



An
Bord
Pleanála

Inspector's Report ABP-301243-18

Question

Whether the cutting of small amounts of turf using a sleán within Mouds Bog, candidate Special Area of Conservation to demonstrate how turf is cut by hand to members of the public is or is not development or is or is not exempted development.

Location

Hawkfield, Co. Kildare

Declaration

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

None

Applicant for Declaration

Department of Culture, Heritage & the Gaeltacht

Planning Authority Decision

None

Referral

Referred by

Department of Culture, Heritage & the Gaeltacht

Owner/ Occupier

Colm Harrigan & John Harrigan

Observer(s)

None

Date of Site Inspection

1st June, 2018.

Inspector

A. Considine

1.0 Site Location and Description

- 1.1. This referral has been submitted to An Bord Pleanála by the Department of Culture, Heritage & the Gaeltacht, on 22nd March 2018, under Section 5(8) of the Planning & Development Act. The referral arises from an application for consent to the Minister, to undertake the cutting of small amounts of turf using a sleán within Mouds Bog cSAC, Site Code 002331, in Co. Kildare. The question arises as to whether the cutting of small amounts of turf using a sleán within Mouds Bog, candidate Special Area of Conservation to demonstrate how turf is cut by hand to members of the public is or is not development or is or is not exempted development, at Hawkfield, Co. Kildare.
- 1.2. The application to the Department provided a description of the nature of the operation / activity for which the consent of the Minister is sought and appears to include an element of visiting public to a location within Mouds Bog. Mouds Bog is located approximately 3km to the north west of the town of Newbridge in Co. Kildare. An area to the north of the subject site has in the past been used for commercial peat extraction and the Departments AA Screening report notes that Mouds Bog comprises a raised bog that includes areas of high bog and cutover bog. The margins of the bog are bound by trackways.
- 1.3. The owners land, to which the referral relates, is identified to the south west edge of Mouds Bog. While an area for the works has not been provided, it appears that it is small, and it is noted that up until the imposition of cessation of turf-cutting at Mouds Bog in 2011, and owners only cut their domestic supply using traditional hand-cutting methods. Since the date of cessation, no turf has been cut, but requests to do so have been made consistently by the owners.

2.0 The Question

- 2.1. The question arising in relation to this Section 5 Declaration request is presented as follows:

Whether the cutting of small amounts of turf using a sleán within Mouds Bog, candidate Special Area of Conservation to demonstrate how turf is cut by

hand to members of the public is or is not development or is or is not exempted development at Hawkfield, Co. Kildare.

3.0 Planning Authority Declaration

3.1. Declaration

Kildare County Council made no determination in relation to this question.

4.0 Planning History

None relevant.

5.0 Policy Context

5.1. Development Plan

The Kildare County Development Plan, 2017-2023 is the relevant policy document in relation to the subject site. The following policies and objectives relate to Natura 2000 sites:

Policies: Natura 2000

It is the policy of the Council to:

NH 4: Support the conservation and enhancement of Natura 2000 Sites including any additional sites that may be proposed for designation during the period of this Plan and to protect the Natura 2000 network from any plans and projects that are likely to have a significant effect on the coherence or integrity of a Natura 2000 Site.

NH 5: Prevent development that would adversely affect the integrity of any Natura 2000 site located within and immediately adjacent to the county and promote favourable conservation status of habitats and protected species including those listed under the Birds Directive, the Wildlife Acts and the Habitats Directive.

NH 6: Ensure an Appropriate Assessment, in accordance with Article 6(3) and Article 6(4) of the Habitats Directive and with DEHLG guidance (2009), is carried out in respect of any plan or project not directly connected with or necessary to the management of a Natura 2000 site to determine the likelihood of the plan or project having a significant effect on a Natura 2000 site, either individually or in combination with other plans or projects and to ensure that projects which may give rise to significant cumulative, direct, indirect or secondary impacts on Natura 2000 sites will not be permitted (either individually or in combination with other plans or projects) unless for reasons of overriding public interest.

Objective: Natura 2000

It is an objective of the Council to:

NHO 6: Request the National Parks and Wildlife Service to prioritise the preparation of Management Plans for Natura 2000 Sites which are located within the county.

5.2. Natural Heritage Designations

The site the subject of this referral is located within Mouds Bog cSpecial Area of Conservation, Site Code 002331.

6.0 The Referral

6.1. Referrer's Case

The Department of Culture, Heritage & the Gaeltacht has applied to the Board under Section 5(8) of the Planning & Development Act for a determination as to whether the activity requiring the consent of the Minister comprises development which is not exempted development. In accordance with the EC (Birds and Natural Habitats) Regulations, 2011 (No 477 of 2011), a Senior Wetlands Ecologist from the Department carried out an Appropriate Assessment Screening for the proposed activity for which the applicant has sought consent. This AA Screening concluded

that “in the absence of contemporary ecological information for the site, it is not possible to adjudicate beyond all reasonable doubt, based on best scientific information, on the impacts of turf-cutting at this plot within Mouds Bog candidate Special Area of Conservation.”

In light of the above, the Minister has formed the opinion that the application relates to a development within the meaning of the Planning & Development Acts, 2000 to 2011 and that the development may not be an exempted development as Appropriate Assessment under the Habitats Directive is required.

6.2. Planning Authority Response

The Planning Authority responded to the Section 5 referral confirming that the question had not been referred to Kildare County Council and no determination was made. The submission makes the following points:

- Notes the location of the site within Mouds Bog, cSAC and the conclusions of the AA Screening carried out by a Senior Wetlands Ecologist of the Department.
- It is concluded that AA must be carried out, requiring a Natura Impact Statement, which will require a contemporary habitat map of Mouds Bog.
- A ‘development’ which requires AA cannot be ‘exempted development’, pursuant to Section 4(4) of the Planning & Development Act, 2000, as amended save if so exempted by Ministerial Regulation pursuant to Section 4(4A) of the Act.
- Notes that the proposal is not confined to the cutting of small amounts of turf, as detailed in the nature of the activity itemised at point 3 of the application form to the Department.
- In addition to the AA concerns raised by the Department, the Planning Authority would have concerns in relation to the scale of the proposal, which is not quantified in the application, including;
 - Likely visitor numbers?
 - Likely traffic generated?

- Parking provisions?
- Vehicular access?
- The need for visitor facilities?
- Timings and numbers of demonstrations.

6.3. Owner/ occupier's response

In response to a number of queries from the Board, the owner of the land submitted the following response:

- Each demonstration will take up to 2 hours. There will be no charge.
- Approximately 20/30 visitors will attend any demonstration, but more can be catered for.
- There will be 10/12 cars at any demonstration. Large buses are not suitable.
- There will be no parking restrictions and access will be via local lanes.
- Toilet facilities will be available as required.
- Information hand-outs will be provided.
- Only the amount of turf necessary for the demonstration will be cut.
- Demonstrations will occur 3 times a year.
- The full experience of working in the bog will be explained as well as the importance the bog played in the life of the family.
- It is stated that it would be a great pity if the tradition and culture of turf cutting was not preserved.

6.4. Further Responses

The Department of Culture, Heritage & the Gaeltacht submitted a response to the Planning Authority submission in relation to the referral. The submission advises no further comments.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. Section 2 (1) of the 2000 Planning and Development Act states as follows:-

“In this Act, except where the context otherwise requires – ‘development’ has the meaning assigned to it by Section 3 ...”

In Section 2 (1) of the Act “works” are interpreted as including “*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure*”.

7.1.2. Section 3 (1) of the 2000 Planning and Development Act states as follows:-

“In this Act, ‘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 other land.”

7.1.3. Section 4(1) of the Planning and Development Act identifies what may be considered as exempted development for the purposes of the Act, and Section 4(2) of the Act provides that the Minister, by regulations, provide for any class of development to be exempted development, where he or she is of the opinion that—

- (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or
- (ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described)

with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described).

7.1.4. Section 4(4) of the Planning and Development Act states as follows:

Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

Section 4(4A) states:

Notwithstanding subsection (4), the Minister may make regulations prescribing development or any class of development that is—

- (a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and
- (b) as respects which an environmental impact assessment or an appropriate assessment is required, to be exempted development.

7.2. Planning and Development Regulations, 2001

7.2.1. Article 6(1) of the Planning & Development Regulations, 2001 as amended states as follows:-

“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.”

7.2.2. Article 9(1) of the Planning & Development Regulations, 2001 as amended, provides a number of scenarios whereby development to which article 6 relates shall not be exempted development for the purposes of the Act. Of relevance is the following

(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act—

(a) if the carrying out of such development would—

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site.

7.2.3. The following Classes, contained in Part 3 (Exempted Development – Rural) of Schedule 2 are considered relevant and states as follows:

<p><i>Peat extraction</i></p> <p>CLASS 17</p> <p>(a) Peat extraction in a new or extended area of less than 10 hectares, or</p> <p>(b) Peat extraction in a new or extended area of 10 hectares or more, where the drainage of the bogland commenced prior to the coming into force of these Regulations.</p>	
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8.0 Assessment

8.1. Introduction

8.1.1. The question has been posed as to whether the cutting of small amounts of turf using a sleán within Mouds Bog, candidate Special Area of Conservation to demonstrate how turf is cut by hand to members of the public is or is not development or is or is not exempted development at Hawkfield, Co. Kildare.

8.2. Is or is not development

8.2.1. Section 2 (1) of the Act defines “works” as including “any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or

other material to or from the surfaces of the interior or exterior of a structure”. I am satisfied that, in accordance with the above definition, the subject referral relates to ‘works’.

8.2.2. In terms of Section 3(1) of the Act, ‘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 other land.” I am satisfied that the said ‘works’ comprise ‘development’. This determined, consideration is required as to whether the ‘works’ would constitute “exempted development”.

8.3. Is or is not exempted development

Is the Development Exempt under the Act?

8.3.1. Having established that the ‘works’ undertaken amount to ‘development’, the issue to be considered is whether the development is exempted development or not. Section 4(1) of the Act defines certain types of development as being ‘*exempted development*’. There is no class of development described which would equate to the works proposed in this instance.

8.3.2. In addition, Section 4(4) of the Planning and Development Act states that notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required. Section 4(4A) further states that:

Notwithstanding subsection (4), the Minister may make regulations prescribing development or any class of development that is—

- (a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and
- (b) as respects which an environmental impact assessment or an appropriate assessment is required,

to be exempted development.

I am satisfied that the works cannot be considered to be exempted development under the provisions of the Planning & Development Act, 2000 – 2013.

Is the Development Exempt under the Regulations?

8.3.3. Articles 6 and 9 of the Regulations are relevant in terms of this referral.

Article 6 (1) of the Regulations states as follows:

“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 a 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 (1) of the Regulations, relating to restrictions on exemption states that

“Development to which article 6 relates shall not be exempted development for the purposes of the Act –

- (a) if the carrying out of such development would –
 - (viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site.

8.3.4. The following class of development is considered relevant in relation to this referral:

Class 17 of Part 3 of Schedule 2 – Exempted Development – Rural (subject to the conditions and limitations imposed under Column 2):-

- (a) Peat extraction in a new or extended area of less than 10 hectares,
or
- (b) Peat extraction in a new or extended area of 10 hectares or more,
where the drainage of the bogland commenced prior to the coming into force of these Regulations.

There are no Conditions or Limitations noted in relation to the above classes.

8.4. Restrictions on exempted development

- 8.4.1. The Board will note the assessment of the Department of Culture, Heritage & the Gaeltacht in relation to the question posed. Based on the AA Screening undertaken by the Department, it was concluded that “in the absence of contemporary ecological information for the site, it is not possible to adjudicate beyond all reasonable doubt, based on best scientific information, on the impacts of turf-cutting at this plot within Mouds Bog candidate Special Area of Conservation.”
- 8.4.2. The subject site lies within Mouds Bog, cSAC and the nature of the works, being turf cutting, albeit in small amounts, within the SAC, requires Appropriate Assessment under the Habitats Directive. As such, a ‘development’ which requires AA cannot be ‘exempted development’, pursuant to Section 4(4) of the Planning & Development Act, 2000, as amended save if so exempted by Ministerial Regulation pursuant to Section 4(4A) of the Act.
- 8.4.3. In addition to the above, and having regard to the information provided as part of the referral, I note the submission of the owners, received by the Board on the 24th May, 2018 which seeks to explain their intentions for the turf cutting demonstrations. It is noted that the demonstrations would not incur a fee, and therefore, it might reasonably be concluded that it would not be a form of commercial activity. I also note the comments in terms of the provision of services, which I consider to be unclear, notably in terms of toilets and parking facilities. It is possible that these services would be required at the site to facilitate visiting members of the public and may require the benefit of planning permission and indeed, Appropriate Assessment.
- 8.4.4. In light of the above assessment, I am of the opinion, having due regard to the provisions of the Planning & Development Act, 2000-2013, and associated Regulations, the development works are constrained by the restrictions on exempted development detailed in Article 9 of the Planning & Development Regulations, 2001, being development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site and therefore, the works do not constitute exempted development.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether the cutting of small amounts of turf using a sleán within Mouds Bog, candidate Special Area of Conservation to demonstrate how turf is cut by hand to members of the public is or is not development or is or is not exempted development at Hawkfield, Co. Kildare:

AND WHEREAS Department of Culture, Heritage & the Gaeltacht, applied to An Bord Pleanála, under Section 5(8) of the Planning & Development Act, for a determination as to whether the activity requiring the consent of the Minister comprises development which is not exempted development on the 22nd day of March, 2018:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000, as amended,
- (c) Sections 4(1), 4(4) and 4(4A) of the Planning and Development Act, 2000, as amended,
- (d) Article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Class 17 of Part 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The subject site lies within Mouds Bog, cSAC

- (b) The activity requiring the consent of the Minister requires Appropriate Assessment under the Habitats Directive,
- (c) Inadequate information has been provided to assess the impacts of the proposed turf-cutting on the Special Area of Conservation

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (8)(a) of the 2000 Act, hereby decides that the activity proposed involving the cutting of small amounts of turf using a sleán within Mouds Bog cSAC to demonstrate how turf is cut by hand to members of the public at Hawkfield, Co. Kildare is development and is not exempted development.

A. Considine
Planning Inspector

10th June, 2018