



An
Bord
Pleanála

Inspector's Report ABP-304569-19

Question

Whether the culverting of a stream for the purposes of drainage works to agricultural land, the upgrading of internal access by the laying of hardcore to facilitate access to uplands including agricultural lands and forestry to the south is or is not development or is or is not exempted development.

Location

Ballyoonan, Omeath, Co. Louth.

Declaration

Planning Authority

Louth County Council

Planning Authority Reg. Ref.

S5 2019/14

Applicant for Declaration

Gerard Watters.

Planning Authority Decision

Is not exempted development

Referral

Referred by

Gerard Watters.

Owner/ Occupier

Gerard Watters.

Observer(s)

None.

Date of Site Inspection

10th December 2019.

Inspector

Deirdre MacGabhann

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Site Location and Description

- 1.1. The subject site is situated c. 2km to the south of Omeath in the townland of Ballyoonan, Co. Louth. It lies to the south of the R173, a regional road that runs along the southern side of Carlingford Lough, on the lower, northern slopes of Carlingford Mountain. The Tain Way, a long-distance walking route, passes through the site.
- 1.2. The large, L-shaped site rises away from the public road and comprises principally rough grazing land. Access to the site is from an existing entrance on the R173. Hard core and fill has been laid to provide a track along the eastern and northern boundary of site and provides access to a ruined house. The track splits just west of the house and two culverts have been provided to allow each section of track to cross a small stream.

2.0 The Question

- 2.1. The question before the Board, is whether or not the following comprise development and exempted development:
 - Maintenance works to a derelict house (removal of ivy and roof). This matter was not addressed by the planning authority in their section 5 report.
 - Culverting of a stream for the purpose of drainage of agricultural land.
 - The upgrading of internal access by the laying of hardcore to facilitate access to uplands including agricultural land and forestry.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On the 3rd May 2019 the planning authority decided that the following development referred to the planning authority is development and is not exempted development for the reasons stated:

- Drainage works for agricultural lands does not come within the scope of Article 8B of the Planning and Development Regulations, 2001 (as amended),
- An internal access by laying of hardcore to facilitate access to uplands for forestry and agricultural land does not come within the scope of Article 8G of the Regulations, or Schedule 2, Part 1, Class 13 of the Regulations as there is no evidence of any existing large wooded or forested areas within the location plan submitted, and
- The culverting of a stream does not come within the scope of Schedule 2, Part 3, Class 3 of the Regulations as it cannot be concluded on the basis of the information provided that the culverting of the stream, which leads directly to Carlingford Lough SAC would not have a significant effect on the integrity of the Site under Article 9(1)(a)(viiB) of the Regulations.

3.2. Planning Authority Reports

Planning Reports

3.2.1. The Planning Report (1st May 2019) refers to the planning history of the site and relevant sections of the Planning and Development Act, 2000 (as amended) and the 2001 Regulations (as amended). Having regard to the definition of development in the Planning Act it considers that the works referred to comprise development. However, it was considered that the works did not comprise exempted development for the following reasons:

- There is no evidence to suggest a large wooded or forested area within the location plan submitted. The internal access road/hardcore area would not come within the scope of Article 8G of the Regulations (construction or improvement of road to serve forests and woodland).
- The internal access/hardcore area is a new access and would not come within the scope of Schedule 2, Part 1, Class 13 of the Regulations (repair or improvement of private street, road or way).
- Drainage works for agriculture would come within the scope of Article 8B of the Regulations.

- The culverting of a stream would normally be considered exempted development under Schedule 2, Part 3, Class 3 of the Regulations (maintenance of culvert), but this is subject to Article 9 of the Regulations.
- Article 9(1)(a)(viiB) restricts exempted development where it is likely to have a significant effect on a European site. The culverting of the stream is a source/pathway between the site and two Natura sites, Carlingford Mountain SAC and Carlingford Lough SAC) and it cannot be concluded that the development would not have a significant effect on these sites.

3.2.2. Other Technical Reports

- None.

4.0 Planning History

- PA ref. 06/801 – Permission granted to relocate an existing field entrance from the western side of the field to the eastern side of the field, on land adjoining the R173 and now comprising part of the subject site.
- PA ref. 18U217 – Enforcement file in respect of alleged unauthorised access from the public road, provision of laneway, culverting of stream and associated site development works. Correspondence on file also refers to works to a derelict house on the lands and provision of access to these.

5.0 Policy Context

5.1. Natural Heritage Designations

- 5.1.1. The subject site lies c.50m south of Carlingford Lough pNHA (site code 000452) and Carlingford Shore SAC (site code 002306). It also lies c.25m north of Carlingford Mountain pNHA and SAC (shared site code 000453).

6.0 The Referral

6.1. Referrer's Case

- 6.1.1. The following grounds are submitted to the Board:

- Works to derelict structure – The works carried out comprise the maintenance and repair of the derelict house (which is not a Protected Structure), namely removing of ivy and dangerous roof which had subsided. The works are exempted development under Section 4(1)(h) of the Act i.e. works for the maintenance, improvement or other alteration of any structure which do not materially affect its external appearance.
- Drainage works – These comprised:
 - a. The installation of two culverts in a stream involved the laying of 4m length of pipe, 24” diameter, and embedding the pipe in stone. Prior to this there had been problems with drainage on the land which resulted in waterlogging of fields making it impossible to carry out any farming. A culvert had been in situ on the land prior to the purchase by the landowner.
 - b. The laying of hardcore in order to prevent significant waterlogging which has occurred along the internal access route as a result of vehicles traversing the land to access the commonage lands to the south (affidavits attached demonstrating that other landowners require access through the site).

Use of land for the purpose of agriculture is exempted development under section 4 of the Planning and Development Act. Under Article 8B works consisting of field drainage for agriculture is exempted development. The drainage works were carried out in the form of field drainage for agriculture and are therefore exempted under Article 8B.

- Laying of hardcore – Comprise part of the maintenance of an internal access to the forest and woodland to rear and would constitute exempted development under Article 8G of the Regulations. There has always been a gate at this entrance and no new access to the public road has been provided. The internal access which only consists of hardcore (<4m wide), does not involve the creation of a new access to the public road, is not a road and only serves to provide for the safe traversing of agricultural vehicles over the land to access commonage and woodland areas to the south. It was carried out as part of drainage works associated with agricultural

development. The Tain Way passes through this field and the applicant receives funding for it. In order to maintain the lands and facilitate access to Tain Way the hardcore was essential and constitutes drainage works for the purpose of agriculture (attaches schedule of work required for maintenance of the route, which includes maintenance of drains, rehabilitation of surface where localised damage occurs). The works were carried out in compliance with the Tain Walks Scheme to facilitate safe access to commonage lands and Tain Way. The internal access was becoming more and more waterlogged and was restricting pedestrian movement within the field. As the works are specifically required by the Department of Environment, Heritage and Local Government, to maintain the Tain Way, they do not constitute development and would be exempted under section 4A and 8B of the Regulations.

- Appropriate Assessment – Refers to an attached Appropriate Assessment Screening Report which concludes that the works have no impact on European sites, alone or in combination with other plans and projects.

6.2. Planning Authority Response

- Works to derelict house – Refers to attached photographs and states that the dwelling has been abandoned for some time. Any maintenance or repair works would be substantial and require a planning application. The referrer's submission refers to the structure as being derelict.
- Laying of hardcore – Article 8G of the Regulations refers to development consisting of the construction, maintenance or improvement of a road where the road serves forests and woodlands. There is no evidence to suggest that there is a large wooded or forested area within the location plan which the internal road/way/access would serve. Google aerial maps from April 2010 indicate that there has never been an internal road/way/hard core area in situ at this location. The works therefore do not come within the scope of Article 8G.
- Restrictions on Exemptions under Article 9(1) of the Regulations are not subject to Article 8G.

- General drainage works to agricultural land do come within the scope of 8G. However, it is considered that culverting a stream did not come within the scope of Schedule 2, Part 3, Class 3 of the Regulations as it could not be concluded that the development would not have an effect on a European site. The planning authority did not have the benefit of the Screening Report at the time of their assessment.
- Request the Board to uphold their decision.

6.3. Further Responses

- None.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 (as amended)

- Sections 2, 3 and 4 of the Planning and Development Act 2000 (as amended).

7.2. Planning and Development Regulations, 2001

- Articles 8B, 8G and Schedule 2, Part 1, Class 13 and Part 3, Class 3 of the Planning and Development Regulations 2001 (as amended).

8.0 Precedents

8.1. Previous cases which raise similar issues to the current case, include:

- RL3352 – The Board decided that works carried to a derelict single storey farmhouse for habitable use at Carrigmartin, Ballyneety, County Limerick was development and was not exempted development.
- RL2587 – The Board decided that the carrying out of works to complete flood relief pipe at Scariff, Middleton, County Cork was development and was not exempted by reason of the nature and extent of work involved.
- RL2485 – The Board decided that the filling of 0.8 hectare area with inert materials and the construction of a forestry road at Cruagh, Rockbrook,

Rathfarnham, Dublin was development and was not exempted development (road had not been constructed to serve forestry).

9.0 Assessment

9.1. Is or is not development

9.1.1. Three principle works are referred to the Board:

- Maintenance and repair of derelict house.
- Carrying out of drainage works for agriculture (provision of two culverts).
- Laying of hardcore as part of internal access to forest and woodland to rear.

9.1.2. Section 3(1) defines development as '*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*'. And the term 'works' is defined in section 2 as '*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal*'.

9.1.3. Having regard to both definitions, I would conclude that all three of the acts referred to the Board comprise development.

9.2. Is or is not exempted development

9.2.1. **Maintenance and repair of derelict house.** The building on the appeal site is referred to by the referrer in his submission to the planning authority and the Board as a derelict house and, having inspected the site, I would concur with this description. The use of the building as a house has been abandoned for some time and the roof, windows and walls are not intact. Section 4(1)(h) of the Planning and Development Act 2000 (as amended) provides that '*development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures*' is exempted development. In this instance, the building is derelict and the works which have taken place (removal of ivy and roof) are substantial and materially affect the external appearance of the structure and rendering it

inconsistent with its original character. I do not consider therefore that the maintenance and repair of the derelict house comprise exempted development.

- 9.2.2. **Carrying out of drainage works for agriculture.** The referrer argues that the two culverts have replaced an existing culvert and have been put in place to improve drainage on the site. From my inspection of the site it is evident that a small but fast flowing stream enters the subject site from the north, passes under it in the two culverts (and a short open stretch of water) and re-join the watercourse which discharges into Carlingford Lough. The northern most culvert is laid c.1-2m below ground level.
- 9.2.3. Section 4(1)(a) of the Planning and Development Act provides an exemption for the use of any land for agriculture and Article 8B of the Regulations provides an exemption for '*works consisting of field drainage for agriculture, other than drainage and/or reclamation of wetland*'. There is no information on the state of the previous culvert or how this affected land in the area of the culvert e.g. as a consequence of waterlogging of soils, and I would accept that it is possible that in poor condition the previous culvert may have made it difficult for vehicles to pass through this section of the subject site, to access wider lands for the purpose of farming these lands.
- 9.2.4. Section 4(4) of the Act provides that development shall not be exempted development if an appropriate assessment is required. In this instance, Carlingford Mountain Special Area of Conservation (site code 000453) lies upstream of the site and the stream crossing the appeal site discharges into Carlingford Lough, which is also designated as an SAC, c.400m downstream of the outfall from the most northerly culvert.
- 9.2.5. The referrer includes in his submission to the Board an Appropriate Assessment Screening Report. The report concludes that the development (provision of culverts and laying of hardcore) would not have an adverse effect on any European site, for example, by way of land take or emissions. However, the report provides little information on the methodology that was adopted to protect water quality during construction of the culverts (e.g. timing of works, arrangements for diversion of flows and management of soils). Given my observations on the volume and speed of water flowing in the stream and the depth of the culvert (most notably the northern one), I consider that there is a risk that construction works could have a deleterious

effect on water quality in the Lough, albeit localised to the outfall point. Whilst any such effects are likely to have been both short term and localised, they would have triggered the need for a more detailed screening. Further, appropriate assessment screening requires assessment of likelihood of effects in the absence of mitigation measures. Consequently, I consider that the risk of environmental effects on a European site, would have triggered the need for appropriate assessment screening and, given the proximity of the site to the SAC and depth of culvert, probably a Natura Impact Statement. For this reason, I consider that the carrying out of drainage works (installation of culverts) would not be exempted development.

9.2.6. Article 6 of the Planning and Development Regulations 2001 (as amended), subject to Article 9, provides an exemption for minor works and structures, including the *'maintenance of any gully, drain, pond, trough, pit or culvert, the widening or deepening of watercourses, the removal of obstructions from watercourses and the making or repairing of embankments in connection with any of the foregoing works'* in Class 3, Part 3 (Exempted Development – Rural) of Schedule 2. However, again this exemption is precluded by Section 4(4) of the Act which provides that development shall not be exempted development if an appropriate assessment of the development is required.

9.2.7. **Laying of hardcore as part of internal access to forest and woodland to rear.** Article 8G of the Planning and Development Regulations 2001 (as amended), provides that *'Development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road), or works ancillary to such road development, where the road serves forests and woodlands, shall be exempted development'* (my emphasis).

9.2.8. It is evident from inspection of the subject site that hardcore track principally serves the referrer's landholding, providing access to agricultural land and to the ruined house on the site. There is little evidence of any substantial forestry or woodland within this holding, or south of it (vegetation is principally upland heath).

9.2.9. The affidavit on file indicates that other parties cross the site to access common lands and the applicant also argues that (i) the hardcore track was laid to prevent further degradation of the soils on site by access vehicles, and can be considered to

be field drainage works, and (ii) the works were carried out in compliance with the Tain Walks Scheme to facilitate safe access to commonage lands and to the Tain Way, with the waterlogged field restricting pedestrian movements, and would be exempted in accordance with Section 4a (use of land for agriculture) and Article 8B (field drainage works for agriculture) of the Regulations.

9.2.10. Field drainage works are typically those employed to remove excess soil water to reduce or eliminate waterlogging, with the introduction of drains, provision or clearance of culverts etc. Therefore, in principle, I am not inclined to accept that the construction of an access track comprises field drainage works (regardless of need). Further, the Tain Way is a long-distance walking route. From inspection of the site, there is little evidence that pedestrians have been restricted in their movements along the trail given the terrain over which they would be walking, through the subject field to access the steeper, and rougher slopes of the mountain (see photographs).

9.2.11. Article 6 of the Planning and Development Regulations 2001 (as amended), subject to Article 9, provides an exemption for '*The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving*' in Class 13, Part 1 of Schedule 2. From the information on file, it would appear that the subject hardcore track is a new development and provides access for vehicular traffic. It would not, therefore, fall within this Class of exempted development.

10.0 Recommendation

10.1. 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 culverting of a stream for the purposes of drainage works to agricultural land, the upgrading of internal access by laying of hardcore to facilitate access to uplands, including agricultural lands and forestry to the south, is or is not development or is or is not exempted development:

AND WHEREAS Gerard Watters, Balregan, Kilcurry, Dundalk, Co. Louth requested a declaration on this question from Louth Council and the Council issued a declaration on the 3rd day of May 2019 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 30th day of May 2019:

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

- (a) Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) Articles 8B and 8G of the Planning and Development Regulations, 2001, as amended,
- (c) Class 13, Part 1, Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (d) Class 3, Part 3, Schedule 2 of the Planning and Development Regulations, 2001, as amended,
- (e) the planning history of the site,
- (f) the location of the subject site in proximity to Carlingford Lough;
- (g) the nature of land uses and pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The maintenance and repair of derelict house; carrying out of drainage works for agriculture (provision of two culverts) and laying of hardcore as part of internal access to forest and woodland to rear comprise development.
- (b) The maintenance and repair of derelict house does not come within the scope of section 4(1)(h) of the Planning and Development Act

2000 (as amended) due to the nature and scale of works carried out.

- (c) Carrying out of drainage works for agriculture (provision of two culverts) do not come within the scope of Article 8B or Class 3, Part 3 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended), as the works require appropriate assessment and are, therefore, subject to the requirements of Section 4(4) of the Planning and Development Act, 2000 (as amended).
- (d) Laying of hardcore as part of internal access to forest and woodland to rear does not come within the scope of Article 8G of the Planning and Development Regulations, 2001 (as amended) as there is no evidence of any substantial forest or woodland that is served.
- (e) Laying of hardcore as part of internal access to forest and woodland to rear does not come within the scope of Article 6 and Class 3, Part 1 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended) as the subject track is a new development and provides access for vehicular traffic.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the maintenance and repair of derelict house; carrying out of drainage works for agriculture (provision of two culverts) and laying of hardcore as part of internal access to forest and woodland to rear is development and is not exempted development.

Deirdre MacGabhann
Planning Inspector

9th January 2020