

SCOPE OF OPINION AND BACKGROUND FACTS

1. Agents have requested my advice as to whether a proposed development on a site of 11 hectares on the western end of the town of Kilcock falls within the following category of development specified for EIA purposes under para 10 (b)(iv), Part 2, Schedule 5 of the 2001 Regulations:

*“(iv) Urban development which would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of **other parts of a built-up area** and 20 hectares elsewhere. (In this paragraph, “business district” means a district **within a city or town** in which the predominant land use is retail or commercial use.)”¹*

2. The relevant category of development requiring an EIAR under EU Directive 2011/92, as amended (*“the Directive”*), on environmental assessment is set out under paragraph 10(b) of Annex II of the Directive. The population of the town of Kilcock is c. 6,093.² The subject site is not within the boundary of the town as defined by the Central Statistics Office (CSO). The site is approximately a 12 minutes’ walk from the town centre. It lies outside the town boundary (as defined by the CSO) to the east but adjacent to and bounded by an existing residential development to the east.
3. It is against the foregoing brief factual background that my advices are sought as to whether an EIAR can be screened out in the present case. The central issue is as to whether the site is located in *“other parts of a built-up area.”*

¹ Emphasis added.

² The Kilcock LAP states: *‘Kilcock has doubled its population in the nine year period between 2002 and 2011This major increase in population was 6 times the national average, representing the most significant period of population growth in the town in recent history.’*

RELEVANT STATUTORY PROVISIONS

4. Article 3(3) of the Planning and Development Regulations, 2001 (*the 2002 Regulations*) provides –

*“built-up area” means a city or town (where “city” and “town” have the meanings assigned to them by the Local Government Act, 2001) or an adjoining developed area;”*³

5. The site in question is not located within the town of Kilcock as it is on a green field site beyond the existing settlement to the east.
6. A separate meaning is provided for “business district” under para 10 (b)(iv), Part 2, Schedule 5 of the 2001 Regulations:

*“(iv) Urban development which would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of **other parts of a built-up area** and 20 hectares elsewhere. (In this paragraph, “business district” means a district **within a city or town** in which the predominant land use is retail or commercial use.)”*⁴

7. *Section 10(3)* of the Local Government Act 2001, as originally enacted, did not provide definitions for towns but they are described by reference to Schedule 6 of The Act. *Section 10(3)* provides:

³ Emphasis added.

⁴ Emphasis added.

“(3) Within the county in which they are situated and of which they form part, there continue to be such other local government areas as are set out in Schedule 6 which—

(a) in the case of the areas set out in Chapter 1 of Part 1 of that Schedule, shall be known as boroughs, and

(b) in the case of the areas set out in Chapter 2 of Part 1 and Part 2 of that Schedule, shall be known as towns,

and in this Act a reference to a town shall include a reference to a borough.”⁵

8. Kilcock is not listed as a town or borough.

9. However, *Section 10(3)* of the Local Government Act 2001, as originally enacted, has been repealed as town councils have been abolished.

DEFINITIONS OF CASE LAW ON “ADJOINING”

10. The word “*adjoin*” is defined under the Concise Oxford English Dictionary (11th Ed.) as:

*“v. [often as adj. **adjoining**] be next to and joined with.”*

11. In *Lightbound .v. Higher Bebington Local Board*⁶, Bowen, L.J. stated as follows:

“You cannot define “adjoin” as meaning benefit of access, or vice versa, but in considering whether houses adjoin which are placed in close proximity to the part of the street which is to be paved, it is a most important fact, and in many cases a dominant fact, to see whether there is substantial access and advantage which the houses enjoy from that portion of the street which is to be paved, and a substantial

⁵ Emphasis added.

⁶ (1885) 16 ABD 577 at 584.

access and advantage of that kind, coupled with close proximity, may bring the case within the word “adjoin” though there is no actual touch.”

12. In *Cave .v. Horsell*⁷, Buckley, L.J. stated as follows:

“There are three words, “adjoining”, “adjacent”, and “contiguous”, which lie not far apart in the meaning which they convey. But of no one of them can its meaning be stated with exactitude and without exception. As to “adjoining” the expression “next adjoining” or “immediately adjoining” is common and legitimate. This expression at once conveys that two things may adjoin which are not next to each other. “Adjacent” conveys that which lies “near to” rather than that which lies “next to”. “Contiguous” is perhaps of all three the least exact. Any one of the three may by its context be shown to convey “neighbouring” without the necessity of physical contact.”

13. In *Re Ecclesiastical Comrs for England’s Conveyance*⁸, Luxmoore, J. stated:

“When used in conjunction with the word land, the word “adjoining” in its primary sense means that which lies near so as to touch in some part the land which it is said to adjoin.”

14. In *Buckinghamshire County Council .v. Trigg*⁹, Lord Parker, C.J. stated as follows:

“I think that it is beyond doubt that the word “adjoins” [in the Highways Act 1959 s.295(1) (repealed; see now the Highways Act 1980, s 329(1))] or, indeed, the words “fronts” or “abuts”, envisage actual contact between part of the premises and the street, not only contact but contact of the sort which will produce some frontage which can be measured.”

⁷ [1912] 3 KB 533 at 544.

⁸ [1936] Ch. 430 at 440.

⁹ [1963] 1 All ER 403, at 406.

16. Stroud's Judicial Dictionary of Words and Phrases¹⁰ gives prominence to the meaning assigned to "adjacent" in the case of *Wellington .v. Lower Hutt*¹¹, referred to below, as "not confined to places adjoining, and it includes places close to, or near."

CASE LAW ON INTERPRETATION OF EIA CATEGORIES

17. It is well established under Irish law that the question as to whether an EIA is required under the 2001 Regulations implementing the Directive is a question of law for the Courts to determine, although obviously it is an issue to be determined, in the first instance, by An Bord Pleanála in the present case.¹² A similar position has been adopted in the U.K. jurisdiction. In *R (Goodman) .v. London Borough of Lewisham and Big Yellow Property Company Limited*¹³ the Court of Appeal had to consider the question as to whether a development of self-storage units was within the category of "infrastructure" projects and whether it amounted to an "urban development project". Buxton, L.J. (with whom Brooke, L.J. and Morland, J. agreed) stated:

*"However fact-sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgment. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the Regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the Court must correct that error: and in determining the meaning of the statutory expressions the concept of reasonable judgment as embodied in *Wednesbury* simply has no part to play."*¹⁴

¹⁰ 9th Ed., 2012, at p. 58.

¹¹ [1904] AC 773.

¹² *Shannon Regional Fisheries Board .v. An Bord Pleanála*, [1994] 3 IR 449; *Maher .v. An Bord Pleanála*, [1993] 1 IR 439.

¹³ [2003] EWCA Civ. 140

¹⁴ [2003] EWCA Civ. 140, [2003] 13 LS Gaz R 28, para. 8.

18. *Annex II, paragraph 10(b)* of Directive 2011/92/EU on environmental assessment, as amended by Directive 2014/52/EU (*“the Directive”*) provides for the following category of development:

(b) Urban development projects, including the construction of shopping centres and car parks;

19. An EIA may need to be carried out in relation to a project of this nature, depending either on the threshold set by Member States or the case by case examination carried out by the competent authorities who carry out functions of screening for EIA. It is well established that the types of development to which this category applies is not limited to the two examples given of shopping centres and car parks. However, the category must be given a broad interpretation and the relevant category that is provided for by way of implementation of the Directive must be interpreted in a manner that is consistent with the Directive.

CONCLUSIONS

18. Having regard to the foregoing considerations, and subject to any qualifications or assumptions expressed above, my principal conclusions are as follows:

1. For the proposed development to require an EIA or screening for an EIAR, it must be located on a site within either a city or town or a “developed area” that is adjoining a city or town, as so defined under the Local Government Act 2001.

A “built up area”, defined as –

*“built-up area” means a city or town (where “city” and “town” have the meanings assigned to them by the Local Government Act, 2001) or an adjoining **developed area;**”*

However, the site of the proposed development comprises a green field site on the edge of the developed settlement of Kilcock. It is not located *within* a developed area as it is surrounded on three sides by undeveloped land. Therefore, even if Kilcock could be regarded as a town for the purposes of the definition of a “business district”, the site does not require an EIAR because it is not within a developed area. The site is clearly not within the town of Kilcock.

2. Furthermore, Kilcock was not designated as a “town” for the purposes of the Local Government Act 2001 (albeit that the definition of a “town” under that Act has been appealed) and it would appear therefore that the site does not adjoin a city or town for the purposes of this class of EIA development.
3. The fact that the site may be within the development boundary for Kilcock does not affect the application of para 10 (b)(iv), Part 2, Schedule 5 of the 2001 Regulations as it is the actual unbuilt context of the development site rather than its development plan designation or potential future developed status that is relevant to the application to this category of EIA development.
4. I am therefore of the opinion that the proposed development does not fall within para 10 (b)(iv), Part 2, Schedule 5 of the 2001 Regulations:

*“(iv) Urban development which would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of **other parts of a built-up area** and 20 hectares elsewhere. (In this paragraph, “business district” means a district **within a city or town** in which the predominant land use is retail or commercial use.)”¹⁵*

5. Accordingly, an EIA or screening for EIA is not required under the legislation..

¹⁵ Emphasis added.

Nothing further occurs at this time. I can advise further if required.

Eamon Galligan S.C.

28th January, 2019.