

Wicklow County Council
Planning Department
Aras an Chontae
Wicklow
Co. Wicklow

AN BORD PLEANÁLA
LDG- _____
ABP- _____
15 MAR 2019
Fee: € 220 Type: Cheque
Time: 14-15 By: Council

15th March, 2019

Dear Sir/Madam,

Re: REFERRAL OF WICKLOW COUNTY COUNCIL DECISION TO AN BORD PLEANÁLA IN RELATION TO REFERENCE UNDER SECTION 5 OF THE PLANNING AND DEVELOPMENT ACTS 2000-2018 AND PLANNING AND DEVELOPMENT REGULATIONS 2001-2018 IN RELATION TO WORKS TO THE GARDEN AREA AT POWERSCOURT HOTEL, POWERSCOURT, CO. WICKLOW

Wicklow County Council Ref. 03/19

1.0 Introduction

1.1 Purpose of this reference

Sugarloaf Investment Property Holdings Ltd.¹ (the Applicant) has retained Tom Phillips + Associates², to make a referral of the decision of Wicklow County Council (WCC) to An Bord Pleanála (ABP) in relation to a Declaration made under Section 5 of the *Planning and Development Acts 2000-2019* ('the Acts') in respect of provision of works carried out in the garden area of Powerscourt Hotel, Powerscourt, Co. Wicklow, to create a landscaped amphitheatre space. These works were undertaken on a site which previously comprised a square hardstanding area which has existed since 2007/2008.

1.2 The Works for Which a Declaration is Sought

The Applicant requests that ABP make a Declaration as to whether or not the provision of the landscaped amphitheatre space at these lands constitutes exempted development under the provisions of the Acts and the *Planning and Development Regulations, 2001-2018* ('the Regulations').

The development, which provides a garden space only used in association with the main function of the hotel, is described in more detail in Section 3.0.

A cheque for €220 is included as the fee payable for referring a declaration to An Bord Pleanála.

¹ Heritage House, 23 St. Stephen's Green, Dublin 2

² Town Planning Consultants, 80 Harcourt Street, Dublin 2



2.0 Background Information

2.1 Site Location and Context

The lands to which the referral relates comprise a landscaped garden area to the south of Powerscourt Hotel. This area was cleared and landscaped as part of the overall development of the hotel, which was completed in 2007/2008 by the previous owner. A square hardstanding area (stated to be c. 1,250 sqm by WCC in correspondence on UD4891) was provided at this location and may have been used as a helipad for access to the hotel – Figure 2 illustrates this space in May 2008. The Applicant, who took over control of the hotel in 2013, can confirm that this hardstanding area has not been used as a helipad since they have taken charge of the hotel.

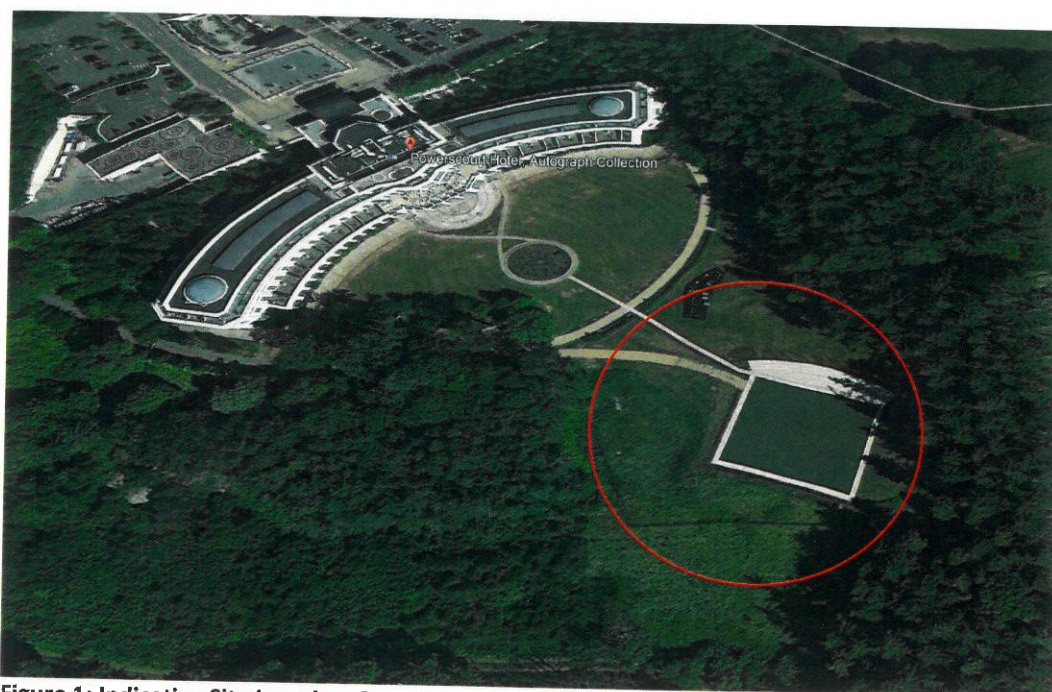


Figure 1: Indicative Site Location. Source: Google Earth 2019

This hardstanding area was of little use to the hotel and considered an eyesore when viewed from the building. The Applicant decided to upgrade the existing hardstanding area in 2017 and provide a new landscape feature, now referred to as the 'amphitheatre'. The owner carried out the works in good faith and did not consider that landscaping works carried out on private property, require planning permission. This is further discussed in Section 4.

It is also noted that the previous hardstanding space has been used for events associated with the hotel and that there is no intensification of the use of the hotel as a result of the changes carried out.

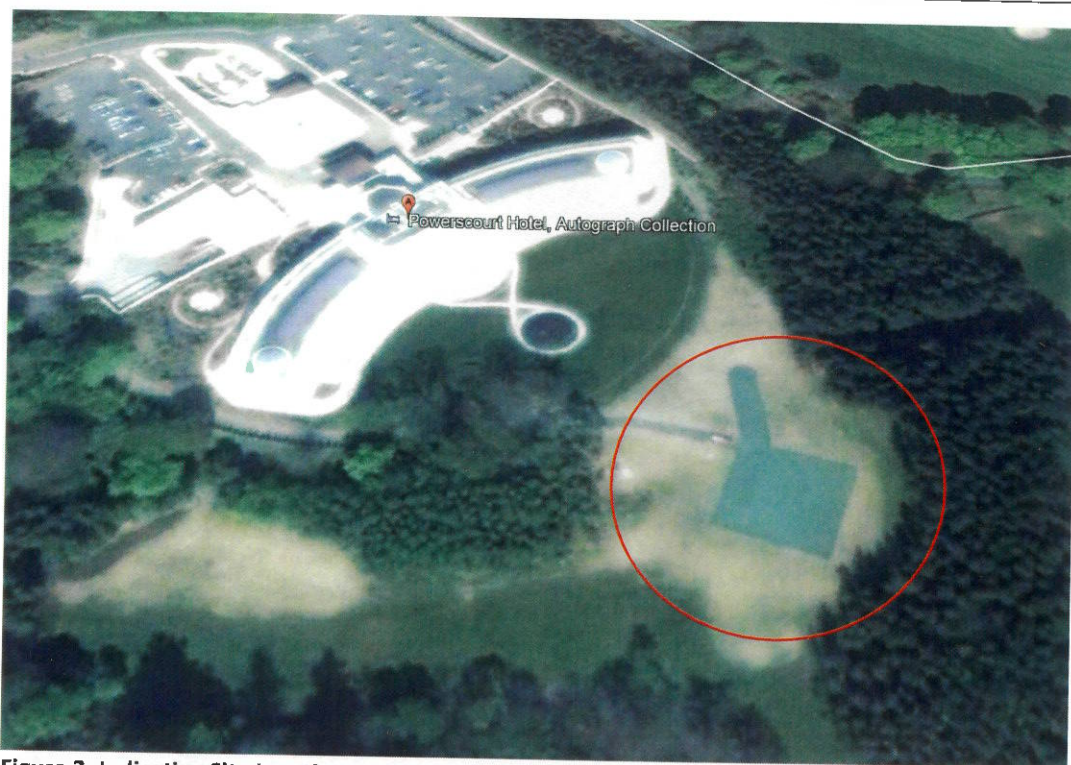


Figure 2: Indicative Site Location – Imagery Dated 06/05/2008. Source: Google Earth 2019

3.0 Description of Development

3.1 Details of the Works Carried Out

As outlined previously, the extended garden area and hardstanding area was constructed at the time of the completion of the overall hotel development in 2007/2008. The landscape works carried out to provide the 'amphitheatre' development included the provision of a stone terraced area to the north of the hardstanding, with planting along its boundaries (Illustrated in Figure 3). The hardstanding area was resurfaced to improve the overall look and quality of the space. No trees or planting were removed to facilitate these improvement works. These works provide for a private open space and ornamental garden now in-situ. This space is used for events associated with the hotel and is not used independently for other events.



Figure 3: Photo During Construction Works of Feature

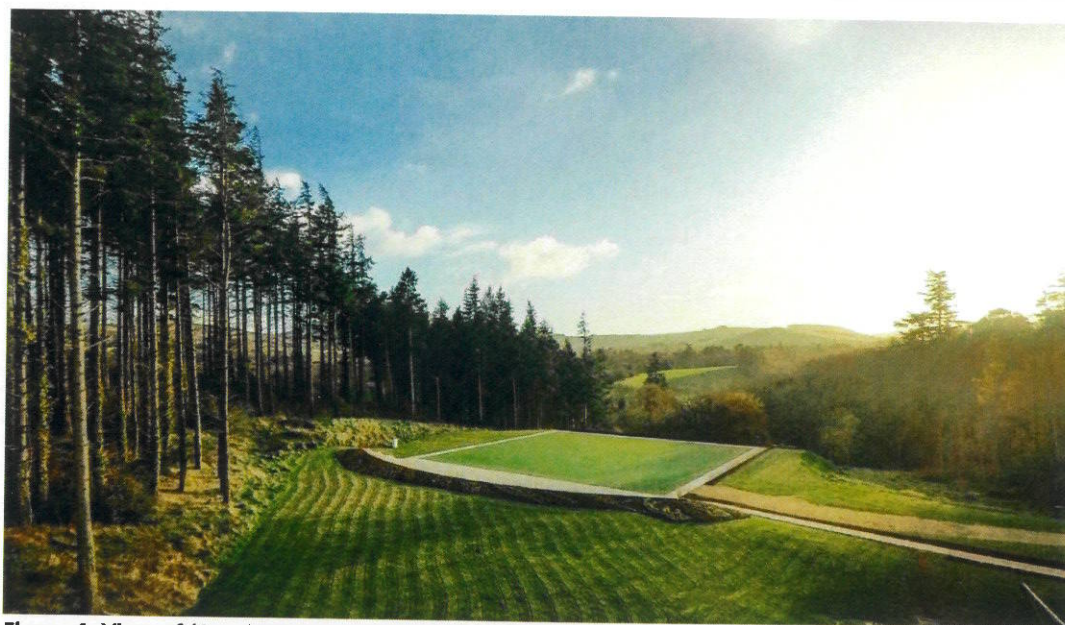


Figure 4: View of 'Amphitheatre' from Powerscourt Hotel

4.0 Compliance with Exempted Development Provisions

4.1 Legislative Context

Works is defined in the Act as follows

*"Works includes any act or question 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."*

Since the development involved the carrying out of works on the site, it clearly constitutes 'development'. The question is therefore whether the development would constitute 'exempted development'.

4.2 Development for amenity or recreational purposes

The works, as outlined in Section 3.0, comprise the provision of a landscaped space (comprising hard and soft landscaping features) in the grounds of Powerscourt Hotel. The works are considered to be exempt under *Schedule 2, Class 33(a)* of the Regulations. This states that:

Development consisting of the laying out and use of land-

- (a) As a park, private open space or ornamental garden,*
- (b) As a roadside shrine, or*
- (c) For athletics or sports (other than golf or pitch and putt or sports involving the use of motor vehicles, aircraft or firearms) where no charge is made for admission of the public to the land.*



The "Works" associated with the provision of landscaped space clearly comprise the laying out and use of land as private open space and an ornamental garden. This ornamental garden has been used in conjunction with events associated with the hotel where required. We submit therefore that the works carried out constitute development and are exempted development under Class 33(a) of the Regulations. There is no intensification of use associated with the works carried out.

The extended garden area or 'amphitheatre' is available for guests/patrons to use and facilitates events that are associated with the operation of the hotel development. An example of such is where a wedding is being held in the hotel, the space may be used for the wedding ceremony/reception, whilst the dinner/evening entertainment of the wedding would take place in the hotel ballroom. The space has also facilitated BBQ's and team building events in 2018 and was used in association with 12 No. events at the hotel over the year. We confirm that the garden area has not and will not be used to accommodate events such as concerts or open-air cinema screenings.

Furthermore, it is considered that the works are also exempted development under *Section 4(1)(h)* of the Acts, which relates to:

'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.'

The works comprise the improvement of the existing hardstanding area at Powerscourt Hotel. The external appearance has not changed to materially affect the structure and its appearance on the character of the structure and does not impact on neighbouring structures. In this regard, the works carried out are exempted development.

4.3 **Appropriate Assessment/Environmental Impact Assessment are Not required**

Section 4(4) of the Acts stipulates a further 'de-exemption' in circumstances where an Appropriate Assessment (AA) or an Environmental Impact Assessment (EIA) would be required in respect of development:

"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."

4.3.1 Appropriate Assessment

The development comprises landscaping works to an existing hardstanding and landscaped area in the grounds of Powerscourt Hotel. Having regard to the nature, scale and location of the site it is not considered that a requirement for Appropriate Assessment can arise in this instance.



4.3.2 Environmental Impact Assessment

The various classes and thresholds of development for which an Environmental Impact Assessment (EIA) is required are listed in Schedule 5 of the Regulations. Since the development relates to minor landscaping works within the grounds of Powerscourt Hotel, it is not a form of development which would require EIA, nor is it considered likely to have a 'significant effect on the environment'.

Having regard to the above, it is our professional planning opinion that the restrictions on exemption relating to AA and EIA as set out under the Acts are not applicable in respect of the development which is the subject of this section 5 referral.

5.0 **Commentary on Wicklow County Council Declaration (21st February 2019)**

WCC made a declaration on 21st February 2019 that *'The Planning Authority considers that works carried out to provide a landscaped space is development and is not exempted development'*. We strongly disagree with the declaration made by WCC and in particular the assessment carried out in the Planning Report (a copy of same is included as Appendix A). We outline below commentary in relation to the declaration made.

WCC states that *'the said development does not come within the scope of Section 4(1)(h) of the Planning and Development Act because the works have not been carried out to a structure'*. The works carried out subject to this referral relate to landscaping works to provide for a landscaped garden area including the provision of a stone terraced steps and associated planting. The previously existing hardstanding area was resurfaced to improve the overall look of the space.

Having regard to the Acts a structure means:

'any building, structure, excavation, on or other thing constructed or made on, in or under any land, or any part of a structure so defined, and –

(a) Where the context so admits, includes the land on, in or under which the structure is situate...'

It is clear therefore, that the works carried out to upgrade an existing hardstanding area within the grounds of Powerscourt Hotel and other associated landscaping works relate to works to a 'structure' and could also relate to works to the land where the structure is situated.

WCC also comment that the works involved the *'raising of levels and creating of a structure'* which are both incorrect. Levels have not been raised on site to create this landscape amphitheatre area and works to provide for the stone terrace area and planting were provided through reprofiling of the existing garden area. As highlighted in Section 4.2, the works carried out to provide for the landscaped garden area do not materially affect the external appearance of the structure, the character of the structure or neighbouring structures and therefore should be considered exempted development under Section 4(1)(h) of the Acts.

WCC state that:



'the helipad / amphitheatre structure has been constructed on lands that are outside of the permitted boundary of the Powerscourt Hotel.'

In the first instance, it is important to point out that the declaration relates to the works carried out to provide this landscaped space/amphitheatre on site in 2017. The works for the provision of the hardstanding area, referred to by WCC as a platform area/helipad (also referred to as 'new helipad' later in the WCC assessment), were carried out in 2007/2008 when the hotel was first constructed and is therefore in situ nearly 11 No. years. This space has always formed part of the grounds of the hotel since it opened.

Secondly, the landscaped garden is for the use of hotels guests and patrons and also to facilitates events associated with the operation of the hotel. In our opinion, the 'hotel' use does not solely relate to the physical building but also to the surrounding grounds. These lands are within the ownership of the Applicant and clearly associated with the hotel. In any event, the referral relates to the relevant development of a landscaped space and the location of same or the 'permitted boundary' as discussed has no relevance to this determination.

WCC state that there has been a:

'...material change of use of the lands from dense forest associated with the Powerscourt Estate to hotel use. The material change of use does not constitute exempted development.'

It is considered that 'dense forest' is not a use in itself and this characterisation of what was previously a wooded area to the south of the hotel has been greatly exaggerated. The removal of this wooded area, which occurred c. 11 No. years ago, does not constitute a change of use in our opinion and still provides for an area within the grounds of Powerscourt Hotel that can be enjoyed by guests.

WCC then go on to state that the development is not exempted development under Class 33 of the Regulations:

'...because the development does not consist of the laying out or use of the original lands.'

In this regard, we reiterate that Class 33 relates to '**Development consisting of the laying out and use of land**' and the interpretation of WCC is entirely misleading to refer to 'original lands' in their commentary. This has no relevance to the determination of this Referral and the inference by WCC that it does colours the entire assessment which is therefore inaccurate.

Again, to clarify the comments made by WCC in the 1st paragraph of the final page of assessment (Appendix A refers), the lands have not been raised to provide this area and the 'new helipad' or hardstanding area has been in situ for c. 11 No. years. It is also noted that Class 33(a) refers to development of land for use as a '*park, private open space or ornamental garden*'. WCC do not give consideration in their assessment to this area as a 'private open space', as highlighted in Section 4.2 above, and instead focus on the space as an 'ornamental garden'.

WCC provide an extremely narrow view in our opinion of what constitutes an ornamental garden as the space '*is not dedicated to the enjoyment of plants, greenery or natural lawn and there are no ornamental features*'. Indeed, as demonstrated in Figure 4, this space provides



for expansive views of the surrounding landscape and is considered to provide for the dedicated enjoyment of this natural amenity. The space also provides for planting along the edges of the terraced steps which will further improve the space as the plants grow over time. Ornamental gardens come in a wide variety of hard and soft landscaping forms and WCCs interpretation in this regard is not shared by the Applicant. Notwithstanding the above, the works to provide for this landscaped garden clearly constitute the laying out and use of lands as a private open space or ornamental garden.

WCC refer to Class 11 of the Regulations and consider that the provision of a terrace wall with a total height of 1.2m does not meet the requirements outlined under this exemption. In the first instance, this class of development relates to development within the curtilage of a house so should not be even considered in relation to the works being discussed. The works comprise of terraced steps as part of a landscape feature and planting arrangement of the space and as such are considered exempt in their own right. For clarity, no part of the works comprises a wall of 1.2m and each terraced step only relates to a structure of between c. 0.4m – 0.55m in height, which have been constructed further to the reprofiling of the garden area.

In the concluding paragraph of the WCC assessment, it is again stated that the lands have been raised and that infilling has taken place. This is incorrect and we are unsure as to why this claim is repeatedly made without any basis for same. Any drainage works provided are localised and minor in nature to ensure that the area is adequately drained and are considered to be ancillary works to the provision of this landscape space. The aforementioned issues do not de-exempt the works which have been undertaken.

It is submitted that the assessment provided by the Planning Authority is littered with inaccurate statements and has relied on information to inform the assessment that is not relative to the determination being made. The relevant development comprises the laying out of and use of land as a private open space or ornamental garden in accordance with Class 33(a) of the Acts.

6.0 Conclusion

In our professional opinion, the development comprises exempted development, with the works being exempt under *Class 33(a)* of the *Planning and Development Regulations 2001-2018* and under *Section 4(1)(h)* of the *Planning and Development Acts 2000-2018*.

We look forward to a positive determination of this case from An Bord Pleanála in the near future. In the meantime, if you require further information, please do not hesitate to contact me.

Stephen Barrett
Associate
Tom Phillips + Associates



Appendix A: Copy of Assessment and Decision of Wicklow County Council, dated 21st February 2019



Comhairle Contae Chill Mhantáin Wicklow County Council

Forbairt Pleanála agus Comhshaol
Planning Development and Environment

Áras An Chontae / County Buildings
Cill Mhantáin / Wicklow
Guthán / Tel: (0404) 20148
Faics / Fax: (0404) 69462
Rphost / Email: plandev@wicklowcoco.ie
Suíomh / Website: www.wicklow.ie

21st February 2019

Tom Phillips & Associates,
80 Harcourt Street
Dublin 3.

**RE: Declaration in accordance with Section 5
of the Planning & Development Acts 2000 – 2011**

I enclose herewith Declaration in accordance with Article 5 (2) (A) of the Planning & Development Act 2000 in respect of the following:

Exemption Ref. No: 03/19

Applicant: Sugarloaf Investments Property Holdings Ltd

Nature of Application: Works carried out to provide a landscaped space

Location: Powerscourt Hotel, Enniskerry

Where a Declaration is used under this Section any person issued with a Declaration under subsection (2) (a) may, on payment to An Bord Pleanála of such fee as may be prescribed, refer a declaration for review by the Board within four weeks of the date of the issuing of the declaration by the Local Authority.

Is mise, le meas,

**ADMINISTRATIVE OFFICER
PLANNING DEVELOPMENT & ENVIRONMENT**

Encl.

REG POST



Comhairle Contae Chill Mhantáin Wicklow County Council

**Forbairt Pleanála agus Comhshaol
Planning Development and Environment**

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DECLARATION IN ACCORDANCE WITH ARTICLE 5 (2) (A) OF THE PLANNING & DEVELOPMENT ACT 2000.

**Applicant: Sugarloaf Investment Property Holdings
Location: Powerscourt Hotel, Enniskerry**

DIRECTOR OF SERVICES ORDER NO. 275/19

A question has arisen as to whether or not works carried out to provide a landscaped space is or is not exempted development.

Having regard to:

- The details and drawings received with this Section 5 application (EX 03/19) on the 30th January 2019.
- Sections 2, 3 & 4 of the Planning & Development Act 2000 (as amended)
- Section 4 (1) (H) of the Planning & Development Act 2000 (as amended)
- Article 6, 9 & 10 of the Planning & Development Regulations 2001 (as amended)
- Class 33, 11 and 13 of the Planning & Development Regulations 2001 (as amended)
- Previous planning history.

Main Reasons with respect to Section 5 Declaration:

The said development does not come within the scope of Section 4(1)(h) of the Planning and Development Act because the works have not been carried out to a structure. 4(1)(h) relates to the carrying out of works to a structure. In this instance the works involved the construction of a platform area, ie. raising of levels and creating of a structure, and did not involve the carrying out of works to a pre-existing structure. The provisions of 4(1)(h) do not apply.

The helipad / amphitheatre structure has been constructed on lands that are outside of the permitted site boundary of the Powerscourt Hotel. There has been a material change of use of the lands from dense forest associated with the Powerscourt Estate to hotel use. This material change of use does not constitute exempted development.

The said development does not come within the scope of the exempted development provisions of class 33 of Part 1 of Schedule 2 because the development does not consist of the laying out or use of the original lands. The



lands have been raised and re-contoured. A new helipad / amphitheatre structure has been constructed that has been laid with hardstanding/ artificial grass material and terrace walls, paths and drainage have been constructed. Furthermore, the structure does not constitute an ornamental garden. The primary purpose of the structure is for the hosting of events. It is not dedicated to the enjoyment of plants, greenery or natural lawn and there are no ornamental features.

A terrace wall has been constructed. The works do not come within the scope of Class 11 because the total height of the wall is over 1.2m. It does not come within the scope of the conditions and limitations.

Lands have been raised / infilled and re-contoured. There is no exempted development provision to allow for this.

Surface water drainage works have been carried out, insufficient information has been submitted regarding these works, however, these works are ancillary to a structure which is not considered exempt development.

The Planning Authority considers that works carried out to provide a landscaped space is development and is not exempted development.

Signed: Siobhan O'Brien
ADMINISTRATIVE OFFICER
PLANNING DEVELOPMENT & ENVIRONMENT

Dated 21st day of February 2019