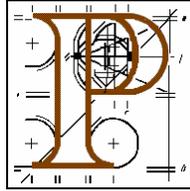


An Bord Pleanála



Inspector's Report

Appeal Reference No: PL 22.238742

Development: Proprietary waste water treatment plant and retention of existing portacabin and storage container at Glenahilty Bog, Glenahilty, Cloughjordan Co. Tipperary

Planning Application

Planning Authority: North Tipperary County Council
Planning Authority Reg. Ref.: 10/51/0299
Applicant: Bulrush Horticulture Limited
Type of Application: Planning permission
Planning Authority Decision: Refuse permission

Planning Appeal

Appellant(s): Bulrush Horticulture Limited
Type of Appeal: First party against refusal
Observers: None
Date of Site Inspection: 15th July 2011

Inspector: Mary Kennelly

1.0 SITE LOCATION AND DESCRIPTION

The appeal site is located, as the crow flies, approximately half way between Roscrea to the north-east and Nenagh to the southwest. It is in the townland of Glenahilty, which is approx. 4-5km south of the village of Cloughjordan and a similar distance to the north-west of Moneygall. It is accessed by means of the R491 (Nenagh-Roscrea/Birr regional road) and a rural road which turns off the regional road and crosses the mainline railway line. A private access road leads to the site via a circuitous route.

The appeal site consists of a section of a working bog with a stated area of 0.40ha. the appeal site is located at the northern extremity, immediately adjacent to the end of the access road. There is an existing portacabin and a small storage container immediately to the east of the entrance. There were several mechanical vehicles parked near these structures at the time of my inspection.

2.0 PLANNING HISTORY

08/51/0292 Permission refused for a virtually identical development on same site on the grounds that the proposed development was associated with an unauthorised use. The P.A. had considered that the workings of the bog were unauthorised..

Plc 17310 Application for peat extraction in 1995 not pursued following request for further information involving submission of an EIS

It is stated in the submissions that a warning letter was issued by the P.A. (UD08/053) regarding possible unauthorised peat extraction on the site.

Plc 19808 P.A. reports refer to refusal of permission for retention of a gravel pit on adjacent site

3.0 PROPOSED DEVELOPMENT

Permission is sought to retain the existing portacabin and storage container on the site and to provide a proprietary waste water treatment plant to facilitate the use of a toilet for staff in the portacabin. The stated gross floor area of the portacabin is 9sq.m with a ridge height of 2.75m. The storage container has a stated floor area of 27sq.m. It is intended that the WWTP would serve the existing toilet in the portacabin. It is proposed to locate the WWTP to the south-west of the entrance.

4.0 PLANNING AUTHORITY DECISION

4.1 Planning Authority Reports

The *Area Planner's report of 19/8/10* raised concerns regarding the planning status of the peat harvesting and milling works. The Area Planner noted that the proposed development is intended to provide staff facilities for those involved in the peat milling operations. However, it was noted that during the course of previous planning applications, the P.A.

had come to the view that the existing peat extraction operations were unauthorised and as such it was necessary to establish the status of these activities in respect of the current application. It was also noted that an affidavit had been submitted as part of a previous application in 1995 for peat extraction on the site and adjoining lands (site area given as 59ha) and that when asked to submit an EIS, the request was not complied with than the application was not determined. It is stated that the affidavit had indicated the following sequence of events

1990-1991	Drainage works under taken on bog (believed to be exempt under 1963 Act)
1992	Sod peat harvested
1999-2000	Peat milled (believed to be exempt under 1994 Regs as area <50ha)
2000	site and surrounding lands purchased by current applicant

The PA was also concerned that the information submitted in respect of the proposed WWTP was based on compliance with the EPA manual dated 2000, whereas the DoEHLG had issued a directive that all such plants must comply with the requirements of the 2009 manual.

4.2 *Further information*

FI was sought on these matters including documentary evidence such as maps, drawings and photographs to outline the exact extent of milling/peat extraction activities and all drainage works, (to be set out in chronological order in intervals not exceeding 2 years).

A *Response to the Further Information* request was received by the P.A. on 15th February 2011 This provided information relating to the previous history of land reclamation works of the overall site since 1989 together with aerial photographs dated 1995 and 2000, and a Site Suitability Report in respect of the proposed WWTP. It is claimed that the peat extraction use was exempt under the Local Government (Planning and Development) Act 1963 and the Land Reclamation Act 1949, and that it constitutes exempted development under S265 and S2(1) of the Planning and Development Act 2000.

The Area Planner was not satisfied that the applicants had demonstrated that the use was authorised. The principal concern related to the lack of evidence relating to the exact extent of the area of workings at the relevant time periods. In addition, the fact that the aerial photographs indicated that peat extraction had taken place outside of the boundaries of the site also raised concerns. It was pointed out that since 1994, a threshold of 50 ha had been introduced above which an EIA is required. Particular concern was expressed regarding the events surrounding the planning application in 1995 by the previous owner, whereby it was considered that an EIS was required on the basis of the extent of the works, as the site area had been given as 59ha. Subsequently, the site area was then reduced to 35ha, but the PA had maintained its position that an EIS was required on the basis that the proposed development would still have been likely to have had significant impacts on the environment. It was also pointed out that under the 1994 Regulations, peat extraction *requiring EIA* is not exempted development and that the 2000 Act expressly excluded the use of land for turbary from exempted development.

4.2 *Planning authority decision*

The planning authority decided to refuse planning permission for one reason as follows:

On the basis of the submissions made in connection with the planning application, the Planning Authority is not satisfied that the proposed development for retention is not located on a site where unauthorised development is taking place and, accordingly, the Planning Authority is precluded from considering a grant of planning permission in this instance.

5.0 **DETAILS OF APPEAL**

5.1 **Grounds of appeal**

The first party appeal is submitted by Vincent JP Farry and Co. Ltd. Planning and Development Consultants on behalf of the owner, Bulrush Horticulture Ltd. The appeal sets out the background including reference to the previous planning history on the site. The **grounds of appeal** may be summarised as follows:

1. *The reason for refusal does not question the merits of the proposed development-*. It is noted that the P.A. did not raise any objection to the substance of the proposal in terms of the proposed WWTP or the retention of the temporary structures. Neither did it raise any environmental objection to the long standing peat extraction operation on the land, but merely was dissatisfied that the activity was not unauthorised. Neither has there been any objection from local residents or amenity groups.
2. *The existing peat extraction operations constitute exempted development because:*
 - The Local Government Planning and Development Act 1963 included the use of land for turbary (peat extraction) in the definition of agriculture and included land drainage works as an exempted development (as these works were included in the works referred to in the Land Reclamation Act 1949). No limit was placed on the area of land that could be used for turbary under the 1963 Act.
 - The drainage works commenced in 1991 and the peat extraction in 1992 at which time each of these works were exempted development under the 1963 Planning Act and the Land Reclamation Act 1949 and has continued since then;
 - Notwithstanding subsequent changes in legislation, which introduced a threshold of 50ha in 1994 (P&D Regs) above which (1) an EIA was required for peat extraction and (2) exemption from the need for planning permission no longer applied, and a threshold of 30ha and 10ha respectively under the P&D 2000 Act above which EIA and planning permission were required for new and extended areas of peat extraction (respectively), and the exclusion of turbary as an exempted development under the 2000 Act, it is claimed that as the activity commenced in the early 1990s and continued, the exempted status was retained. In other

words, the exempted status cannot be eroded by the enactment of subsequent legislation, retrospectively.

3. Burden of proof unduly onerous- given the minor nature of the proposed development, the burden of proof involving detailed records at 2 yearly intervals spanning 2 decades of the exact nature and extent of activities at different stages of its lifetime is considered to be excessive.
4. Identical issues were raised in an appeal before the Board under Ref PL19.230913 It is stated that in that case the Board granted permission for a similar development on the grounds that it was ancillary to the peat extraction works notwithstanding the fact that the peat extraction works did not have the benefit of planning permission.
5. The PA has not sought to bring proceedings against landowner Whilst the P.A. states that it is not satisfied that the operations are not unauthorised, no attempts have been made to bring proceedings against the landowner, nor has the matter been referred to the Board under Section 5 of the 2000 Act.
6. Grant of permission would not facilitate continuation or expansion of an unlawful use Notwithstanding the appellant's position that peat extraction is exempted development, the proposed development (WWTP, portacabin, storage container) would not facilitate the continuation /expansion of the peat extraction use as they represent staff comfort and storage facilities which are not essential to the operation. The use can continue regardless of whether permission is granted or not. Thus the status of the peat extraction use is not critical to the determination of the appeal. This approach has already been adopted by the Board in PL19.230913.
7. The appeal can be determined without undue weight being applied to planning history – This is particularly relevant due to the recent ECJ ruling whereby planning permission cannot be granted retrospectively in respect of retention of development which might require EIA. Given that the PA has already indicated in the past that EIA may be required should the land owner decide to apply for planning permission for the peat extraction, should the Board decide to refuse permission on the basis that the well-established peat extraction works are unauthorised, this could mean that the overall development might never be regularised. This approach would seem particularly harsh given that the proposal is a relatively minor development and the applicant's altruistic motives to provide proper sanitary facilities and a lunch canteen for employees working in an outdoor environment.

5.2 Responses to grounds of appeal

The planning authority's response to the grounds of appeal was received on 5th May 2011, in which it was stated that it had no further comments to make and urged the Board to uphold its decision to refuse planning permission.

6.0 DEVELOPMENT PLAN

The statutory plan for the area is the North Tipperary Development Plan 2010. It is a key aim of the Council to identify, facilitate and promote the development of the County's peatlands where appropriate (section 4.8). "The Council will seek to achieve a balance in developing such a valuable land resource whilst also protecting the heritage and environmental value of these areas where required" (4.8). Policies ENV 8, ENV 8a, ENV

9 and ENV10 relate to wastewater treatment systems. It is the Council's policy to strictly control the siting, construction and lay-out of WWT systems and to require that all assessments of such systems be carried out in accordance with the EPA guidance and any Codes of Practice superceding these.

7.0 ASSESSMENT

The main issues arising from this appeal are whether the proposed development relates to a site where unauthorised development is taking place and in such circumstances, whether it would either facilitate the continued unauthorised use or expansion of these activities and whether the planning authority is precluded from considering the grant of permission. In addition, it is considered that the issues of whether the proposed development is appropriate in terms of environmental impact and visual amenity should be addressed.

7.1 Unauthorised development and related issues

The planning authority's main concern seems to be the absence of detailed evidence documenting the nature and extent of the operations at various time intervals between 1991 and the present day. In this respect it is noted that the Statutory Declaration from the previous owner, submitted to the P.A. with the application in 2008 (Ref.08/51/0292), clearly established the following:

- The land drainage works commenced on site in 1990 and 1991 and these works related to lands comprised in Folio 28342. It is claimed that these works were exempted development under S4.1.(i) of the Local Government Planning and Development Act 1963 which exempted development consisting of "development consisting of the carrying out of any works referred to in the Land Reclamation Act 1949". It is stated that the 1949 Land Reclamation Act (Section 1) defined "any works" as "field drainage, land reclamation, construction and improvement of watercourses and reclamation of estuarine marsh land and callows."
- The harvesting of sod peat commenced on the site in 1992 and these works related to lands comprised in Folio 28342.
- The milling of peat commenced on the site in 1999 and 2000 and these works related to lands comprised in Folio 28342. It is claimed that these works were exempted development under of the Local Government Planning and Development Regulations 1994.
- The previous owner, P.J. Brislaire, sold the lands comprised in Folio 28342 to Bulrush Horticulture Ltd. On 29th May 2000.

It is further noted that there is a plan attached to the statutory declaration showing the lands comprised in Folio 28342, which seems to correspond with the blue line boundary submitted with the current application. It is stated in the submissions that this parcel of land is 42.594ha in area. Whilst I would accept that some of the evidence on file might suggest that the peat extraction works may have extended beyond the area comprised in this folio number and that Mr Brislaire may have sought planning permission for peat extraction on a site that was greater than 50ha at some point in the mid-1990s, it would

appear that the applicant's contention that peat extraction works on the site commenced in the early 1990s (prior to the existence of any thresholds) seems credible. It should be noted that between 1st February 1990 and 10th December 2001 a 50ha threshold for exempted development was applied to peat extraction (whether by way of new or extended area) and in parallel, EIA was also required for peat extraction during this period by way of new or extended area above a threshold of 50ha. It was subsequent to 21st September 1999, (following an ECJ judgement C-392/96) that the threshold for EIA was reduced to 30ha and the threshold for exempted development was reduced to 10ha (in respect of new or extended areas). I would accept that planning law cannot be applied retrospectively and thus if the peat extraction was exempt prior to the introduction of a threshold, the exemption would remain after the introduction of any such threshold.

Thus on the balance of probabilities, on the basis of the information submitted by the appellant and in the Statutory Declaration dated 26/06/2008, the peat extraction operation may well be exempted development.

However, the key issue here is that the proposal that is before the Board relates merely to the provision of a WWTP and to the retention of a small portacabin and a storage container. It is considered that although the proposed development is ancillary to the operations of the bog, the peat extraction can continue in the absence of this proposal. Thus it is difficult to see how the grant of permission for the proposed development would facilitate the continued use of the peat extraction works. This view is also consistent with the approach taken by the board in PL19.230913 (file attached). Thus I do not agree that the planning authority (or the Board) is precluded from granting permission for the proposed development.

7.2 Environmental impact

The site is not the subject of any designations in terms of natural heritage or landscape sensitivity. There is little vegetative cover remaining on the site due to the workings of the bog and the application site represents just 0.09% of the bog that is in the applicant's ownership, although the bog itself may well extend beyond these boundaries. It is considered that any ecological value would be very limited apart from the remaining peat deposits. Notwithstanding this, there are two issues that need further examination, namely, the adequacy of the proposed wastewater treatment system proposed and the adequacy of the proposals for storage of fuels and chemicals on the site, in terms of the potential for contamination of groundwater or surface water (in drainage ditches).

i. Wastewater treatment system

The 'Site Suitability Test Report' initially submitted showed that the proposed WWTP would generally comply with the standards required by the EPA Manual 2000 for such systems. However, the P.A. requested that the applicant provide information to show that the standards contained in the EPA 'Code of Practice: Wastewater Treatment and Disposal Systems Serving Single Houses' (2009) can be met. The revised Site Suitability Report indicates that the Groundwater Protection Response is R1, the aquifer category is locally important and that there are tributaries of the Ollatrim river adjacent to the site. However,

the bogland was generally found to be well drained and well maintained with little evidence of ponding and the ground was firm under the machinery. There was no restriction on site size and all separation distances can be achieved. The PE was estimated to be 3, based on a maximum of 6 staff during the harvest period. The main targets at risk were identified as surface water and groundwater with no wells present, and the closest house being 250m away.

The site of the proposed WWTP was found to be located at the interface of the bog land and a hill of gravelly soil, and the trial hole was described as containing a layer of peat which overlies a well drained layer of sandy gravelly silt. The upper layer was made ground. It was stated that the peat layer is unsaturated and will allow effluent to discharge to ground water. No water table or bedrock were encountered in the trial hole. The site was found to have an average T value was given as 20.17 and the P value as 18.72. It was considered that the soil will retain the effluent adequately for treating prior to discharge to groundwater and that the polishing filter will be designed to provide a minimum of 1.2m of unsaturated peat above the sand gravel layer. It is proposed to provide a proprietary waste water treatment system with an irrigation area consisting of a pumped soil polishing filter of 54m² which it is stated will comply with the EPA code of Practice Waste Water Manual 2009. It is proposed to provide for a maintenance contract with service and inspection twice a year.

On the basis of the information submitted it is considered that the proposed WWTP would be acceptable subject to appropriate conditions regarding maintenance and decommissioning once activities on site have ceased.

ii. Storage of fuels and chemicals

It is noted that the storage container includes storage of fuel, lubricant etc. in connection with the maintenance of the machinery on site. I also noted that there is a storage tank on top of the storage container, which may also be used for storage of fuel. It is considered that given the nature of the site with made ground over bog, and the high number of drainage channels it would be appropriate to ensure that suitable bunding be provided to avoid any adverse effects from accidental spillage or leakage of chemicals or fuels. It is also necessary to ensure that all petrochemicals, hydrocarbons, fuels etc. are stored appropriately.

In conclusion, given the relatively minor nature of the works and the limited area of the site, it is considered that any environmental impact would not be significant and the maintenance of the WWTP and the provision of appropriate measures for the storage of the petrochemicals and hydrocarbons can be addressed by means of appropriately worded conditions.

7.3 Visual impact

The site is relative remote and is not in a highly prominent position. There are no landscape sensitivity designations affecting the site. Notwithstanding this, the portacabin and storage structures, by reason of their temporary nature and proposed use, could

become an eyesore if left unmaintained in the longer term, should the activities on site cease at some point in the future. Thus it would be appropriate in the interests of the visual amenities of the area to grant a temporary permission for a period of 5 years, unless within this time period, a further application for retention of these structures shall have been granted. This would also be consistent with the approach taken by the board in the case of PL19.230913.

8.0 CONCLUSIONS AND RECOMMENDATION

Having regard to the character and nature of the area within which the site is located with existing peat extraction and milling activities on the wider landholding, and to the temporary nature of the structures to be retained and to the findings of the site suitability assessment report, it is considered that the proposed development, subject to appropriately worded conditions, would not seriously injure the amenities of the area and would be in accordance with the development plan policies and the proper planning and sustainable development of the area. It is recommended therefore that planning permission be granted for the reasons and considerations hereunder.

REASONS AND CONSIDERATIONS

Having regard to the provisions of the current North Tipperary Development Plan 2010, the character and nature of the area, the existing peat extraction operations on the extended land holding, to the temporary nature of the structures proposed to be retained, and to the findings of the site suitability assessment report, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the amenities of the area or of property in the vicinity and would not conflict with the policy of the planning authority and would be in accordance with the proper planning and sustainable development of the area.

CONDITIONS

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application as amended by the further plans and particulars received by An Bord Pleanála on the 15th day of February 2011, except as may otherwise be required in order to comply with the following conditions. Where such conditions require points of detail to be agreed with the planning authority, these matters shall be the subject of written agreement and shall be implemented in accordance with the agreed particulars. In default of agreement, the matter(s) in dispute shall be referred to An Bord Pleanála for determination.

Reason: In the interest of clarity.

2. (a) This permission shall apply for a period of five years from the date of this order. The portacabin and storage container and any associated support structures shall then be removed from the site and the wastewater treatment

plant shall be decommissioned, unless, prior to the end of that period, planning permission for their retention beyond that date shall have been granted.

- (b) The site shall be reinstated on removal of the portacabin and storage container and ancillary structures and on decommissioning of the waste water treatment plant. Details relating to the removal and reinstatement shall be submitted to and agreed in writing with the planning authority at least one month before the expiry of this permission.

Reason: to enable the impact of the development to be re-assessed, having regard to changes in technology and design during the specified period.

- 3. (a) The treatment plant and polishing filter shall be located, constructed and maintained in accordance with the details submitted to the planning authority on the 15th day of February, 2011, and in accordance with the requirements of the document “Code of Practice Wastewater Treatment and Disposal Systems Serving Single Houses (p.e.<10)”, Environmental Protection Agency (current edition). No system other than the type proposed in the submissions shall be installed unless agreed in writing with the planning authority.
- (b) Certification by the system manufacturer that the system has been properly installed shall be submitted to the planning authority within four weeks of the installation of the system.
- (c) A maintenance contract for the treatment system shall be entered into and paid in advance for a minimum period of five years from the date of this order and thereafter shall be kept in place at all times. Signed and dated copies of the contract shall be submitted to, and agreed in writing with, the planning authority within four weeks of the installation.
- (d) Within three months of the date of this order, the developer shall submit a report from a suitably qualified person with professional indemnity insurance certifying that the proprietary effluent treatment system has been installed and commissioned in accordance with the approved details and is working in a satisfactory manner and that the polishing filter is constructed in accordance with the standards set out in the EPA document.

Reason: In the interest of public health.

- 4. (i) Within 3 months of the date of this order the applicant shall have removed any existing fuel storage containers and shall have first provided a waterproof bunded area for the storage of any petrochemicals or lubricants required in conjunction with operations on the extended site. The said bunded area shall be of sufficient volume to hold 110 per cent volume of the tanks/containers within the bund. All water contaminated with hydrocarbons, including store water shall be discharged via grit traps and three-way oil interceptor with sump to a water course. The sump shall be provided with an inspection chamber and shall be installed and operated in accordance with the requirements of the planning authority.

- (ii) Within 3 months of the date of this order the applicant shall have provided a suitably designed and sized area with an impermeable surface, equipped with appropriate fluid interceptors, to accommodate the refuelling and maintenance of any on-site plant/machinery. The design and details of the said area shall be agreed in writing with the planning authority. All on-site re-fuelling and maintenance of any on-site plant/machinery shall be carried out by appropriately trained personnel and shall take place within the said area.
- (iii) Any emergency repairs of immobilised plant may be carried out outside of that area referred to under point (ii) of this condition provided that mechanics use appropriate drip trays and oil catcher tanks to drain hydraulic, or oil lubrication, systems.

Reason: To limit the impact of the development on the hydrology and hydrogeology of the area in the interest of proper planning and sustainable development.

- 5. Water supply and drainage arrangements, including the disposal of surface water, shall comply with the requirements of the planning authority for such works.

Reason: To ensure adequate servicing of the development and to prevent pollution.

Mary Kennelly
Senior Planning Inspector
26th July 2011