



An
Bord
Pleanála

Inspector's Report RL305296.

Question

Whether the construction of earthen embankments for the purpose of drainage improvements is or is not development and is or is not exempted development.

Location

Speenogue, Burt, Lifford, Co. Donegal.

Declaration

Planning Authority

Donegal County Council

Planning Authority Reg. Ref.

S5/19/16.

Applicant for Declaration

Mr Gerard McLaughlin.

Planning Authority Decision

Is development and is not exempted development.

Referral

Referred by

Mr Gerard McLaughlin.

Owner/ Occupier

Mr Gerard McLaughlin.

Observer

None.

Date of Site Inspection

28th November 2019.

Inspector

Mairead Kenny.

1.0 Site Location and Description

The case relates to lands which are located south of the N13 and the An Grianan Hotel in Speenogue, Burt in north county Donegal. The site adjoins the marked route to An Grianan Aileach, a significant archaeological site of national importance, which is a tourist attraction of importance to the region. There are stunning views throughout the area over Lough Swilly to the north.

The overall holding in the ownership of the referrer comprises a 10.55 hectares plot, which it is stated he purchased in June 2017. The former use of the lands had been as a pitch and putt which had ceased trading in 2000. The general layout of the lands as a pitch and putt is shown on an image on page 3 of the application submission. The land is presently in agricultural use.

The defined plot is 2.3 hectares in area and comprises an elevated and steeply sloping field, which is bounded by roads on the south-east and south-west sides. Adjacent these roads there is a deep ditch which is in turn connected with a public surface water pipe which passes under the local road to the south-east and which discharges to the applicant's lands. There is a ditch also at the east / north-eastern site boundary. At an entrance at the field at the south-western side the drain is piped under the hardcore adjacent the field gate.

On site I noted the earthen embankment subject of this referral, which I estimate to be 2m in height on average. This passes parallel to the south-east and south-west site boundaries and parallel to the drainage ditches at this location. Some tree planting has taken place and the field was marked with poles in connection with a planning application for a dwellinghouse.

Photographs of the site and surrounding area which were taken by me at the time of my inspection are attached.

2.0 The Question

Whether the construction of earthen embankments for the purpose of drainage improvements is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The planning authority having considered

- section 2,3, 177U of the PDA 2000 as amended and
- Class 3, Part 3, Schedule 2, Articles 6, 8 and 9 of the PDR 2001 as amended,

decided that the construction of earthen embankments is development and is not exempted development.

The declaration application form refers to the proposed development as a single storey bungalow type dwellinghouse and describes the subject query as relating to the construction of earthen embankments.

It refers the Planning and Development Regulations as follows:

Class 3 – Works relating to the construction or 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.

The applicant's submission notes that there are no specific conditions or limitations attached to this class of development. It is considered that the works are exempted under article 6(3) of the Planning and Development Regulations 2001. The submission notes the exceptional circumstances in this case.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The planner's report notes that the site occupies an elevated position relative to Burt chapel and can afford scenic views to visitors of Grianan of Aileach over Inch Island and Lough Swilly on their descent. The site is in close proximity to view identified in the development plan map 7.1.1.

The report notes that the site is not within an EHSA, is not within the vicinity of archaeological monuments and would not have an effect on the conservation

objectives of the nearby SPA. No policy issues arise. There is no potential for de-exemption on amenity, ecology or other such grounds.

The provision of earthen embankments which exceed 1m in height is 'works' and therefore constitutes 'development'.

The planning authority is not satisfied that the development comes within the scope of class 3 as:

- No watercourse exists at the location of the embankment.
- Neither have they been made in connection with widening or deepening of any watercourse.
- Article 8 of the PDR 2001 as amended provides for works specified in a drainage scheme and / or reclamation of land 'consisting of re-contouring of land including infilling of soil (but not waste material) within a farm holding' to be exempted development.
- The earthen embankments do not have any function related drainage or land reclamation.

Enclosed photographs which show the embankment soon after construction and the base of the drain which is dry.

3.2.2. Other Technical Reports

None.

4.0 Planning History

4.1. Planning applications and enforcement

Under reg. ref. 19/50514 an application for permission for a dwellinghouse in the south-eastern corner of the referrer's lands was refused permission for three reasons. Reason 2 notes that the site is within an Especially High Scenic Amenity Area. The referrer identifies reason 1 of that decision as being relevant. It may be summarised as follows:

- Installation of earthen berms which has been undertaken to assist in screening of the proposed development and for which permission has not

been sought – application is premature pending regularisation of the unauthorised development on the site. Furthermore the development may be prejudicial to the protection of views and landscape.

In response to the referral the planning authority has advised that there is another application under consideration for a dwellinghouse at the site under planning reg. ref. 19/51373.

Three other previous applications for residential development at this site were refused permission under reg. refs. 11/70334, 10/70128 and 99/3910.

Reg. ref. 92/1114 relates to an application for retention of golf course and change of use of store to clubhouse.

A warning letter was issued under section 152 of the Act in relation to the construction of earthen embankments at the overall plot from which the site of the planning applications is taken.

4.2. Referrals

Regarding precedent cases I consider that the following raise issues which are of some relevance.

Under RL3086 the Board decided that the maintenance and cleaning of an existing field drain for the purposes of agriculture (being works which constituted of the removal of soil and silt and debris in the context of keeping the existing channels maintained and in their normal working order comes within the meaning of Class 3 of Part 3 of the Second Schedule to the Planning and Development Regulations 2001 as amended.

Under RL2728 the Board decided that the **construction of two ponds** and a shed was exempted development. The ponds were stated to have been constructed for reasons of retaining flood waters. The decision referenced Class 3 of Part 3 of the Second Schedule to the Planning and Development Regulations 2001 as amended.

Under RL2760 the Board decided that the **widening and deepening of a stream and the associated embankments** do not come within the scope of Class 3 of Part 3 of the Second Schedule to the Planning and Development Regulations 2001 as

amended as they are not minor works that widen or deepen the stream but instead divert the stream from its natural course.

Under RL 2339 the Board decided that the **construction of a bridge in replacement of an existing bridge / culvert** did not constitute works relating to the construction or maintenance of any gully, drain, pond, trough, pit or culvert and did not come within the scope of Class 3 of Part 3 of the Second Schedule to the Planning and Development Regulations 2001 as amended.

Under RL3003 the question related to **replacement of an existing bridge**. This was considered not to come within the scope of development in Class 3 of Part 3 of the Second Schedule to the Planning and Development Regulations 2001 as amended.

RL3133 relates to construction of an earthen embankment within a housing estate and is not relevant to this rural area.

RL3483 related to the **raising of the height of an existing driving range berm in a golf course**, is not relevant to this rural area (notwithstanding the previous use of lands as a pitch and putt course) as it was considered largely on the basis of Class 34 which relates to golf courses.

5.0 Policy Context

5.1. Development Plan

The site is within an area Especially High Scenic Amenity Area.

The view from An Grianan of Aileach is identified as a view which requires protection under the development plan.

5.2. Natural Heritage Designations

Lough Swilly SPA is to the north and Lough Swilly SAC further north.

6.0 The Referral

6.1. Referrer's Case

The works undertaken were with regard to land drainage improvement. It is a moot point as to whether or not a gully or drain existed originally. The development is exempted development under Class 3:

Works relating to the construction or maintenance of any drain ... and the making of any embankments in connection with any of the foregoing works.

The referral has given ample evidence in relation to the flooding of the lands and that the roadside drainage was overgrown when he purchased it, which is evident from the enclosed image. The planning authority has failed to consider the wording of the Class correctly. Class 3 does not just refer to a watercourse.

Noting the comments of the Council's planner's report there is no dispute that the embankment constitutes development and works. The reference to the embankment exceeding 1m in height may point to a misinterpretation of Class 6 Part 1 of Schedule 2, which does not apply to this referral.

The planning officer has not provided evidence to support the statement that regard was had to recent referrals to An Bord Pleanála.

Regarding A9(vi) the embankment and the trees do not have any effect on the listed view. Images enclosed show that the site lies outside the area that is affected. In addition the small embankment would be barely visible.

The trees could be removed if necessary. There is no requirement for planning permission to plant trees. The matter of any future application is not relevant to this referral.

In relation to A9(viiB) the maintenance or construction of a drain / gully and associated embankment would not be likely to have a significant effect on the integrity of a European site and any impact that it may have would be likely to be positive as it will slow the rate of water entering any watercourses in the future.

The background to the works is described. The subject lands were flooded in what is described as a severe and unprecedented rainfall event in the area in August 2017, which affected the property and the hotel to the north as well as infrastructure in the

area. This involved clearing of drains and construction of earthen embankments. The embankments were planted with trees.

On inspection it should be clear that the embankment constructed along the road would have no effect in hiding any buildings that would be erected in the claimant's landholding.

6.2. Planning Authority Response

Pre-planning advice related to a proposed dwellinghouse had been to plant trees in this general area to provide a backdrop to the dwelling when viewed from the N13 and from beyond on the southward approach to same from the general Buncrana area. The planning authority and the Roads Department have been liaising with Mr McLaughlin regarding suitable methods to deal with surface water disposal. All advice has been to provide ground drainage pipes and that the embankments as constructed are not required for drainage purposes.

6.3. Further Responses

The referrer's further response includes the following points:

- The planning authority response did not deal with the referral points.
- Reference to the planning applications and to the planting of trees are separate matters to the earthen embankment subject of this section 5 referral.
- The landowner's personal submission refers to watercourses in the land and his lifetime knowledge of the local drainage and the information available in the public realm including on Landdirect.ie and on the Geohive maps.
- USB stick enclosed contains 4 audio clips of witnesses to the flood event.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2 (1) of the Act states: -

"In this Act, except where the context otherwise requires –

“**development**” has the meaning assigned to it by Section 3

"works" includes 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.

Section 3 (1) of the 2000 Planning and Development Act 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 in the 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) sets out various forms and circumstances by which the Minister may, by regulations, provide for any class of development to be exempted development for the purposes of this Act.

Section 4 (4) states that notwithstanding paragraph (a) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment is required.

7.2. **Planning and Development Regulations, 2001**

Article 6(3) – subject to article 9, in areas other than a city, a town or an area specified in section 19(1)(b) of the Act or the excluded areas defined in section 9 of the Local Government (Reorganisation) Act, 1985 (No. 7 of 1985), development of a class specified in column 1 of Part 3 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations.

Article 8 – this relates to works specified in a drainage scheme confirmed by the Minister for Finance under the Arterial Drainage Acts and carried out by or on behalf of or in partnership with the Commissioners.

Article 9 - this sets out restriction on development to which article 6 relates.

Schedule 2 - Part 3 – Exempted Development – Rural – Minor works and structures

Class 3 - Works relating to the construction or 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.

8.0 Assessment

I refer the Board to the extensive records on the file in relation to the flooding which has occurred and the proposals or need for flood schemes in the region. The unprecedented nature of the recent flood events and the severity of consequences is evident.

I accept that there is an established drain at this site boundary edge and that water which is collected from lands at the other side of the public road passes under that road and into the drain before flowing along the other side of the field along the other channel. At the time of inspection there was a small trickle of water in that drain.

The subject embankment has been constructed parallel to the south-eastern and south-western site boundaries. I am satisfied that this drainage ditch has been in place for some time. In any event there is no dispute that its construction or maintenance would constitute exempted development under Class 3.

The question relates to the earthen embankment only.

My consideration of the legal issues which are relevant to the Board's decision follows.

8.1. Is or is not development

There is no dispute over this matter.

The construction of an earthen embankment, which is the structure to which the question relates is 'works'.

The construction of the earthen embankment is development.

8.2. Is or is not exempted development

I am satisfied that the question falls to be decided based on whether or not the development comes within Class 3 of Part 3 of the Second Schedule to the Planning and Development Regulations 2001 as amended. In this regard I have considered a large number of referral cases and the submissions on file.

The development is within a rural area, which is a requirement for Class 3 of Part 3 of Schedule 2 to apply. I also consider that the development may reasonably be described as minor works.

In terms of whether the earthen embankment which has been constructed comes within Class 3, I consider that the issue turns on whether or not the earthen embankments have been constructed 'in connection with' the works to upgrade the drain and in particular whether the embankment is functionally connected with the drainage.

The purpose of the drain is to convey surface water from the steeply sloping lands to the north and it is one of a large number of such channels in place across the area, typically bounding each field. The drain would take water from the adjacent road and from the pipe which traverses under the road. The function of this drain is clear and undisputable.

I consider that the purpose of the earthen embankment is less evident. In the first instance I am satisfied that the berm in situ would have no function in relation to the protection of lands in normal circumstances. Surface water would be conveyed along the deep drainage channel at the field boundaries and would be conveyed down gradient. There is ample capacity in the deep channel for that purpose. In such events the embankment would sit proud above the level of the top of the ditch and would be well above the water level.

The referrer states that the embankment is to address flooding and exceptional circumstances. That point should be given serious consideration. I note the reports of flood events in the Inishowen area including the audio reports from Highland Radio. It is clear that this area was severely affected. If the Board determines that the earthen berm would have a function in the protection of lands in the event of a repeat of the extreme rainfall event then in my opinion it would come within the scope of Class 3.

It is relevant to note that there are two significant constraints which might impede the conveyance of surface water in extreme events. These are the piped public drain under the local road and the south-east side and the pipe at the field entrance at the south-west. I do not have information regarding the width of the pipe under the road as I could not safely access it. The entrance pipe is shown in my photographs and I measured it to be 450mm diameter.

In such extreme events as have occurred water flow through the drainage ditch would be likely to exceed the capacity of the pipe entrance at the south-west boundary. In that circumstance and taking into account the amount of water which would gather from the roads and from the upstream public drain it is conceivable that a structure at the location of the earthen berm could function to retain water so that the drainage ditch combined with the embankment functioned as an attenuation pond, holding water and protecting the lands for inundation.

If the Board considers that the earthen berm could so function then I consider that it would be reasonable to conclude that the development is exempted development under Class 3.

In my opinion the earthen berm which is in place would not fulfil that purpose. For a start, due to the topography, the theoretical pond which I have envisaged is in fact open at the entrance along the south-west boundary. In the event of a deluge of water it would not be retained by the combination of the ditch and embankment. Regarding whether the embankment would act to divert the flow of water away from the applicant's lands and retain it in the channel until its release at the site entrance, I submit that there is no evidence presented which suggests that the berm would have the strength to retain that volume of water and to divert it downstream.

I have considered the manner in which the earthen berm might function as part of a flood protection measure for this land. My conclusion is in line with that of the planning authority, namely that it would not have such function, particularly in normal weather conditions but also in an extreme circumstance.

I note that the referral submission presents information relating to the drain, its history and its effectiveness. I do not disagree with any of the points made in relation to the drain and in particular I concur that 'it will prove its effectiveness and worth when rain falls'. However, there are no such points made in relation to the

embankment. In my opinion there are no substantive points which could have been made in relation to the functioning of the embankment or its operation as part of the surface water system in the area. Any works to the drain are clearly exempted but my interpretation of the Class is that the embankment has to be 'in connection' with the drain. I do not consider that there is any functional connection.

As such I conclude that the construction of earthen embankments in this case does not come within the scope of Class 3.

In the event that the Board disagrees with the above I provide some comment in relation to the height of the development. There are no limitations or conditions attached to Class 3. The fact that the embankment exceeds 1m in height is not relevant to an interpretation of Class 3 except, in my opinion, insofar as the height may be considered to relate to the purpose of this case.

Regarding Article 8 I note that the referrer disagrees with the comment of the planning authority that 'the subject development does not come within the scope of Article 8 of the Planning and Development Regulations, 2001 (as amended). I concur with the planning authority – Article 8 has no relevance to works at private lands undertaken by a private individual.

I conclude that the development is **not exempted development**.

8.3. **Restrictions on exempted development**

The referral comments on the restrictions of development under Article 9 and sets out a useful table in section 8.0. I agree with the conclusions therein and consider that only the provisions under A9(vi) and A9(viiB) warrant consideration. These relate to landscape character / views which are protected under the development plan and to development which would require an appropriate assessment.

I agree with the referrer's submission that the development would not interfere with landscape character or protected views. It is a relatively small grass covered structure which would be assimilated into the landscape in distant views and which would be hidden behind hedgerows in close views.

I consider that there is no requirement of appropriate assessment in this case having regard to the small scale of the works undertaken and the composition of the soil, specifically the lack of peaty material.

In this regard it may be concluded that having regard to the nature and scale of the proposed development, the nature of the receiving environment, the likely emissions arising from the proposed development and distance to the nearest European sites, I am satisfied that no appropriate assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.4. **Other comments**

The referrals submissions include many references to the discharge of untreated sewage by way of the manhole in the public road and from the houses at the other side of the public road. This is not relevant to the construction of the embankment to which this question relates.

I note the comments relating to riparian rights and to the right to protect property. This referral relates to a specific question presented and it falls to be determined solely on the grounds of the relevant planning legislation.

9.0 **Recommendation**

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 construction of earthen embankments is or is not development or is or is not exempted development:

AND WHEREAS Gerard McLaughlin requested a declaration on this question from Donegal County Council and the Council issued a declaration on 1st day of August, 2019 stating that the matter was development and was not exempted development:

AND WHEREAS Gerard McLaughlin referred this declaration for review to An Bord Pleanála on the 28th day of August, 2019:

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,
- (c) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) Section 177(U)(9) of the Planning and Development Act, 2000, as amended,
- (e) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (f) Class 3 of Part 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (g) the pattern of development in the area including the topography and watercourses:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The earthen embankment is adjacent a drainage ditch, which would convey large volumes of water in the event of extreme rainfall.
- (b) The earthen embankment would not serve any function related to the diversion of surface water or the protection of lands in times of normal weather patterns as it would be elevated above the water level.
- (c) The purpose of the earthen berm and its function in times of extreme rainfall events is not evidently connected with the function of the drainage ditch and it was considered that it would not assist in the protection of lands in such extreme circumstances and as such could not be considered to be a structure which is connected with the drainage ditch.

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 construction of an earthen embankment for the purpose of drainage improvements is development and is not exempted development.

Mairead Kenny
Senior Planning Inspector

4th December 2019