



An  
Bord  
Pleanála

## Inspector's Report ABP-318469-23

### Question

- (1) Whether the laying out of land for aviation sports at Kilkenny Airfield between 1 October 1964 and 15th May 1994 is exempted development;
- (2) Whether the user of the lands for aviation sports at Kilkenny Airfield between 1 October 1964 and 15th May 1994 is exempted development;
- (3) Whether any intensification of use of lands for aviation sports at Kilkenny Airfield between 1 October 1964 and 15th May 1994 is exempted development.

### Location

Kilkenny Airfield, Airfield Road,  
Holdensrath, Kilkenny

### Declaration

Planning Authority	Kilkenny County Council
Planning Authority Reg. Ref.	DEC 769
Applicant for Declaration	Irish Skydiving Club GLG
Planning Authority Decision	No declaration

**Referral**

**Referred by**

Kilkenny County Council.

**Owner/ Occupier**

Skydive Ireland Limited.

**Date of Site Inspection**

16<sup>th</sup> of January 2025

**Inspector**

Angela Brereton

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## **1.0 Introduction**

This declaration was originally sought from Kilkenny County Council relative to a referral made to them by Irish Skydiving Club GLG, Kilkenny Airfield, Airfield Road, Holdensrath, Co. Kilkenny. The subject site has been the subject of numerous referrals questions including under RL3240, RL3331, RL3590 and also to a number of planning applications, enforcement and legal proceedings. In view of the complex planning history, the Council did not issue a declaration.

A declaration has been sought by Kilkenny County Council from An Bord Pleanála pursuant to Section 5(4) of the Planning and Development Act 2000, in respect of the three questions asked as noted below.

## **2.0 Site Location and Description**

The subject site is located in the rural townland of Holdensrath, Co. Kilkenny. The site is accessed from the bottom of a narrow rural cul-de-sac (LR 10073-9) that terminates at the entrance to the site. The site is c. 2.5 km to the west of Kilkenny City. Documentation on file states that Kilkenny Aerodrome occupies a site of c. 65 acres.

The site comprises of an airfield containing a grass landing strip, control tower/club house and three other buildings. There is a gravelled car parking area immediately inside the entrance. The control tower/club house is located to the east of the car parking area. The grass landing strip is located to the south of the control tower and runs in a roughly east/west direction.

The site was gated and locked on the day of the site visit. There is a grid in front of the gate and CCTV monitoring. There is a house located with access from the lane to the north of the site. There appeared to be no activities going on onsite. There is some directional signage from the public road to the site. Some small aircraft were seen parked on the site in the distance.

## **3.0 The Question**

1. Whether the laying out of land for aviation sports at Kilkenny airfield between 1<sup>st</sup> of October 1964 and 15<sup>th</sup> of May 1994 is exempted Development?

2. Whether the user of the lands for aviation sports at Kilkenny Airfield between 1<sup>st</sup> of October 1964 and 15<sup>th</sup> of May 1994 is exempted development?
3. Whether any intensification of user of lands for aviation sports at Kilkenny Airfield between the 1<sup>st</sup> of October 1964 and 15<sup>th</sup> of May 1994 is exempted development?

#### **4.0 Request to the Planning Authority**

A Request under Section 5 of the Planning and Development Act 2000, as amended was made to the Planning Authority by Irish Skydiving Club GLG with an address of Kilkenny Airfield, Airfield Road, Holdensrath, Co. Kilkenny on the 16<sup>th</sup> of October, 2023 and their Referral to the Planning Authority is summarised under the following headings:

##### **Background**

Kilkenny airfield was established in 1963, the extent of this remains unknown. It is the largest privately owned sport aviation airfield in the State comprising 26.30 hectares (65 acres) of land.

Between the appointed day of 1<sup>st</sup> of October 1964 and 15<sup>th</sup> of May 1994, the planning regulations exempted all laying out of the airfield lands and user of the airfield lands for aviation sport.

The laying out of the airfield lands during the said period included the construction of two runway strips comprising runway structures. One runway was decommissioned whilst the remaining and current runway structure was extended to 930m x 24m with a strip dimension of 1,050m x 80m.

The laying out of the lands includes an aircraft apron and parking area, airfield hangar and operational buildings and fuel storage and dispensing facilities and car parking area.

The Department of Power and Transport issued a licence for the airfield in 1965 and the airfield has remained continuously licensed by the State since then to now for private user. The licence issued by the relevant aviation authority does not permit commercial public transport.

### Use of Airfield Site

The airfield was principally used and intensified for aviation sport during the said period. All types and manner of sport aviation activity occurred at the airfield during the said period involving powered and non-powered aircraft – including light single and twin engine fixed wing aircraft, rotorcraft, microlights, parachutes and gliders, hot air ballooning and para- motoring.

### Financial Supports

Kilkenny County Council provided significant financial and other supports which contributed towards the laying out of lands and intensification of user of the lands between 1974 and 2007.

They provide details of Council Funding and note how it increased from 1975 to 1990.

Kilkenny County Council had a member of the locally elected councillors' site on the board of directors of Kilkenny Airport Limited since 1980 – an arrangement which remained in place for over 27 years.

The access road to the field is via the northern entrance off the Tulloran Road (Local Tertiary Road LT 10073-9). This access road was widened and improved by the Council to facilitate access to the airfield.

### Development Plan Policy

The Development Plan specifically supported the continued development of the airfield lands up to from 2002 to 2020. They provide quotes and note policies from the 2008-2014 DP in this regard.

### User Experience

Original flight logs show daily use of the airport facilities at Kilkenny Aerodrome. The established user of the airfield exceeded 10,000 aircraft movements annually during the said period. The nature of the flights in question included intensive and recurring take-off, landing and circling of aircraft in the vicinity of the airfield.

This is consistent with the user expected of a sport aviation facility such as Kilkenny airfield.

The airfield was home to various Kilkenny based aeroclub during the said period.

### Planning History

Various planning permissions were granted by the planning authority or the Board for the lands during the said period. Such development is consistent with the typical user of an airfield for sport aviation. Those permission are a matter of record (Ref. P/1/5312, Ref. 04/241, Ref.05/753, Ref. 06/1286).

Original Kilkenny Airport Limited director meeting minutes and AGM records support the above position.

In 2014, the former County Manager, accepted the legal opinion of Mr. Patrick Butler S.C. as supplied by David Byrnes on behalf of Skydive Ireland Limited. They quote from a letter from the planning authority dated 6<sup>th</sup> of May 2014.

The Board decided that airfields laid out and used for sport aviation during the said period is exempted development. They refer to Ref. 19-8-255 (Mount Lucas Airfield operated by the Irish Parachute Club Limited) and Ref. 677 (Newcastle Airfield).

The said exemptions were granted pursuant to section 4 of the 1963 Act and Articles 10(1) and 11(1) of the 1977 Regulations (S.I. 65 of 1977). They also refer to Article 12 of the 1994 Regulations.

It is stated that the Applicant will seek to be furnished with all documents and records from Kilkenny County Council which are relevant to this matter. Also, that supporting documentation will be forwarded in due course and on request.

### Legal Interest

The Applicant is described as the Occupier of the site of ha 26.30 hectares.

## **5.0 Planning Authority – Referral to the Board**

Kilkenny County Council did not make a Declaration on the questions raised. In accordance with Section 5(4) of the Planning and Development Act 2000 (as amended) on the 15<sup>th</sup> of November 2023, they referred the three referral questions for the purpose of a determination of exempt development to the Board for its consideration and determination.

The Council included a copy of the Referral from Irish Skydiving Club GLG as received by Kilkenny County Council. They referred to the history of declarations



requested on Kilkenny Airfield. They also referred to previous requests for a declaration including the Council's submission to same and referenced the following:

- Dec 330 – ABP RL 3331
- Dec 436 – ABP RL 3590
- Dec 336 - Referred to ABP by KCC
- Dec 341 – ABP RL. 3240

They also advised to see Irish Skydiving Club vs. ABP – Neutral Citation (2016 IEHC 448), Docket No. (2015 No. 170JR) – Judicial review of the decision of An Bord Pleanála made on a referral by Kilkenny County Council under S. 5 of the Act by which the Board determined that the use by the applicant of Kilkenny Airfield for sponsored parachute jumping was a development and not an exempted development.

## 6.0 Planning History

### Planning Application History

**Reg. Ref. 11/179** - Planning permission refused by the planning authority for the retention for a period of 10 years of a metal storage container used as a club room for the Recreational Flying Club. The structure which was located to the north of the control tower on site was subsequently removed. Two reasons for refusal were stated by the planning authority, Briefly, these reasons related to (1) consolidation and intensification of existing unauthorised development and (2) wastewater treatment and disposal.

**Reg. Ref. 11/180** - Planning permission refused by the planning authority for the retention for a period of 10 years of a portacabin used as a club room for the Recreational Flying Club. The structure which was located to the north of the control tower on site was subsequently removed. Two reasons for refusal were stated by the planning authority, Briefly, these reasons related to (1) consolidation and intensification of existing unauthorised development and (2) wastewater treatment and disposal.

**Reg. Ref. 11/180** - Planning permission refused by the planning authority for the retention for a period of 10 years of a portacabin used as a club room for the Recreational Flying Club. The structure which was located to the north of the control tower on site was subsequently removed. Two reasons for refusal were stated by the planning authority, Briefly, these reasons related to (1) consolidation and intensification of existing unauthorised development and (2) wastewater treatment and disposal.

**Reg. Ref. 06/1286** – Planning permission granted by the planning authority to Kilkenny Airport Limited per Order dated 20th, September 2006 for the erection of a hangar for the storage of an aircraft

**Appeal No.10.LV.2590** - The Board refused Reichard Cass of Holdenrath, Co. Kilkenny leave to appeal the planning authority decision under Reg. Ref. 06/1286.

**Reg. Ref. 11/520** – Planning permission granted by the planning authority for an extension of the duration of the planning permission granted under Reg. Ref. 06/1286.

**Reg. Ref. 05/753:** - Planning permission granted by the planning authority to M Breen, D. Bowe, D. Carr and T. Toner for a single storey light-weight structure for the storage of aircraft. Condition No. 3 attached to this grant of planning permission limited the period of the permission to 7 years. The structure was then to be removed unless a subsequent grant of planning permission had been obtained.

**Reg. Ref. 04/241** – Outline planning permission granted by the planning authority to Kilkenny Airport Limited for a single storey extension to the existing club house/control tower building. [It appears that this development did not proceed]

**Appeal No. 10.LV.2276** – The Board refused Richard Cass, Holdenrath, Co. Kilkenny leave to appeal the planning authority decision under Reg. Ref. 04/241.

**Reg. Ref. 11/5312** – Planning permission was granted by the planning authority per Order dated 20th, May 1976 for the construction of a reception area and lookout tower at Holdenrath, Co. Kilkenny.

**Enforcement:**

**ENF 10135:** An Enforcement Notice (dated 9th, March 2012) was issued relating to an unauthorised portacabin style structure and timber decking in the confines of

Kilkenny Airport. It was served on Tandem Skydive Club. The planning authority subsequently determined that the Notice had been complied with.

**ENF 12051:** An Enforcement Notice (dated 22nd, May 2012) was issued seeking the cessation of the unauthorised commercial skydiving activity related to Freefall Ireland Skydive Centre Limited T/A Tandem Skydive Kilkenny. The planning authority subsequently determined that the Notice had been complied with.

**ENF 14036:** - Enforcement case concerning a number of complaints received by the planning authority in May 2014 relating to the use of the airfield for intensive commercial skydiving.

**Other Sites:**

**Ref. 27.RF.677** – The Board decided per Order dated 6 th, July 1994 that the laying out and use of lands at Leamore Upper, Newcastle, Co. Wicklow is exempted development.

## **7.0 Policy Context**

### **7.1. Kilkenny City and County Development Plan 2021 – 2027**

This is now the pertinent plan and was adopted in September 2021 and subsequently came into effect on the 15<sup>th</sup> of October 2021.

Volume 1 provides the County Written Statement and Maps

Volume 2 – the City Written Statement and Maps.

As shown on the Land Use Zoning Map the site is outside of the City boundaries.

Volume 1 – County

*Chapter 12 – Movement and Mobility.*

*Section 12.9 refers to Airports: The Council recognises the importance of air travel in improving the attractiveness of the county for industrial, commercial and tourism development. The nearest airport to Kilkenny is the Waterford Airport, south of Waterford City centre. The Council supports the development of Waterford Airport as an important regional transport asset and the return of scheduled passenger services to and associated investment in Infrastructure.*

### Kilkenny Airfield

*There is a privately-owned public use airfield located three miles to the west of Kilkenny City.*

## **7.2. Natural Heritage Designations**

The subject site is located c. 3km from the River Barrow and River Nore Special Area of Conservation (SAC) (Site Code 002162).

The site of the proposed development is located c. 3km from the River Nore Special Protection Area (SAC) (Site Code 004233).

## **8.0 Owner/occupier's response - Submission to the Board**

While note has been made of the Referral made to the Council above, and their subsequent Referral of such to the Board, regard is also had to the subsequent detailed submission by Skydive Ireland Ltd made to the Board, which provides detailed information relevant to the site and its planning history. This is summarised under the headings below:

### Owner/Occupier

- In 2014, Skydive Ireland Ltd acquired and is the owner within the meaning of S.2 of the Planning and Development Act 2000 of the lands comprising Kilkenny Airfield.
- Irish Skydiving Club CLG is an occupier. They are also the party that made the original referral to the Council of the three questions subsequently referred to the Board.
- They note that for the avoidance of any doubt, Skydive Ireland Ltd and Irish Skydiving Club CLG are entirely independent, separate, unconnected and distinct legal entities.
- They refer to an adjoining landholder to the lands comprising Kilkenny Airfield who has participated in matters coming before the Board in respect to the airfield. They state that good neighbourly relations now exist between the parties.

## Planning Enforcement

- They provide details of previous planning enforcement notices. Noting that by letter dated 6<sup>th</sup> of May 2014 the Council, confirmed that *“no further enforcement will issue with regard to the use of (Kilkenny Airfield) as an airfield.”* They provide details of this.
- The binding decision made is immune from challenge in the High Court by virtue and operation of s. 50(2) of the PDA 2000, (see *Krikke v Barranafaddock Sustainable Electricity Ltd.* (2023 - ILRM 81).
- The right to public participation has not been compromised and/or there is no right of public participation in respect to a decision to issue a planning enforcement notice.
- The enforcement notices dated 22<sup>nd</sup> of May 2017 are the subject of active judicial review proceedings (*David Byrnes and Skydive Ireland Ltd. – v – Kilkenny County Council* Record No. 2017/580JR). They refer to referral ABP10. RL3240.
- They submit that in deciding to issue impugned enforcement notices, the Council clearly did not see the relevant considerations.
- They note the three questions the subject of the present matter (specifically covering a period of 30 years) referred on the 15<sup>th</sup> of November 2023 and a single question referred on the 6<sup>th</sup> of January 2015 (ABP 10.RL.3331) and decided by the Board on the 24<sup>th</sup> of October 2019.
- They refer to a number of legal cases relevant to enforcement. They note the Council’s role regarding enforcement. Also, that the Board has no function whatsoever in a criminal prosecution and a section 5 declaration issued by the Board is not admissible evidence in a criminal prosecution.

## Limitation Period

- Under S. 157(4)(a) of the PDA 2000, the outer limitation period of 7 years from the *date of commencement* of the alleged unauthorised development at Kilkenny Airfield has expired. Thus, the initiation of criminal proceedings under Part VIII of the PDA 2000 is statute barred.

- No proceedings under Section 160 of the PDA have ever been taken against Kilkenny Airfield.
- The outer limitation period of 5 years is applicable under the PDA 1963 and is also well expired.
- They deny any allegation concerning unauthorised development at Kilkenny Airfield.

#### Three Questions raised

- The three specific questions presently before the Board concern the question of exempted development for the period commencing 1<sup>st</sup> of October and ending on the 15<sup>th</sup> of May 1994 as referred to the Board by Kilkenny Council in purported pursuance of s.5 PDA 2000.
- This is the first time these three specific questions have been referred to the Board. It is requested that these three questions be reformulated by substituting *“for aviation amenity sport and/or recreation”* for *“aviation sport”*, *having regard to the applicable exempted class of development under the 1963 Regulations pertaining to the present matter.*
- Kilkenny Airfield has existed from around 1963 to 2023 – spanning 60 years. The period in the present referral is confined to 1964 to 1994.

#### Preliminary issue

- Section 5 PDA 2000 has been expressly confined to the meaning development or exempted development under the PDA 2000. It is unclear what (if any) jurisdiction under s.5 PDA 2000 exists to determine the three questions that have been referred to the Board by the Council. If the Oireachtas intended for the Board to make declarations under s. 5 PDA 2000 concerning development or exempted development occurring within the meaning of the PDA 1963, it would have expressly stated so.
- Development or exempted development occurring prior to the PDA 2000 is governed by the PDA 1963. Section 265 of the PDA 2000 governs the continuity of the PDA 1963 and the 1963 Regulations and the validity of anything done thereunder at Kilkenny Airfield.

- There are no transitional provisions contained in the PDA 2000 providing jurisdiction for the Board to consider and determine the present referral under s. 5(4) PDA 2000 concerning matters which in fact and in law are required to be determined within the meaning of development or exempted development under the PDA 1963.
- They refer to a Supreme Court decision (*Krikke v Barranafaddock Sustainable Electricity Ltd*). The law on the jurisdiction and operation of Section 5, it now applies to the within matters, was recalibrated by that decision.
- They provide details on the Scope of the Section 5 Jurisdiction which are discussed in the context of the Assessment below.

#### Inadequate Referral

- They consider that the information submitted by Kilkenny County Council appears to have submitted little more than the copy of the referral to the Council by Irish Skydiving Club CLG. That in this regard the Council owes a statutory duty of candour to the Board for which it is in breach.
- They reference a High Court case relevant to compliance with the mandatory provisions of s. 127(1) of the PDA 2000, is a question of fact for the Courts (and not for the Board) to determine in every case.

#### Irrelevant Consideration

- They note that the Council has requested the Board to “*consider requests for a declaration including the Council’s submissions to same*”, relevant to the following:
  - ABP 10. RL3240 (14<sup>th</sup> of January 2015)
  - ABP 10. RL3331 (24<sup>th</sup> of January 2019)
  - ABP RL10. RL3590 (22<sup>nd</sup> of October 2019).
- Those matters are *functus officio* the Board and are materially distinct and separate to the three questions now pending before the Board as a matter of fact and/or law.

- Kilkenny County Council has also requested the Board to consider “Dec 336 – referred to ABP by KCC”. They have not found any details of this and searches conducted on the website operated by the Board returned null.

Strictly without prejudice to the foregoing

- The Board has not provided them with a copy of all documents in respect of the foregoing matters and this should occur on notice if such matters (which is denied) are to be considered relevant by the Board.
- They refer to the narrow scope of the jurisdiction under s.5 and in consideration of the statutory meaning of ‘development’, ‘exempted development’, ‘structure’ etc. Also, to intensification of user for amenity, sport and recreation aviation and ancillary activities at Kilkenny Airfield from 1<sup>st</sup> of October 1964 to 15<sup>th</sup> of May 1994.
- To the lawful status of Kilkenny Airfield to the appointed day.
- To planning permissions granted after the appointed day.
- The planning enforcement history and allegations thereto for the period in question.
- They note that there are no planning conditions limiting or curtailing the user or extent or frequency of Kilkenny Airfield.
- Aircraft noise and in particular the noise emitted by aircraft when in flight.
- The manner or type of aerial amenity, sporting and recreational activities that took place at Kilkenny Airfield.
- There are no conditions limiting the model or type of light aircraft utilised at Kilkenny Airfield.
- Flight by aircraft, noting that navigation by aircraft and the nature thereof is not subject to the planning code.
- Alleged breach of privacy rights, property rights as third party issues.
- The principal users of Kilkenny Airfield for the period in question were non-profit clubs.



### Validity and continuity of exempted development

- Since s. 265 of the PDA 2000 governs the continuity of the PDA 1963 and the 1963 Regulations and the validity of anything done thereunder at Kilkenny Airfield, then the PDA 1963 (and not the PDA 2000) is the applicable or principal law for the three questions the subject of this matter and the period in question dating from 1964 to 1994.
- They refer to what they consider to be relevant articles of the 1963 Regulations, including:
  - Article 4 and Class 21(c) of Part 1 of S.I No. 236/1964
  - Article 11 and Class 30(c) of Part 1 of S.I.86/1994
  - Article 4 and Class 14 of Part IV of S.I No. 236/1964.
- The transitional provision under the 1963 Regulations means that the exempted development at Kilkenny Airfield between the 1<sup>st</sup> of October 1964 and 1<sup>st</sup> of May 1994 shall continue in force and have effect.
- The club have used the light aircraft at Kilkenny Airfield principally for social amenity, sport and recreation aviation activities and ancillary user for the period in question and the general public were always admitted to Kilkenny Airfield at no charge.
- They refer to S.I No. 600/2001 Planning and Development Regulations 2001 and to Part III which governs Exempted Development. Also, to the definition of 'aerodrome'.

### Section 5 Precedents

- They note that at par 131 of Krikke v Barranafaddock Sustainable Electricity Ltd the Supreme Court alluded to and recognised the precedential operation of declarations made under s.5 of the PDA 1963 and PDA 2000.
- That the Board has previously and consistently declared that the laying out of lands and the user intensification of lands in a number of comparable airfields for amenity, sport, recreational use etc are exempted development pursuant to each or either of the above class of development (and in particular Class 26(d) of Part 1 of the Third Schedule to S.I No. 65/1977.

- They reference and discuss a number of separate cases to include:
  - ABP Ref 19.8.255
  - ABP Ref 19.8.422
  - ABP 27 RF. 677 (6<sup>th</sup> of July 1994)
  - ABP PL19.215675
  - ABP 09.RF.0889

#### Meaning of Exempted Development

- They note that the PDA 2000 repealed and replaced the 1963 Act. They also note the general requirement to obtain planning permission was introduced by the Local Government Planning and Development Act 1963 as amended and the Regulations made thereunder (1963 Regulations).
- They refer to the meaning of development and to exempted development as introduced by the 1963 Act and Regulations.

#### Planning History

- They note that Kilkenny Airfield comprises 65 acres. Noting that the airfield unquestionably benefits from a combination of pre-1964 status, exempted development status of planning permissions granted and its status in planning terms is therefore regularised.
- They provide that as a matter of principle, authorised development is synonymous with pre-1964 development, exempted development and the grant of permission.
- They note that permissions granted in respect to Kilkenny Airfield, objectively construed, are consistent with the nature and character of the airfield being development for amenity, sport and recreation. That this is specifically reflected in the County Development Plan.
- They provide a list of permissions granted in respect to structures and works carried out at the airfield from 1976 to 2011. Also making note of some refusals.

### Development Plan

- They note that Kilkenny Airfield was specifically referred to and/or supported in the Kilkenny CDP since 1967 and they provide details of such from various Development Plans up to and including the 2014 to 2020 CDP.
- They submit that the Development Plans acknowledges Kilkenny Airfield as a leisure (to include sporting) recreation, social and community amenity for public use and hence this is evidence of it coming within the meaning of exempted development in respect to change of user.

### Intensification of user

- They provide that at no stage when granting permission (whether between 1964 and 1994 or at any time thereafter) has the Board or the Council ever limited or altered the nature and extent of or conditioned out the class of exempted development in respect to amenity, sport and recreation air activities by the imposition of planning conditions.
- They note that a s. 5 jurisdiction cannot be used to retrospectively invent a quasi-condition which have never existed.
- They provide quotes from a number of legal cases, these include regard to the issue of intensification of user and also material change of use and include a discussion of the following:
  - Weston Ltd v An Bord Pleanala (2010) IEHC 255 Charleton J (2010 IEHC 255 Charleton J)
  - Butler v Dublin Corporation (1999) 1 IR 565 (at 593)
  - Lanigan v Barry (2016) IR 656
  - Galway County Council v Lackagh Rock Ltd (1985) I.R 120.
  - Dublin County Council v Carthy Builders Ltd (1987) I.R 355
  - Cork County Council v Slattery Pre Cast Concrete LTD (2008) IEHC 291

### Facts of Kilkenny Airfield 1964 -1994

- They note that Kilkenny Airfield was principally used for social amenity, sport and recreational activities and other user activities between 1<sup>st</sup> of October

1964 and 15<sup>th</sup> of May 1994 to include all manner of recreational aviation activities and provide details of these.

- They provide a history of the ownership of Kilkenny Airfield.
- The unincorporated Kilkenny Flying Club was formed in the 1970's and it incorporated in February 1971. It was dissolved in June 1994 and was the main aviation sports club based at Kilkenny Airfield at that time.
- They note details of the usage of the Airfield from the 1960's to 1994. That the airfield has also been the permanent or temporary home to numerous sporting aviation clubs from 1971 and they provide a list of such.
- Subsequent to 15<sup>th</sup> of May 1994, sporting and recreational organisations continued to use Kilkenny Airfield including Recreational Flying Club Ltd, Irish Aero Sports Flying Club and Freefall Ireland Skydive Centre and the Irish Skydiving Club CLG.
- That Kilkenny Airfield has always had an east/west runway, which was extended in 1977 to a length of 914m.
- That it has facilitated tens of thousands of flight movements (i.e. aircraft movements in either a take-off and landing) for amenity sport and recreation. Non-powered parachutes/aerofoil is a form of aircraft that land but which do not take-off.
- Available records (to include airfield, aircraft and pilot logbooks) show that Kilkenny Airfield was used daily for amenity sport and recreation aviation and uses ancillary thereto between 1<sup>st</sup> of October 1964 and 15<sup>th</sup> of May 1994.
- They refer to sworn Affidavits regarding the laying out and usage of the airfield.
- Records show that the national gliding and other aero championships were hosted at Kilkenny Airfield on several occasions between 1970's to the 1990's.
- They provide details of minutes of various meeting including AGM's held by directors of Kilkenny Airport Ltd in the 1970's and 1980's.

- Also relative to newspaper articles over the years relative to the use and the popularity of the airfield in the Kilkenny People.
- They provide details of the legal opinion dated 9<sup>th</sup> of April 2014 of Mr Patrick Butler SC, obtained on behalf of Skydive Ireland Limited. This is in regard to the continuous use of the airfield from: *“at least 1959 through the 1970’s into the 1980’s the 1990’s and on up to 2010”*.
- Also, to legal advice given to Kilkenny County Council stating that there is: *“a strong likelihood that the layout out of the airfield was carried out prior to the 1<sup>st</sup> of October 1964.*
- They provide that the number of flights increased considerably between 1964 and 1994 from several hundred to several thousand flights. Noting details of the nature of these flights for amenity, sport and recreation.
- The principal user of the airfield has always been for amenity, sport and recreation activities.
- That records indicate that Kilkenny Airfield was licenced by the Department of Transport and Power on the 30<sup>th</sup> of April 1965 and that it was continuously licenced for the period in question.
- They provide details relative to permissions granted for structures in the Airfield by Kilkenny County Council in the 1970’s. This includes a look out tower.
- An existing farm building was converted in the 1960’s to a hanger for light aircraft. Noting that an aircraft hanger was erected for amenity, sport and recreational purpose and that this benefits from exempted development.
- They provided details of the number of light aircraft stationed at the airfield at any one time between 1964 and 1994.
- They provide that there is ample space for the outdoor parking of up to 200 aircraft light aircraft at the airfield. Noting that this capacity of the airfield, therefore, in planning terms is a relevant consideration as to the authorised planning status of the airfield.

- They submit that the Council was aware of this capacity as part of the nature and capacity of the airfield when it granted permission for the clubhouse/lookout tower in the mid 1970's and did not impose conditions limiting the scale or extent of the usage.
- Planning conditions were not and could not be imposed on permissions granted between 1964 and 1994 that would purport to limit the nature and extent of the user of Kilkenny airfield for amenity, sport and recreation since such user was exempted by the 1963 Regulations.
- Post 1994 permission and outline permission were granted by the Council and/or the Board for structures that are used for amenity, sport and recreational aviation activities. This is consistent with the continued nature and character of the airfield for amenity, sport and recreation for the period in question and also beyond the period in question.
- In granting these permissions the intensification of user from 1964 to 1994 was considered (and was required lawfully to be considered for the proper planning and sustainable development of the area) and was deemed lawfully regularised – in a manner similar to the permission granted (as they refer to) at Birr Airfield.
- They refer to *Weston v An Bord Pleanála* relative to aviation regulation. They provide that there is no evidence which shows that Kilkenny Airfield ever operated as or was deemed by the aviation regulator to be a Code 2 runway.
- Kilkenny Airfield held a private aerodrome licence and never a public licence. The latter is a mandatory aviation regulatory requirement to operate commercial flights. There was never any commercial transport aircraft stationed at Kilkenny Airfield for the period in question.
- That the Council has recognised the value of the Airfield as a local amenity by providing significant funding of public monies between 1974 and 1994. That they continued to provide significant funding for the airfield operating and development costs up until the last documented payment in 2007. They provide some details of funding and have regard to records.

- That records show that the Council was involved in the extension of the runway and the carrying out of drainage works in the 1970's and 1980's. Also the continued drainage works as is consistent with the nature of a grass surface airfield, which constitute exempted works.
- They note that the access road to Kilkenny Airfield is from the northern entrance off the Tulloran Road (Local Tertiary Road LT 10073-9). That this access road was constructed, widened and maintained by the Council to facilitate traffic to access the airfield. That it has been continuously improved and maintained by the Council. That a local landowner donated the lands of the purpose of this road.
- In the early 1980's there was an aspiration to transform Kilkenny Airfield to become a regional airport that would service the Southwest Region. They provide details and note that such aspirations were never realised as Waterford Airport is now the Regional Airport.
- From 1964 to 1994 (and beyond), the concept of Kilkenny Airfield being anything other than a facility principally for amenity, sport and recreation would be unsustainable.

#### Oral Hearing

- They provide that the facts underpinning these matters are crucial to the proper and lawful resolution of this matter. To support their case they refer to legal cases, where previous oral hearings had been carried out.
- They provide that a dispute concerning the facts, circumstances and context of matters material to each or either of the three questions the subject of the within matter warrant an oral hearing. That this would be the only fair and adequate meaning of resolving any such dispute.
- That any refusal to this request should be accompanied by lawful reasons.
- That the Board, sitting as a first tribunal of fact in the present matter, must establish all relevant facts from the admissible evidence. Primary facts must be established based on admissible evidence, and inference to be drawn from such facts is a question of law.

- They refer to several legal cases and conclude that Skydive Ireland Ltd and its director reserve all of their rights and entitlements.

## 9.0 Statutory Provisions

### 9.1. Planning and Development Act, 2000

**Section 2(1)** (Interpretation) states:

‘In this Act, except where the context otherwise requires-

‘works’ includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.....’

‘structure’ means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined.

“unauthorised development” means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use;

“unauthorised structure” means a structure other than—

(a) a structure which was in existence on 1 October 1964, or

(b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34 or 37G of this Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act);

**Section 3 (1)** states: ‘In this Act, ‘development’ means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.’

**Section 4(4)** states: Notwithstanding.....any regulations under subsection 2, development shall not be exempted development if an environmental impact assessment or appropriate assessment of the development is required.

**Section 5** – Declaration and referral on development and exempted development.



**Section 138 (1)(b)** states: The Board shall have an absolute discretion to dismiss an appeal or referral where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to (i) The nature of the appeal (including any question in the Board's opinion is raised by the appeal or referral), or (ii) .....

## **Part XIX Commencement, Repeals, and Continuance**

### **Repeals**

**263.**—In this Part, “repealed enactments” means the enactments specified in column (2) of the Sixth Schedule.

**264.**—The enactments specified in *column (2)* of the *Sixth Schedule* are hereby repealed to the extent specified in *column (3)* of that Schedule.

### **Continuity of repealed enactments**

**265** – (a) Nothing in this Act shall affect the validity of anything done under the Local Government (Planning and Development) Acts, 1963 to 1999, or under any regulations made under those Acts.

### **Sixth Schedule**

#### **Enactments Repealed** – The list includes:

No.28 of 1963 – Local Government (Planning and Development) Act, 1963 – The whole Act.

No. 20 of 1976 – Local Government (Planning and Development) Act, 1976 – The whole Act.

## **9.2. Planning and Development Regulations, 2001**

**Article 5(1)** of the Regulations includes the following definitions for the purposes of interpretation in respect of exempted development provisions:

“aerodrome” means any definite and limited area (including water) intended to be used, either wholly or in part, for or in connection with the landing or departing of aircraft.

“airport” means an area of land comprising an aerodrome and any buildings, roads and car parks connected to the aerodrome and used by the airport authority in connection with the operation thereof.

“airport operational building” means a building other than a hotel, required in connection with the movement or maintenance of aircraft, or with the embarking, disembarking, loading, discharge or transport of passengers, livestock or goods at the airport.

#### **Article 6(1) Exempted Development**

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

#### **Article 9 Restrictions on exemption.**

#### **Schedule 2 Part 1 *Exempted Development – General***

### **9.3. Case Law**

The Submission made by the owner of the site, Skydive Ireland Ltd (not the Referrer) refers to a number of legal cases and provides a discussion of such in support of the details they have given. These include regard to the following:

- Krikke v Barranafaddock Sustainable Electricity Ltd. (2023). IILRM 81 (Supreme Court) neutral citation [2022] IESC 421
- David Byrnes and Skydive Ireland Ltd v Kilkenny County Council Record No. 2017/580 JR
- Irish Skydiving Club v An Bord Pleanala – Neutral Citation (2016 IEHC 448) Dockett No. (2015 No. 170JR)

Copies of these legal judgements are included in the Appendix to this Report.

## **10.0 Assessment**

### **10.1. Introduction**

- 10.1.1. The purpose of a referral is not to determine the acceptability or otherwise of the subject matter in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so falls within the scope of exempted development, within the meaning of the relevant legislation. The onus of proof is on the party seeking to prove the exemption, and the development in question must fall clearly and unambiguously within the terms of the exemption claimed.
- 10.1.2. It should be stated at the outset, that this is not a planning application under consideration. Reference is had to the Referrer rather than the Appellant. The planning merits as to whether or not the development has or should take place is not the basis on which to determine the referral.
- 10.1.3. Likewise, planning enforcement is a matter for the planning authority, and does not fall within the jurisdiction of the Board.

### **10.2. Is or is not development**

- 10.2.1. Section 3 (1) of the Planning and Development Act, 2000 (as amended) states that development “means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land”.
- 10.2.2. It is clear that the three questions asked have constituted development as defined, and as such is development within the meaning of the Act.

### **10.3. Is or is not exempted development**

- 10.3.1. Under the Irish planning system, development can lawfully be carried out in either of the following circumstances:
- In accordance with the terms of the planning permission granted for it; or

- In the case of an exempted development, without planning permission but in accordance with the terms of the exemption.

10.3.2. Regard is had to the three Questions asked in the Referral by the Irish Skydiving Club GLG. In this case the 3no. Questions now asked are historic in that they refer specifically to a time period between 1<sup>st</sup> of October 1964 and 15<sup>th</sup> of May 1994. As noted in the Referral and in the Submission made a detailed account has been given of the use and workings of Kilkenny Airfield including during that time period.

#### 10.4. Legal issues – Historic Nature of Referral

10.4.1. It is noted that development took place under the previous Planning and Development Act 1963 and the relevant regulations, rather than under the current Act. As per the Sixth Schedule of the Planning and Development Act 2000 (as amended) the 1963 Act has been repealed. Section 264 of the 2000 Act refers.

10.4.2. Reference is had in Section 265 to the Continuity of repealed enactments i.e. s.265(a) *Nothing in this Act shall affect the validity of anything done under the Local Government (Planning and Development) Acts, 1963 to 1999, or under any regulations made under those Acts.*

10.4.3. This Referral is made under Section 5 of the Planning and Development Act 2000 (as amended). It has been referred to the Board by Kilkenny County Council under Section 5(4) of the said Act. However, it relates to a period before that time. I note that the submission made by Skydive Ireland Ltd, refers to the ‘*Scope of the Section 5 Jurisdiction*’ i.e. *The three questions to be determined under s.5 PDA 2000 concern (and solely concern) the question of exempted development as defined in the relevant legislation and nothing more than that. The question of what is/is not exempted development within the meaning of or corresponding to the PDA 1963 and the 1963 Regulations is materially distinct and separate to the question of what/is not authorised and unauthorised development. (Krikke v Barranafaddock Sustainable Electricity Ltd).*

10.4.4. The submission made refers to paragraph 131 of Krikke v Barranafaddock Sustainable Electricity Ltd where they submit that the Supreme Court alluded to and recognised the precedential operation of declarations made under s.5 of the PDA 1963 and PDA 2000. I have obtained a copy of the judgment and note that it does

not include the said par. 131 and it does not specifically refer to this matter, nor appear to be relevant to the subject referral. (I have included a copy of this judgment for the Board).

## 10.5. Other Referrals

- 10.5.1. Regard has been had to the planning history including that of Board decisions on previous referrals on this site, relevant to development within Kilkenny Airfield.

### Referrals relevant to Kilkenny Airfield

**Dec 330 – ABP RL 3331** - A Question arose as to whether the use of lands at Kilkenny Airport for airport and aviation use is or is not development or is or is not exempted development. The Board concluded (reasons (a) – (g)) and decided that this was development and was not exempted development.

This included the following of note:

*(f) there are no provisions, under the Planning and Development Act 2000, as amended, the Planning and Development Regulations 2001, as amended, or any prior Planning and Development and Development Acts or Regulations, by which this development would be categorised as exempted development and*

*(g) the planning history of the subject site relates solely to buildings and other structures on the lands, and did not authorise any intensification of the use of the lands, and did not authorise any intensification of the use of the lands for airport and aviation use, over and above that established in 1964, and accordingly, the use of the lands at Kilkenny Airport for airport and aviation use is not permitted development.*

**Dec 436 – ABP RL 3590** – A Question arose as to whether an existing steel structure included during the construction of an existing hangar building to support the sliding doors to the front of the building at Kilkenny Aerodrome is or is not development or is or is not exempted development. The Board concluded (reasons (a) – (g)) and decided that an existing steel structure included during the construction of an existing hangar building to support the sliding doors to the front of the building at Kilkenny Aerodrome is development and is not exempted development.

**Dec 341 – ABP RL. 3240** – A Question arose as to whether the intensification of use of Kilkenny Airfield for sponsored parachute jumping at Kilkenny Airfield, is or is not development or is or is not exempted development.

The Board decision included that the said intensification of use of Kilkenny Airfield for sponsored parachute jumping constitutes a material change of use which is development and is not exempted development. They considered that:

*“notwithstanding the established use of the site as an aerodrome, that there are material consequences for proper planning and sustainable development of the area related to the introduction of sponsored parachute jumping which has a different pattern of use and intensity compared with the established flying club activities.”*

It is of note that the section 5 declaration (Ref: RL10.RL.3240) made on 14 January 2015 still stands. The Irish Skydiving Club Ltd sought to JR this decision but did so outside the 8 week time period. Leave was initially granted by Eager J. in the High Court but the Board later contested this. In a written judgment of Baker J. (*Irish Skydiving Club v. ABP & Ors* [2016] IEHC 448), it was held that these proceedings were brought out of time and no good or sufficient reasons were raised to enlarge the period to bring judicial review proceedings under s.50(8) PDA 2000.

Copies of these decisions and court judgements are included in the History Appendix to this Report.

## 10.6. Conclusion

- 10.6.1. Having regard to the information submitted both by the Referrer and in the submission made, I would not consider that the nature of the historic questions raised relative to the laying out, the user of lands for ‘aviation sports’ and any intensification of such use, represent a new scenario to the questions that have already been asked in the previous referrals regarding Kilkenny Airfield.
- 10.6.2. I would consider that the questions which have been referred to the Board in the current instance are of a general and non-specific nature, relative to a historic time period (that pre-dates the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended)) and which do not relate to a particular or proposed development.

10.6.3. I would question as to whether the questions now asked fall within the scope or remit of Section 5 of the Planning and Development Act 2000 (as amended). In this respect I note that Section 5(1) includes: *If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act,...*

10.6.4. Having regard to the questions asked the Board lacks jurisdiction to decide matters which relate to the operation of the Local Government (Planning and Development) Act 1963 as all the provisions of this Act have now been repealed by S.263 of the Planning and Development Act 2000 (as amended). As has been noted Column 3 to the Sixth Schedule of the consolidated PDA 2000 now states that the entire 1963 Act is repealed.

10.6.5. In addition, I would note that the Board may dismiss appeals or referrals under Section 138 of the Planning and Development Act 2000 (as amended) i.e.:

*Section 138(b)(i) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to—*

*(i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral).*

10.6.6. I would recommend that the Board dismiss this Referral on this basis.

## **10.7. Appropriate Assessment**

10.7.1. Having regard to the historical period of the questions raised and to the nature and scale of the development and nature of the receiving environment together with the proximity to the nearest European site, no Appropriate Assessment issues arise and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

## **10.8. EIAR Screening Determination**

10.8.1. Having regard to the historical period of the questions raised and to the nature of the receiving environment there is no real likelihood of significant effects on the environment arising from the development. Any potential requirement for

environmental impact assessment can, therefore be excluded at preliminary examination and a screening determination is not required.

## 11.0 Recommendation

11.1. I recommend that the Board should decide this referral in accordance with the following draft order.

**WHEREAS** three questions have arisen as to whether in summary the laying out of lands, the user of the lands and the intensification of user of the lands for aviation sports at Kilkenny Airfield between 1<sup>st</sup> of October 1964 and the 15<sup>th</sup> of May 1994 is or is not development or is or is not exempted development:

**AND WHEREAS** Irish Skydiving Club GLG requested a declaration on the questions raised from Kilkenny County Council on the 16<sup>th</sup> of October 2023:

**AND WHEREAS** Kilkenny County Council referred this question for determination to An Bord Pleanála on the 15<sup>th</sup> of November 2023:

**AND WHEREAS** An Bord Pleanála, in considering this referral, considered the nature of the questions, is satisfied that the referral should not be further considered by it:

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 138 (1) of the Planning and Development 2000 Act, as amended hereby dismisses the said referral under subsection (1)(b)(i) of Section 138 of the said Act, based on the reasons and considerations set out below.



## Reasons and Considerations

The Board is satisfied that, in the particular circumstances, the referral should not be further considered by it having regard to the historic nature of the referral which refers to a time period between 1<sup>st</sup> of October 1964 and 15<sup>th</sup> of May 1994, which predates Section 5 of the Planning and Development Act 2000 (as amended). That taking into consideration the fact that the 1963 Act has been repealed, under Section 263 of the Planning and Development Act 2000 (as amended) the Board lacks a factual and evidential basis to make declarations in relation to matters in a time period 1964-1994.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.



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Angela Brereton  
Planning Inspector

28<sup>th</sup> of January 2025

