



An  
Bord  
Pleanála

## Inspector's Report ABP-303109-18

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<b>Question</b>	Whether the removal of trees and other vegetation from the site and infilling of the existing hole with unknown infill material and top soiling of the filled hole and the carrying out of works to allow water held in the hole to discharge to natural drainage network is or is not development or is or is not exempted development.
<b>Location</b>	Crosstown, Ardcahan, Co. Wexford
<b>Referrer</b>	Michael Brennan
<b>Planning Authority</b>	Wexford County Council
<b>Planning Authority Reg. Ref.</b>	ExD. 00729
<b>Observer</b>	None
<b>Date of Inspection</b>	7 <sup>th</sup> February 2019
<b>Inspector</b>	Kenneth Moloney

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## 1.0 Site Location and Description

- 1.1. The referral site is located on the northern outskirts of Wexford town in a semi-rural setting.
- 1.2. The referral site adjoins an agricultural field, situated to the immediate north, and this agricultural field was the subject of a recent appeal (appeal ref. 302310<sup>1</sup>) with the Board.
- 1.3. The referral site is sandwiched between an existing housing development to the east, 3 no. houses under construction to the south-west and an agricultural field to the north, which was the subject of planning.
- 1.4. The ground conditions on the referral were soft and there was also pooling during my site inspection. There are also new trees planted on the referral site.
- 1.5. The newly constructed houses situated to the east are sizable detached houses comprising of both 2-storey and single storey units.
- 1.6. The wider area is characterised by individual houses situated on sizeable plots to the south and agricultural fields to the north.

## 2.0 The Declaration

- 2.1. The Planning Authority issued a declaration on the 9<sup>th</sup> of November 2018, to the effect that the
  - (a) The removal of trees and other vegetation from the site is development and is exempt development, and
  - (b) Infilling of the existing hole (understood to be a former marl hole), with unknown infill material and top soiling of the filled hole. Also carrying out works to allow water held in the hole to discharge to the existing natural drainage network is development and not exempted development.
- 2.2. This Declaration has now been referred to the Board, pursuant to Section 5 of the Act, for review.

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<sup>1</sup> The Board refused permission for a development of 24 no. houses.

2.3. The main points of the Planner's report, upon which the Declaration decision was based, is summarised as follows: -

- The estimated size of the site is 0.2ha.
- It is submitted that the nature of the works is development.
- Having regard to Class 11 'Land Reclamation' the area to be effected shall not exceed 0.1 ha.
- Any previous development on the same farm holding, the total area of any such development along with the area of the previous development, shall not exceed an area greater than 0.1ha.
- The marl holes exceeds 0.1ha and notwithstanding that the fill material originated within the landholding the development is not considered exempt.
- If the fill material was waste material the infilling is not exempted development as no such exempted development provision exists.

### 3.0 The Question

*"Whether (a) the removal of trees and other vegetation from the site and (b) infilling of the existing hole with unknown infill material and top soiling of the filled hole and the carrying out of works to allow water held in the in the hole to discharge to natural drainage network, is or is not development and/or is or is not exempted development'.*

### 4.0 Policy Context

#### 4.1. Development Plan

4.1.1. Wexford Town and Environs Development Plan, 2009 – 2015, is the operational Development Plan.

4.1.2. In accordance with the Town Plan the referral site is zoned 'Medium Residential'. The objective for this land-use zoning is '*to protect and enhance the residential amenity of existing and developed communities*'.

## 5.0 The Referral

5.1. The following is the summary of the referral submission;

- It is considered that the works involving the removal of trees and other vegetation was part of the works involving the infill of a former marl hole.
- Contending that Section 4(1) (i) relates to the exemption of removal of trees and vegetation is flawed.
- Section 4 (1) (i) relates to commercial forestry and woodland development.
- No Screening for Appropriate Assessment has been submitted with the Section 5 application.
- The Planning Authority did not include a Appropriate Assessment Screening.
- The Planner's report referred to an Appropriate Assessment Screening however this maybe related to an Appropriate Assessment Screening for the planning application which was the subject of an appeal.
- The submission also includes a copy of the recommendations from the Senior Executive Scientist in respect of that adjacent planning application. The report confirms that mitigation measures are necessary to avoid impacts on the EU habitat sites.
- It is submitted that the fact that mitigation measures are required prevents the Planning Authority screening out Appropriate Assessment.
- The justification that the Local Authority used to screen out the Appropriate Assessment is distance notwithstanding that the referral site and the designated site are hydrologically linked.
- It is contended that impacts on the EU designated sites cannot be ruled out.

- It is submitted that the Local Authority was incorrect in its determination based on its view that impacts would in fact occur if deleterious material entered the EU site and the absence of any scientific evidence to confirm this.
- It is submitted that as the Local Authority does not know the type of material which was used to fill the threat is a further serious threat to the EU designated site.

## 5.2. **Planning Authority Response**

None

## 5.3. **Respondent**

The following is the summary of a response submitted by Simon Clear & Associates, on behalf of the site owner.

- The subject referral is not related to the adjoining housing development (appeal 302310).
- The referrer is involved in 3 no. separate processes. This current referral, the planning appeal and enforcement.
- It is submitted that the referrer has attempted to conflate these issues.
- The Section 5 application as administered by the Planning Authority is fundamentally flawed as the Planning Authority failed to notify the owner of the declaration decision ref. EX00729.
- It is requested that the referral is dismissed as the correct and legal procedures have not be followed.

## 5.4. **Observations**

None

## 6.0 Evaluation

### 6.1. The Facts of the Case

The facts of the matter include the following;

- **15<sup>th</sup> October 2018** a Section 5 declaration was sought by a third party, Michael Brennan, asking the question whether (a) a change of use from the removal of trees and other vegetation from the site, and (b) infilling of the existing hole with unknown infill material and top soiling of the filled hole and the carrying out of works to allow water held in the hole to discharge to natural drainage network is or is not development and whether is or is not exempted development.
- On the **9<sup>th</sup> of November 2018** Wexford County Council determined that Part (a) of the question is exempted development whereas Part (b) of the question is not exempted development.
- On the **28<sup>th</sup> of November 2018** a third party referral was received by Michael Brennan in accordance with the provisions of Section 5(3)(a) of the 2000 Act.

### 6.2. Statutory Provisions

I consider the following statutory provisions relevant to this referral case:

#### Planning and Development Act, 2000 (as amended)

Section 2 (1) states: - 'development' has the meaning assigned to it by Section 3, and 'develop' shall be construed accordingly;

Section 3 (1) states: -

"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 of use of any structures or other land."

Section 4 (1) sets out various forms and circumstances in which development is exempted development for the purposes of the Act.

Section 4 (2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations, 2001.

Planning and Development Regulations, 2001 (as amended)

**Article 6(1)** of the Regulations states as follows: - “(a) Subject to article 9, development consisting 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 8** relates to exemptions for field drainage.

- Article 8B relates to field drainage for agriculture, other than reclamation of wetlands.
- Article 8C relates to land reclamation works, other than reclamation of wetlands, consisting of recontouring of land, including infilling of soil (but not waste material),

**Class 11** of Part 3, of Schedule 2 refers to ‘development consisting of the carrying out of drainage and/or reclamation of wetlands’. The following conditions apply.

1. The area to be affected shall not exceed 0.1ha.
2. Where development has been carried out within a farm holding under this class, the total area of any such development taken together with the area of



any previous such development within the farm holding shall not exceed the limits set out in 1 above.

### 6.3. Other Relevant Case(s)

- RL 02RL3540 – This case related to a question whether the recovery of surplus excavated inert soil and the importing of that soil for infilling low lying area is or is not exempted development. The Board decided that this would constitute ‘works’ and therefore ‘development’ as defined in Section 2 and Section 3 of the Planning and Development Act, 2000. The Board determined that no exemption is available for the development as such the recovery of surplus excavated inert soil and the importing of that soil for infilling low lying area is development and not exempted development.

### 6.4. Assessment

The Local Authority Section 5 Screening Determination is in two parts. Therefore, in the interest of clarity, I will consider the two questions separately.

#### 6.4.1. Is or is not development

Question no. 1 – Whether the removal of trees and vegetation from the site is development.

Section 2 (1) states: - ‘development’ has the meaning assigned to it by Section 3.

Section 3 (1) states: - *“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 of use of any structures or other land.”* Section 2 defines works as *‘any act or operation of construction, excavation, demolition, extension, alteration, repair, renewal.....’*.

I would note that the subject trees / vegetation is not part of a forest and would appear to be situated on the perimeter of an agricultural field which zoned for residential development. I would consider, having regard to the definitions in Section 2 and Section 3 above, that the removal and clearance of trees and vegetation within an agricultural holding would not be development. As such it is not necessary to consider whether the removal and clearance of trees is exempted development.

Question no. 2 – Whether the infilling of the existing hole (understood to be a former marl hole), with unknown infill material and top soiling of the filled hole. Also carrying out works to allow water held in hole to discharge to the existing natural drainage network is development and is or is not exempted development.

Having regard to Sections 2 and Section 3 of the Act, as amended, referred to in paragraph 6.2 above, drainage works and infilling with soil would constitute development.

#### 6.4.2. Is or is not exempted development

I have reviewed both the Planning and Development Act, 2000, as amended, and the Planning and Development Regulations, 2001, as amended. I would consider, and having regard to the information available on the file, that the relevant exempted development provisions include;

- Class 11, Part 3 of Schedule 2 of the Planning and Development Regulations, 2001, as amended.
  
- Article 8B & 8C of the Planning and Development Regulations, 2001, as amended.
  
- Section 4(1) (l) of the Planning and Development Act, 2000, as amended.

Class 11, Part 3 of Schedule 2 of the Planning and Development Regulations, 2001, as amended

The critical issues in this exempted development provision relative to the subject development is the size of the site. Class 11 condition no. 1 states '*the area to be affected shall not exceed 0.1 hectares*'. The Local Authority have identified that the size of the referral site is approximately 0.2ha and as such would exceed condition no. 1 of Class 11. Therefore the exemption available under Class 11, Part 3 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, would not apply to the development the subject of this referral question.

Article 8B & 8C of the Planning and Development Regulations, 2001, as amended.

Article 8B provides that there is an exemption for field drainage for agriculture, other than reclamation of wetlands.

In considering the subject referral question before the Board it is questionable whether the drainage works were actually carried out for agriculture. The referral site formed part of a planning application for a housing development which was the subject of an appeal (appeal ref. 302301). The location of the referral site is notable as it is sandwiched between two housing developments and a proposed housing development, i.e. appeal ref. 302301. It is also notable that the referral site is zoned for residential development in the current Wexford Town and Environs Development Plan, 2009 – 2015, as extended. The exemption under Article 8B applies to drainage for the purpose of agricultural land and in my view it is questionable whether the subject site is agricultural land.

The second issue to arise is whether the referral site is or is not a wetland. In accordance with Article 5 of the Planning and Development Regulations, 2001, as amended, '*wetlands*' are defined as *natural or artificial areas where biogeochemical functions depend notably on constant or periodic shallow inundation, or saturation, by standing or flowing fresh, brackish or saline water*'. I would consider based on the

information provided, including photographic evidence, by the referrer and having regard to the aforementioned definition that it is possible to conclude that the referral site is a former wetland. I would acknowledge that the site owner has not responded in relation to this issue however I would note that the Local Authority refers to the referral site as a wetland in the planner's report. I would conclude that the exempted development provision available in accordance with Article 8B of the Planning and Development Regulations, 2001, as amended, would not be available to the referral question Part (B).

Article 8C of the Planning and Development Regulations, 2001, as amended, provides an exemption for land reclamation works, other than reclamation of wetlands, including recontouring and infilling of soil, but not waste material, within a farm holding.

I have concluded above that the subject referral site can be considered a former wetland based on the photographic evidence provided by the referrer and the definition of a wetland in accordance with Article 5 of the Planning and Development Regulations, 2001, as amended. Furthermore the exemption applies for the infilling of soil but not waste material. It is unknown from the information available whether the material used for infill is or is not excavated waste material or whether the material is extracted from the established farm holding. The fact that the material must be used from an existing farm holding implies that there is an established agricultural use which is currently not the case or at least this has not been adequately demonstrated. Furthermore it is unknown infill material used for the infill and therefore it has not been demonstrated whether the infill material is waste or non waste material. I would conclude that the exempted development available in accordance with Article 8C of the Planning and Development Regulations, 2001, as amended, would not be available to the subject development.

Section 4(1) (l) of the Planning and Development Act, 2000, as amended.

Section 4(1)(l) provides that development consisting of the carrying out of any the works referred to in the Land Reclamation Act, 1949 (not comprising the fencing or enclosure of land which has been open to the public, or works consisting of the reclamation of estuarine marsh land and of callows), is exempted development.

The Land Reclamation Act, 1949, does not define the term land reclamation, but as stated previously, the term is referred to and described, in Article 8 of the Planning and Development Regulations, 2001 (as amended).

*‘Land reclamation works (other than reclamation of wetlands) consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development’.*

The Waste Management (Facility Permit and Registration) Regulations, 2007, as amended, define recovery of natural materials (clay, silt, sand, gravel or stone) as a waste activity. I refer from this, there, therefore, that recovered soil is a waste material, and that the subject development, would not, therefore, comply with this requirement of Article 8C of the Regulations. Furthermore I have concluded earlier in this report that the referral site can be defined as a former wetland.

I consider that the subject development, which involves the infill of unknown waste material to a site which is in part of a former wetland, does not constitute land reclamation. The proposed development, therefore, would not benefit of the exempted development provisions set out in Section 4(1)(l) of the Planning and Development Act, 2000 (as amended).

#### 6.4.3. Appropriate Assessment

The Board will note that Section 4(4) of the Planning and Development Act, 2000, as amended, sets out that development shall not be exempted development if an EIA or

AA is required. As no exemptions are available for the development in question it is not necessary for the Board to examine whether appropriate assessment issues arise.

## 7.0 RECOMMENDATION

### 7.1. Conclusions and Recommendations

Accordingly, I would recommend an order along the following lines: -

**WHEREAS** a question has arisen as to whether (a) removal of trees and other vegetation from the site is development and is exempt development, and (b) the infilling of the existing hole with unknown infill material and top soiling of the filled hole and the carrying out of works to allow water held in the hole to discharge to natural drainage network, is or is not development and/or is or is not exempted development'.

**AND WHEREAS** the said question was referred to An Bord Pleanála by Michael Breenan:

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

- a. Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- b. Section 4(1)(l) and 4(4) of the Planning and Development Act, 2000, as amended,
- c. Articles 5, 6 and 8 of the Planning and Development Regulations, 2001, as amended and Class 11 of Part 3 of Schedule 2 of the said Regulations, as amended,
- d. the Waste Management (Facility Permit and Registration) Regulations 2007 (as amended by SI No. 86 of 2008), and

**AND WHEREAS** An Bord Pleanála has concluded that:

- a. the removal of trees and other vegetation from the site is not development,
- b. the infill development does not come within the scope of the exemption set out under section 4(1)(l) of the Planning and Development Act 2000, as amended,
- c. the infill development does not come within the scope of the exemption set out in Article 8B of the Planning and Development Regulations, 2001, as amended, because the subject site is a former wetland as defined in Article 5 of the Planning and Development Regulations, 2001, as amended,
- d. the infill development does not come within the scope of the exemption set out in Article 8C of the Planning and Development Regulations, 2001, as amended, in respect of Land Reclamation, because the material used for infill is unknown which may give rise to filling with waste material as defined in the Waste Management (Facility Permit and Registration) Regulations 2007 (as amended), and the site is a former wetland.
- e. the infill development does not come within the scope of Class 11 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, (Land Reclamation - infilling of wetlands) because of non-compliance with the Conditions and Limitations Column 1 of that Class, as the area in question exceeds the 0.1 hectares, and

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that (a) the said removal of trees and other vegetation from the site is not development, and (b) the said infilling of the existing hole with unknown infill material and top soiling of the filled hole and the carrying out of works to allow water held in the in the hole to discharge to natural

drainage network, at Crosstown, Ardavan, County Wexford is development and is not exempted development.

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Kenneth Moloney  
Planning Inspector

27<sup>th</sup> March 2019