



An
Bord
Pleanála

Planning Appeal Form

Your details

1. Appellant's details (person making the appeal)

Your full details:

(a) Name

Lance O'Brien

(b) Address

Boherkyle, Goresbridge, Co. Kilkenny

Agent's details

2. Agent's details (if applicable)

If an agent is acting for you, please also provide their details below. If you are not using an agent, please write "Not applicable" below.

(a) Agent's name

DAVID SMYTH

(b) Agent's address

The Old Schoolhouse, Duninga, Goresbridge, Co.
Kilkenny

AN BORD PLEANÁLA
LDG- 057297 - 22
ABP- _____
16 SEP 2022 o.k.
Fee: € 270 Type: Cheque
Time: _____ By: Reg post

Postal address for letters

3. During the appeal we will post information and items to you or to your agent. For this appeal, who should we write to? (Please tick ✓ one box only.)

You (the appellant) at the address in Part 1

The agent at the address in Part 2

Details about the proposed development

4. Please provide details about the planning authority decision you wish to appeal. If you want, you can include a copy of the planning authority's decision as the appeal details.

(a) Planning authority

(for example: Ballytown City Council)

Kilkenny County Council

(b) Planning authority register reference number

(for example: 18/0123)

DEC710

(c) Location of proposed development

(for example: 1 Main Street, Baile Fearainn, Co Ballytown)

Boherkyle, Goresbridge, Co. Kilkenny

Appeal details

5. Please describe the grounds of your appeal (planning reasons and arguments). You can type or write them in the space below or you can attach them separately.

Ross O Shea, Planning Official for Kilkenny County Council carried out an inspection of the farm and farm buildings which are at the centre of a Section 5 Declaration which was sought from Kilkenny County Council in June and inspected the site in mid August 2022. The Planning Authority by a decision made on the 23/8/2022 held that ...'the proposed activities relating to a cider brewery constitute a change of use of development that is material having regard to Section 3(1) of the Planning and Development Act 2000 and which gives rise to planning and Environmental issues relating to a new activity such as traffic, odour, alcohol licensing, increased water usage, surface water/waste water management and health and safety etc that requires planning permission'... and ...the proposal contravenes article 9(1) (i) and (iii) of the Planning and Development Regulations 2001 because it constitutes a use of development that would be inconsistent with existing agricultural use specified in planning permission reference P05/1796 and would in combination with existing access design and available sightlines give rise to traffic intensification and hazard endangering public safety and obstruction of other road users'...

Kilkenny County Council via Section 5(3)(a) of the 2000 Act decided that ...'the construction/change of use of an agricultural farm building from an orchard machinery store to a cider brewery...requires planning permission.

The first issue that arises is the actual inspection. Ross O'Shea of Kilkenny County Council spent fewer than 20 minutes on site, and the principal who

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was engaged in laying a concrete apron only engaged with him for a few minutes.

If Mr O'Shea had enquired as he was obliged to do, per his 'findings', he would have noted the following:

1. The farm and buildings also house a commercial vehicle garage which caters for local motoring needs as well as agricultural machinery and campervan sales, repair and service. The site has hosted a commercial garage since 1937, and certainly since 1954 when the activity was intensified. And again in the 80s to 90s The slowdown of the campervan repair business has lessened the vehicular traffic, and the change of use from potato and other arable crop farming to an orchard more than 7 years ago, has not increased the traffic but has lessened it. No useful observation of traffic movements over the 20 minutes was taken, nor was an enquiry made of the principal, Mr Lance O'Brien as to the level of traffic movements on site. No traffic survey was undertaken by Kilkenny County Council. The cidery relies on the existing farm movement of apples, and is housed in the apple storage shed. No additional movements of vehicles are required as the proportion of apple juice derived from apple crushing processing is already factored into existing farm movements over the last 7 years, and the apples are moved from the orchard to the storage shed once a year at harvest time and from there a mere 4 meters away to the apple processing machinery therefore no on/off site movement occurs which would give rise to additional traffic movements worthy of consideration of planning. As for off site movements of finished product, these are

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few and far between due to the low production intensity of the cider project, which would amount to less than 2 vehicle movements per week/Month.

2. Odour, there is no odour from the process as the apple pulp is an animal feed and is immediately distributed and consumed by bovine animals to prevent spoilage. Water usage. There is no additional water usage as the product is pure juice based extracted from the apples. The cleaning of the extraction machinery is by steam and this is once a year at harvest time, 1 litre of water generates 1700 litres of steam. Steam is used for food hygiene and sanitation purposes worldwide.
3. Surface water/waste water. For apple juice, or cider production there is no issue arising of water usage resulting in waste water. The site has its own private well, and does not rely on public or group water supply, nor does it feed into an existing public or private waste water system. All surface water has been and is dealt with on site through a well constructed series of water chutes, water catchment, French drain and septic tank system. No increased impact is expended on water or waste water systems and a simple enquiry, which was not done, by the Planning Official, would have yielded these answers.
4. Alcohol licensing. It is not a function of the project to engage in the sale of alcohol from the premises, merely to apply for a Revenue Storekeepers licence in which to allow product to mature. An existing shed, used as a vehicle spray booth (the vehicle refinishing function of the site is being wound down) is being converted to a Revenue store replete with strong doors and camera system. A simple enquiry

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by the Planning Official would have yielded the information that the alcohol licence was merely for a small-scale store for the product and no vehicle movements, or off licence sales were being considered.

5. Health and safety. It is not a function of Kilkenny County Council to engage in health and safety planning, save and except within the building regulations and fire regulations. The building is already fitted with a fire door, is made of non combustible material etc. No enquiry was made of the principle Mr Lance O'Brien, nor was the proposed alcohol store entered into by the Official. The Orchard store has been in use for many years for the pressing and juice extraction of apples, and the machinery component takes up space fewer than 8 metres by 8 metres, even allowing for walkways and product storage. This is a very small scale production process to meet the needs of a 26 acre apple farm. This is not a Bulmers of Clonmel type project.

6. Existing agricultural use.

There are two interlinked issues which give support to the legitimacy of the apple shed, for planning purposes firstly is the change of use of the land from growing of arable crops to fruit growing, and inter alia, the need for buildings to house the fruit, and its associated machinery. It is of vital importance that circa 26 acres of fruit is connected to the land folio where the apple shed is.

Section 4(1)(a) of the 2000 Planning and Development Act (PDA) provides for exempted development in that it shall include

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'Development consisting of the use of any land for purposes of agriculture and development consisting of the use for that purpose of any building occupied together with the land so used'.

Section 2 of the 2000 PDA defines agriculture as:

'Horticulture, fruit growing, seed growing, dairy farming, the keeping and breeding of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its own use in the farming of land) the training of horses and the rearing of bloodstock, use of land as grazing land, meadow land, osier land, market gardens and nursery grounds'

So, as you can see from the above, fruit farming is clearly stipulated in law as an exempted development.

Environmental and Land use law by Yvonne Scannell 2006 states at page 95 ...'*The exemption for agricultural development is plainly a significant one in Ireland, and it should be noted that the exemption relates only to the use of land for agriculture and not the carrying out of works for those purposes. The words in Section 4(1)(a) must be construed as meaning a change of use to agricultural use as mere use per se is not a development. It would therefore appear that planning permission is not necessary for the change of use of any land to agricultural use (See Crowborough Parish Council v Secretary of State for the Environment 1981 JPL 281) or for the change of use of any buildings to agricultural use provided they are 'occupied together with the land so used' (North Warwickshire BC v Secretary of State for the Environment 1984 JPL 435)'*

So the attachment of the fruit farm (orchard) to the shed is of considerable planning importance.

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More exemptions for agricultural works are provided for in the 2001 Planning Regulations, Part 3 of Schedule 2, which fleshes out the exemptions granted pursuant to Section 4(1) of the 2000 Planning and Development Act

Of note is the Planning and Development Act 2000 Schedule 2, and Class 9.

...Works consisting of the provision of any store, barn, shed, glass-house or other structure, not being of a type specified in class 6, 7 or 8 of this Part of this Schedule, and having a gross floor space not exceeding 300 square metres'...

This is subject to a variety of caveats

1. No such structure shall be used for any purpose other than the purpose of agriculture or forestry but excluding the housing of animals or the storing of effluent. The orchard shed does not house animals.
2. The gross floor space of such structures together with any other such structures situated within the same farmyard complex or complex of such structures or within 100 metres of that complex shall not exceed 900 square metres gross floor space in aggregate. The Planning Official did not measure any of the existing sheds, nor take any measurements whatsoever.
3. No such structure shall be situated within 10 metres of any public road. The Orchard shed is located around 45 metres from a public roadway.
4. No such structure within 100 metres of any public road shall exceed 8 metres in height. The Orchard shed does not exceed this height, nor did the Planning Official take any measurements.

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5. No such structure shall be situated 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. The Orchard shed is situated as an addendum to a farm complex adjacent to the principals Mr lance O'Briens house.

6. No unpainted metal sheeting shall remain for roofing or on the external finish of the structure. The building is painted.

Based on the above, I am confident that the Orchard shed is planning compliant, as regards its purpose and its situation within the other farm buildings.

The next issue which arises is one of ancillary usage.

Again, I refer to the commentary of Yvonne Scannell in Environmental and Land Use Law, 2006 wherein she opines:

'There may be subordinate uses of land that are incidental to the main use. These subordinate uses are called 'ancillary' or incidental uses. Thus, for example, where part of an office is used for the storage of files, the use of the whole premises will be an office use with no storage element (Rehabilitation Institute v Dublin Corporation unreported High Court Barron J January 14 1988). An ancillary use is regarded as part of the primary use so that ending the primary use does not give rise to a material change of use (Carroll v Brushfield Ltd unreported High Court Lynch J October 9 1995) Not all uses are ancillary to main uses. There must be an interdependence and functional connection between the main use and ancillary use. The ancillary use must be of a kind ordinarily incidental to

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the main use. So for example, the erection of telephone antennae and ancillary equipment was held not to be ancillary to the use of premises as a public house (Esat Digiphone v South Dublin County Council 2002 3IR 585 2002 "ILRM 547). Neither was a helicopter landing pad for the shop owners helicopter on the roof of Harrods (Harrods v Secretary of State 2002 JPL 1258)

If an ancillary use becomes a main use or a separate use, by expansion or otherwise, planning permission may be required. In Dublin Corporation v Regan Advertising (1986 IR 171), premises in York Road, Dublin had been used for industrial purposes since 1938. A huge advertisement for the business being carried on in the business was painted on the facade of the premises in 1954 and repainted in 1972. In 1984, the owners made a contract with Regan advertising permitting them to use the facade of the premises for advertising unconnected with their business. The Corporation successfully sued under Section 27(1) of the 1976 Act to prevent this. The Supreme Court held that the use of the facade of the premises to advertise other businesses was a material change of use for which planning permission was required. An ancillary use had become the main use, so that there were two main uses of the premises when the rights to use the facade was rented to another business'...

The orchard store is used for the grading/processing apples from the orchard, storing the cultivating, planting, spraying and harvesting equipment. That an ancillary use of the apple shed is, and has been the sorting and pressing of apples to make apple juice, including its fermentation into a cider, perry or spirit, and that associated with this conversion to add value to your apple crop you have a variety of

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fermentation vessels, filters, conveyors, and bottling equipment. These process vessels take up very little room in the Orchard shed. There is a strong history of apple juice making and historically, the making of cider from orchards on the site, and surrounding areas going back several hundred years. The Principles father, Mr John O'Brien who is 84 and still an active farmer, and lives on site and has done since his birth can give a sworn affidavit as to cider brewing on the site prior to the inception of the 1963 Planning Act (1st October 1964) in the area over at least 70 years. It is argued that:

1. The change of use of the land from arable farming to fruit farming is exempted development withing the meaning of the Planning and Development Act 2000 (as amended)
2. The construction of the apple shed is also exempted development, as the shed is on the farm/orchard folio, and is surrounded by the very orchards it is meant to support. The apple shed is clearly provided for as exempted development under class 9 exemptions of the 2001 Planning Regulations.
3. The value conversion of the apple crop into apple juice, cider, perry or spirit is a natural progression of, and ancillary to your business as an apple farmer, farming his own orchards.
4. While a consideration for a planner on a material change of use hinges on the above factors, including intensification, the classical issue of 'two uses' does not arise, as the materiality of both fruit farming and its value conversion is inextricably intertwined by use of the principles own apple crop to make beverages.

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Notwithstanding the above, the fact that the operation is ancillary to, and inextricably linked with, on such a small scale and footprint within the farm and buildings, and as the Kilkenny County Council Planning Official did not make reasonable enquiries as to the history of the site, the production process's, the machinery used, the traffic movements, the water/waste water usage or alcohol licensing. In essence this is a small family farm project, housed within existing farm buildings, generating no more traffic than its previous agricultural usage, and quite possibly less.

Supporting material

6. If you wish you can include supporting materials with your appeal.

Supporting materials include:

- photographs,
- plans,
- surveys,
- drawings,
- digital videos or DVDs,
- technical guidance, or
- other supporting materials.

Acknowledgement from planning authority (third party appeals)

7. If you are making a third party appeal, you **must** include the acknowledgment document that the planning authority gave to you to confirm you made a submission to it.

Fee

8. You **must** make sure that the correct fee is included with your appeal. You can find out the correct fee to include in our Fees and Charges Guide on our website.

Oral hearing request

9. If you wish to request the Board to hold an oral hearing on your appeal, please tick the “yes, I wish to request an oral hearing” box below.

Please note you will have to pay an **additional non-refundable fee** of €50. You can find information on how to make this request on our website or by contacting us.

If you do not wish to request an oral hearing, please tick the “No, I do not wish to request an oral hearing” box.

Yes, I wish to request an oral hearing

No, I do not wish to request an oral hearing

NALA has awarded this document its Plain English Mark

Last updated: April 2019.

