Agriculture, Food and Rural Development and Department of the Environment and Local Government requirements and shall have regard to the need to avoid water pollution.
4. No such structure shall be situated, and no effluent from such structure shall be stored, within 10 metres of any public road.
5. No such structure within 100 metres of any public road shall exceed 8 metres in height.
6. No such structure shall be situated, and no effluent from such structure shall be stored, within 100 metres of any house (other than the house of the person providing the structure) or other residential building or school, hospital, church or building used for public assembly, save with the consent in writing of the owner and, as may be appropriate, the occupier or person in charge thereof.
7. No unpainted metal sheeting shall be used for roofing or on the external finish of the structure.
8. Boundary fencing on any mink holding must be escape-proof for mink".

13. In the Assessment section of the report, the planner states that the floor area of the three sheds most recently permitted exceeds 2491 sq m and the ridge heights all exceed 10.6. The report says that based on the conditions and limitations of both Class 6 and Class 7, a change of use of any of the sheds on the site would require planning permission as the floor area exceeds 100 sq. m and the height exceeds 8 m where the sheds are within 100m of a public road. The report further said that the change of use of sheds for the housing of cattle as per Class 6 to housing pigs as per Class 7 is not exempted development and such change of use requires planning permission.

14. In my view that above analysis is fundamentally in error. Neither Class 6 nor 7 of Part 3 of the relevant Schedule concern change of use but relate to the carrying of certain works which may qualify as exempted development insofar as they fall within the terms of either of the Classes. This is very clear from the wording of both Class 6 and 7 which both refer to:

> "*<u>Works</u> consisting of <u>the provision</u> of a roofed structure.. etc*"

There are other Classes in Part 3 which concern "uses" rather than works, such as Class 1 (*Temporary* <u>*use*</u> *of any land for the placing of any tent, campervan or caravan or for the mooring of any boat, barge or other vessel used for the purpose of camping*). Neither the construction of the sheds nor the installation of the slatted tanks were carried out in reliance on either Class 6 or Class 7

15. In considering "use" or change of use, the planner also gave no consideration to section 4(1)(a) of the 2000 Act which provides that the following as exempted development:

    > "development consisting of the use of any land for the purpose of agriculture and development consisting of the <u>use for that purpose of any building occupied</u> together with land so used"

    In the present instance, the use in question was the keeping of pigs (which comes within the definition of "*agriculture*" in section 2(1) discussed below) in a building occupied together with land used for the purpose of agriculture.

16. In fact the shed was constructed not on the basis that it was exempted development under Class 6 or 7 but pursuant to a planning permission, in particular 2008/1365. This permission granted permission for an "*agricultural shed*". The permission did not purport to limit the type of agriculture for which the shed may be used. It was open to the planning authority to limit the use of the shed to particular types of agriculture by way of condition. This is clear from section 39(2) of the 2000 Act which states:

    > "*(2) Where permission is granted under this Part for a structure, the grant of permission* <u>*may specify the purposes for which the structure may or may not be used*</u>, *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*".

    However, no such limitation was imposed. Furthermore there was nothing in the planning applications documents lodged, which I am aware, which purported to limit the use of the shed to particular types of agriculture such as for cattle rather than pigs.

17. Section 2(1) of the 2000 Act defines "agriculture":

"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";

The reference to the breeding and keeping of "livestock" would therefore include both cattle and pigs. It therefore follows that it is reasonable to construe the scope of the planning permission granted for an agricultural shed as including any agriculture use within the definition of agriculture above. The use of the shed for housing pigs was therefore authorised under the planning permission. The Report of the Planner in the section 5 referral was therefore misconceived, where it stated:

"...a change of use of any of the sheds on the site would require planning permission as the floor area exceeds 100 sq. m and the height exceeds 8 m where the sheds are within 100m of a public road".

The change of use did not require planning permission as the change in use came within the scope of the planning permission which was for an agricultural shed.

18. In fairness to the planner in the section 5 referral, he appears to have been led into error by the formulation of the question requested for a declaration which was, "*whether the Change of use from Class 6 to Class 7 of the exempted development Regulations – Rural constitute development and is not exempted development*". The question referred was therefore premised on an erroneous confusion between "works" and "use", in planning terms. The premise of the question was also in error insofar it was never claimed that the shed fell within Class 6. Therefore the question of *change of use from* Class 6 to Class 7, never arose. However, while question referred was itself in error, there was no obligation on the planning authority to answer such question on the assumption that it was correctly formulated or that it made sense. In fact it is well established that either a planning authority or the Board has the power to reframe a question referred to it in a section 5 referral. In *Esat Digifone Ltd v South Dublin County Council* [2002] 3 IR 585, Kearns J. noted at pg. 591:

"Firstly, counsel on behalf of the applicant contends that An Bord Pleanála is only entitled, when making a decision under s. 5, to do so in relation to the question actually submitted. The Board is not, he submits, entitled to reformulate the question in the way that had occurred in the instant case

> whereby the Board enlarged the issues to be considered so as to take into account any possible "material change of use" over and above the question submitted in relation to a possible exemption under s. 4(1)(g) of the Act of 1963.
>
> In reply counsel for the respondent argued, in my view correctly, that the function of the section is to clarify whether particular works or users constituted development or exempted development, so that the Board could not be confined in some artificial way".

This was affirmed and applied by Hedigan J in *Rossmore v An Bord Pleanala*, Unreported, High Court, August 28, 2014.

19. Thus insofar as the section 5 determination was the basis for Wexford County Council issuing the enforcement notice, it follows that the enforcement notice is therefore similarly flawed.

20. It is noted that the section 5 declaration was not challenged in any judicial review proceedings or appealed. However, this does not mean that reliance can appropriately be placed on the same by the Council in taking the subsequent step of issuing an enforcement notice. Even on its own terms the section 5 declaration deals with a change of use and not works; while the enforcement notice clearly deals with the distinct works in the form of the installation of the slatted tanks. It would therefore appear to be irrational to rely upon a section 5 referral which concerns change of use rather than works. Apart from this, the section 5 declaration is so manifestly in error, that it could be described as nullity even if has not been quashed. In *Mone v an Bord Pleanála* [2010] IEHC 395, where a planning permission was premised on an earlier planning permission which had not been challenged, the Court rejected that reliance could be placed on the earlier planning permission as it was so flawed as to be a nullity. McKechnie J commented at para. 84:

> "The argument of the Board by reference to s.50 of the Act of 2000 is misconceived. That section (subject to the court's power to extend time, which here is not relevant) is a time limit restriction operating not as a matter of defence but of jurisdiction. It regulates the challenge to a decision, nothing more. It leaves unaltered the legal status of the decision. It has no influence on the lawfulness or effect of the decision. It gives it no badge of either approval or disapproval. It prevents challenge. Notwithstanding these views the practical effect of this section is that in almost all cases once the time period has expired, no further consideration will be required or needed. But exceptionally, as here, where a subsequent decision depends on conferring the status of legality on a legal nullity, that decision will not be allowed to stand".

***Whether the Installation of Slatted Tanks is unauthorized development***

21. It is noted that the first item in the enforcement notice is that installation of the slatted tanks is unauthorized and so therefore requires the removal of the slatted tanks. In response to the warning letter relating to the same it was indicated that the installation of the slatted tanks was exempted development under section 4(1)(h) of the Planning and Development Act 2000 as amended. While the letter was acknowledged, the enforcement notice subsequently issued and so it is not clear why this was not accepted. As noted, it appears not to have been accepted based upon the section 5 declaration and the assessment set out therein.

22. The scope of section 4(1)(h) of the 2000 Act may therefore be considered, which 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.*"

Much of the case law on this provision has focused on works which affect the external appearance of the structure and whether this is material and the notion of character. See *Cronin (Readymix) v An Bord Pleanala* [2017] 2 IR 65 and *McCabe v Córas Iompair Éireann* [2007] 2 I.R. 392; *Morgan v Slaneygio* [2017] IEHC 284. However, none of these questions arise of material or character arise where the works only relate to the interior of the structure. Where the works affect only the interior of the structure, the works will be exempted development where it consists for works "*...for the maintenance, improvement or other alteration of any structure...*".

23. As regards the meaning of alteration or improvement in *Cronin (Readymix) v An Bord Pleanala* [2017] 2 IR 658, O'Malley J. said at pg. 674 that the meaning of 'alteration', "*...is best taken as simply bearing its ordinary meaning of "change*". She further stated that "*...an "improvement", for the purposes of an exemption, must be something that relates to the internal use and function of the structure, resulting in either no externally noticeable difference or an insignificant difference.*"

24. 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 is clear that the installation could be described as an "alteration" to interior of the structure as described. It therefore follows that that installation of the slatted tanks falls within section 4(1)(h) of the 2000 Act. It should be noted that section 4(4) provides that development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required. I am instructed that the scale of activity on the farm is below the threshold for rearing of pigs which requires a mandatory EIA. In order for section 4(4) to apply an EIA must be actually required and it is not sufficient merely that a screening for EIA may be undertaken. However, there is no evidence to indicate that EIA would be required for the activities on the farm and the Council have made no such determination in the context of the issuing of the enforcement notice and so it does not arise. Therefore based on the evidence presented, it follows that Querist can rely under section 4(1)(h) for the installation of the slatted tanks being exempted development and so it is not unauthorized.

## IV VALIDITY OF THE ENFORCEMENT NOTICE

25. The Council in its letter 11th September 2020, stated that that they were now investigating an alleged 'change of use' of an agricultural shed (Shed A) 'from Class 6 to Class 7' and advised that a decision on the enforcement case would be made 'soon following the assessment of all relevant issues'. It therefore appears that this related to the section 5 declaration described above. Thus as discussed above insofar as the issuing of the enforcement notice was based on the section 5 declaration, which was flawed, it equally follows that the enforcement notice is flawed.

26. However, in addition to the above, there are also other concerns regarding the procedural steps relating to the issuing of the enforcement notice, in particular the other two items which concerns the concrete ramp and shed B. It is noted that the warning letter issued by the Council on 24th April 2020 only concerned the installation of the slatted tanks. It makes no mention of an external concrete access ramp from Shed A and the cessation of the use of Shed B for storage of waste metal and textiles. It appears no warning letter was issued in respect of these matters (and this might be confirmed).

These additional items were however included in the enforcement notice. The only circumstances in which an enforcement notice can be issued without a warning letter is where urgent action is required. This follows from a combination of section 154(1)(a) and section 155(1) set out below. Section 154(1)(a) provides that:

> "*Where a decision to enforce is made under section 153 or where urgent action is required under section 155 , the planning authority shall, as soon as may be, serve an enforcement notice under this section*".

Section 155(1) concerns urgent action, stating:

> "Where, in the opinion of the planning authority, due to the nature of an unauthorised development and to any other material considerations, it is necessary to take urgent action with regard to the unauthorised development, notwithstanding sections 152 and 153, it may serve an enforcement notice under section 154" .

There is no evidence that urgent action was required so as to allow an enforcement notice issued to include external concrete access ramp from Shed A and the cessation of the use of Shed B for storage of waste metal and textiles without the prior issuing of a warning letter. Therefore, independent of the enforcement notice being based on a flawed section 5 declaration, there are serious doubts concerning the legality of the procedural steps which led to the issuing of the enforcement notice regarding these two additional items.

27. It may be noted that under section 154(11)(a) of the 2000 Act the planning authority has the power to withdraw an enforcement notice and this may be the appropriate action to request in the circumstances.

## CONCLUSION

1. The section 5 declaration to the effect that Change of use from Class 6 to Class 7 of the exempted development Regulations – Rural constitutes development and is not exempted development, is fundamentally flawed. It erroneously conflates "use" with "works", failed to consider that the use of a building for agriculture is exempted under section 4(1)(a) of the 2000 Act and further failed to take into account that planning permission was granted for an agricultural shed.

2. Insofar as the issuing of the enforcement notice was based on the section 5 declaration, it equally follows that the issuing of the enforcement notice was also flawed.
3. The planning permission granted for the agricultural shed was not limited to any particular types of agriculture. Thus the change of use from the keeping cattle to pigs comes within the scope of the permission insofar both the keeping of cattle and pigs come within the notion of "agriculture" under the 2000 Act.
4. Based on the evidence presented, the installation of slatted tanks falls within the scope of the exempted development provision of section 4(1)(h) of the 2000 Act, insofar as it relates to works to the interior of the shed. There is no evidence to say that reliance cannot be placed on this provision due to the de-exemption provision of section 4(4) where an EIA is required.
5. There are doubts concerning the legality of the procedural letters leading to the issuing of the enforcement notice concerning the other two items. No warning letter was issued with respect to the external concrete access ramp from Shed A and the cessation of the use of Shed B for storage of waste metal and textiles and there is no evidence that urgent action required the enforcement notice to include such matters.

**STEPHEN DODD SC**
**The Law Library**
**2nd December 2020**

## APPENDIX 5: COPY OF BOREHOLE TEST RESULTS

ALS Life Sciences Ltd trading as ALS
Carrigeen Business Park, Clonmel, Co. Tipperary
Telephone: +353 (0) 52 617 8100

Report No: PRPI-259121223

Document No: EF0011

# CERTIFICATE OF ANALYSIS

| | | | |
|---|---|---|---|
| **Client** | **Premier Pigs**<br>Bulgan<br>Glynn<br>Co. Wexford | **Date Submitted** | 12/12/2023 |
| | | **Date Reported** | 15/12/2023 |
| | | **Order Number** | N/A |

**For the Attention of:** Kevin Riordan

**Sample Reception** 1 sample(s) received in good condition.

**Comments** N/A

Report Authorised by: Olwen Maher

Olwen Maher
Deputy Microbiology Manager

*Conditions:*
1. Results in this report relate only to the items tested
2. Reports may not be reproduced except in full without the approval of ALS Life Sciences Ltd
3. All queries regarding this report should be addressed to the Technical Manager at the above address
4. A * next to a method reference signifies that ALS Life Sciences Ltd is NOT INAB accredited for this method
5. Results reported as CFU/cm² are calculated based on information supplied by customer regarding area swabbed
6. SUBCON* indicates analysis subcontracted to approved subcontractors who do not hold accreditation for this test
7. SUBCON^ indicates analysis subcontracted to approved subcontractors who hold accreditation for this test
8. Where sampling is undertaken by ALS personnel, sampling activities are outside the scope of INAB accreditation
9. Dil next to a method reference indicates that a dilution of the water sample was undertaken during testing
10. Statement of conformity made against the result does not take into account the uncertainty of measurement associated with the method

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| | |
|---|---|
| Sample Type | Water |
| Client ID | Premier Pigs - Bord Bia testing - ZY374 11/12/2023 AM |
| Date Tested | 11/12/2023 |
| ALS ID | 5892170 |

| Test | Result | Unit | Method |
|---|---|---|---|
| Enterococci | 0 | CFU/100ml | SP 071 Based on ISO 7899-2 (2000) |
| Coliforms | 0 | MPN/100ml | SP 196 Based on ISO 9308-2 (2012) |
| Escherichia coli | 0 | MPN/100ml | SP 196 Based on ISO 9308-2 (2012) |
| Faecal coliforms | 0 | MPN/100ml | SP 200 based on the IDEXX Colilert 18 test kit. |

Report Authorised by: Olwen Maher

Olwen Maher
Deputy Microbiology Manager