



An
Bord
Pleanála

Inspector's Report ABP-307625-20

Question

Whether the groundworks undertaken, including importation and deposition of fill material to create a hardstanding area and the raising of ground levels from 2013 onwards is or is not development and/or is or is not exempted development.

Location

Knockanoura, Tulla Road, Ennis, Co. Clare

Declaration

Planning Authority

Clare County Council

Planning Authority Reg. Ref.

20-25

Applicant for Declaration

Pat Quinn

Referred by

Clare County Council

Owner/ Occupier

Valley Healthcare Fund Infrastructure Investment Fund (ICAV)

Date of Site Inspection

14th October 2020

Inspector

Colin McBride

1.0 Site Location and Description

1.1. The lands to which the referral relates are located in the north-eastern environs of Ennis Town Centre on the southern side of the Tulla Road. The lands occupy an area stated to be approximately 1.8 hectares. They are currently undeveloped and filled with hardcore material. The north-eastern portion of the lands front onto the Tulla Road and extend back from the road to occupy an area to the rear of a petrol station and a number of commercial units which fronts onto the Tulla Road. The suburban estate of Castle Rock is located on lands to the west and south of the subject site. A large area of public open space associated with this estate is located adjacent to the south-eastern boundary of the site. The subject site extends to the bank of the River Fergus but the area where the infill has taken place has not extended to the river. It appears from maps on file that a drainage channel to the east of the River Fergus traversed part of the site to the rear of the petrol station in a north/south direction prior to the infilling of the site with hardcore. This drainage channel which comprises of an elongated depression is still apparent on lands to the south of the site adjacent to the existing residential estate. It appears from maps submitted that this drainage channel previously extended across the site to the rear of the existing petrol station.

2.0 The Question

2.1. The question is whether or not groundworks undertaken, including the importation and deposition of fill material to create a hardstanding area and the raising of ground levels at Knockanoura, Tulla Road, Ennis, Co. Clare from 2013 onwards is or is not not development and whether such is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority received the request for a declaration from Pat Quinn on the 08th June 2020 and referred it to Board on the 30th of July 2020.

4.0 Planning History

- 4.1 ABP-307172-20: Current case seeks leave to apply for substitute consent by Valley Healthcare Fund Infrastructure Investment Fund (ICAV) regarding infilling of land, which is a portion of the site subject to this section 5 declaration.
- 4.2 RL03.RL3202: A declaration was sought from the Board from the residents of Woodstock Hill and Woodstock View as to whether or not the removal of fill material from lands for the use in the construction of embankments as part of the Ennis South Flood Relief Scheme constitutes development and if it constitutes development whether or not the works constituted exempted development. The Board issued a declaration that the construction of embankments as part of the Ennis South Flood Relief Scheme which is incidental to the works being carried out pursuant to the approval under Appeal Ref. No. 03.JP0013 together with the exemptions under Article 8 of the Planning and Development Act which are not bound by the restrictions on exemptions specified under Article 9 of the said Regulations that the works in question constitute development which is exempted development.

5.0 Policy Context

5.1. Development Plan

The relevant development Plan is the Clare County Development Plan. The site is has two zonings. A portion of the site running along the Tulla Road frontage is zoned 'Commercial', "the use of land zoned for 'commercial' purposes shall be taken to include the use of the lands for commercial and business uses including offices, service industry, warehousing and the facilitation of enterprise/retail park/office type uses as appropriate. Retailing is open for consideration on this zoning, provided that a sequential test is carried out and the lands are demonstrably the optimum location for the nature and quantum of retail development proposed". The portion of the site to the rear of the commercial zoning is zoned 'Open Space', "it is intended that lands zoned 'open space' will be retained as undeveloped open space, mainly for passive open space related activities. The open space/park areas could contain active play

facilities such as children's play areas but these would only be a small component of the overall areas involved".

The sites is part of an area designated as OP18.

5.2. **Natural Heritage Designations**

Part of the site is within the Lower River Shannon SAC (site code 002165).

6.0 **The Referral**

6.1. **Referrer's Case**

The declaration was submitted by P. Coleman & Associates on behalf of Pat Quinn, Knockanoura, Tulla Road, Ennis.

- The referrer outlines infilling works that took place on site between 1999 and 2002 and infilling works that took place from 2013 onwards. The referral concerns the infilling works carried out since 2013. The referrer outlines the different stages of works that took place on site indicating that works were carried out to infill and create hardstanding area, increasing ground levels outside of the scope to the River Fergus Lower Certified Drainage Works and are works that constitute development and are not exempted development.
- The works in question which relate to infilling of the site and uniform increase in ground levels across the site constitute development as defined by Section 3 of the Planning and Development Act, 2000 (as amended).
- The referrer note that a previous referral on site subsequently quashed by the High Court (RL3611) referred to Section 4(1)(g) and Section 4(2)(a) of the Planning and Development Act, 2000 (as amended), Article 6(1) and Article 8 of the Planning and Development Regulations, 2001 (as amended) and Schedule 2, Part 1, Class 16 of the same regulations.
- The referrer states that the works carried out between 1999-2002 are unauthorised works that were not exempted development.

- In relation to the works carried out between 2013-2014 such works were outside of the area subject to the Drainage Scheme and were accommodation works for the landowner and cannot be regarded as works incidental of necessary for the drainage scheme and does not come under the scope of Article 8 of the regulations. It is considered that the infill works (Area A) that were carried out outside of provision of temporary access to the drainage works are not incidental to the drainage scheme and Article 8 does not apply.
- In relation to works carried out in 2015 relating to a construction compound associated with improvements of the water networks the provisions of Section 4(1)(g) of the Act and Schedule 2, Part 1, Class 16 of the regulations does not apply as the exemption only relates to the period for which construction works are being carried out and the hardstanding area/material imported to create such are still in-situ.
- In relation to the works carried out between 2014-2015 to infill the remainder of the subject lands with stone creating a hardstanding area over the remaining lands in Area A and Area B, such did not for part of Drainage Scheme, constitute development as defined under the Planning Act, do not come under the scope of Article 8 of the Planning and Development Regulations and section 4(1)(g) of the Planning and Development Act.
- The site is part classified in Flood Zones A, B and C. The referrer notes the hydrology of the site could be affected by the raising of the levels on site with concern about increased flood risk.
- The referrer states that the environmental impact of the works have not been assessed. The site adjoins the Lower Shannon River SAC and that there were wetlands/reedbeds present on site prior to infill works (refers to department submission to ref no. P19-049). There is a potential source pathway link between the site and the adjoining SAC. There was no screening report or determination made for the works in question. It cannot be determined that the works in question would not be likely to have significant effects on a designated Natura 2000 site.
- In relation to Environmental Impact Assessment the environmental impact of the infill works is unclear with questions regarding the nature of the material

used. The impact of the works on the receiving environment and its proximity to a designated SAC. Screening for a sub-threshold EIA is required.

- The works in question constitute development and is not exempted. It is noted that Section 4(4) of the Planning and development Act, 200 (as amended) indicates that works which would be exempt by virtue of certain sections of the act or exempted development regulations shall not be exempted development if an EIA or AA is required.

6.2. Planning Authority Response

6.2.1 Response by Clare County Council.

- No further comment to make.

6.3. Owner/ occupier's response

6.3.1 Response by Crossfield Property Company Limited

- Crossfield Property Limited Company indicate they are no longer the beneficial owner of the site.
- The former owners indicate that the majority of the works on site and associated fillings was done by the OPW and the contractors carrying out a water supply upgrade scheme.
- The former owners of the site refer to a report from the OPW on flood risk management which shows the majority of the site is within Flood Zone C. It is noted that less than 10% of the site is in Flood Zones A and B and the part of the site in Flood Zone A is now totally isolated from the River Fergus and the SAC by the new embankment erected by the OPW.

7.0 Statutory Provisions

7.1. EU Habitats Directive (92/43/EEC)

7.1.1 The Habitats Directive deals with the Conservation of Natural Habitats and of Wild Fauna and Flora throughout the European Union. Article 6(3) of this Directive requires that any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The competent authority must be satisfied that the proposal will not adversely affect the integrity of the European site.

7.2. Planning and Development Act, 2000

7.2.1 Section 2 of the Act includes the following definitions: "Works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal or in relation to a protected structure includes any operation involved in the application or removal of plaster, paint, wallpaper, tiles or any other material to or from the surfaces of the interior to the exterior of the structure.

7.2.2. Section 3(1) of the Planning and Development Regulations 2000, as amended, states the follow: "Development" in this Act means except where the context other requires, 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.

7.2.3. Section 4 of the Act states the following shall be exempted development for the purposes of this Act. 4(1)(g) 'development consisting of the carrying out by any local authority or statutory undertaking of any works for the purposes of inspecting, repairing, renewing, altering or removing of any sewers, mains, pipes, cables, overhead wires or other apparatus including the excavation of any street or other land for that purpose'.

7.3. Planning and Development Regulations, 2001 (as amended)

7.3.1 Article 8 of the Regulations state the following: Works specified in a drainage scheme confirmed by the Minister of Finance with the Part 2 of the Arterial Drainage Act 1945 (No. 3 of 1945) or the Arterial Drainage (Amendment) Act 1995 (No. 14 of 1995), carried out by or behalf of or in partnership with the commissioners with such additions, omissions, variations, deviations or other works incidental thereto as may be found necessary by the commissioners or their agent or partner in the course of the works shall be exempted development. Article 6 states that 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.

7.3.2. In relation to Temporary Structures and Uses, Class 16 refers to the erection, construction or placing on land on, in, over or under which or on land adjoining which development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or exempted development, of structures, works, plant or machinery needed temporarily in connection with that development during the period of which it is being carried out.

7.3.3. The conditions and limitations as they apply to Class 16 are as follows: Such structures, works, plant or machinery shall be removed at the expiration of the period and the land shall be reinstated save to such an extent as may be authorised or required by a permission under the Act.

7.3.4 Article 9(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:

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of the development plan

(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.

(viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use....

8.0 Assessment

8.1. Is or is not development

8.2. The first issue the Board must determine is whether or not the importation and deposition of fill material to create a hardstanding area and the raising of ground levels importation and deposition of hardcore constitutes “works” and if so whether or not the activities undertaken constitute development. The activities undertaken on site involved the importation of fill material which was deposited and levelled on the subject site which resulted in an increase of ground levels. I would consider that such works would constitute development under definition of the Planning and Development Act.

8.3. Is or is not exempted development

8.3.1. On the question of whether works are exempted development or not exempted development I am satisfied that the area subject to the referral has been infilled with material creating a large area of hardcore material would have increased ground levels at this location. I would note that the referrer makes reference to a referral case, RL3611 in his referral submission. I would state at the outset that this declaration case was quashed by the High Court and assessment of this current referral pays no regard to such.

- 8.3.2. Based on the information on file works were carried out as part of River Fergus Lower Certified Drainage Works at this location with the River Fergus running along the south west boundary of the site subject to this referral. Based on the information on file these work did entail the infill of lands located adjacent the river and to the rear of the existing petrol station. There is a question mark regarding whether the level of infill and material imported on site were parts of the works necessary to implement the drainage scheme and whether such fall under the terms of Article 8 of the Planning and Development Regulations, 2001 (as amended). The referrer provides details of the timeline of works on site and is of the view that additional works/material were imported to the advantage of the site owner to provide a hardcore surface and were not works incidental or necessary to implement the drainage scheme.
- 8.3.3. In relation to the portion of the site with road frontage along the Tulla Road and located to the north easts of the Petrol Station, the referral indicates that such lands were not part of the lands subject to the drainage scheme and that such lands were used for temporary access. The referral notes that in addition use of this lands for temporary access the whole of this portion of lands was infilled and surfaced with hardcore material, which is outside of the scope providing temporary access to the lands subject to the drainage scheme. The referral also indicates that a strip of land to the east of the site was used as a temporary construction compound for a water infrastructure upgrades, however such includes importation of material and changes of levels that were not reversed after the compound was removed. In this case it is noted that Class 16 of Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended) does not apply.
- 8.3.4. There is certain degree of difficult to quantify the nature of works carried out at this location and how such relates to the drainage scheme on site and the temporary construction compound for the water infrastructure upgrade. Notwithstanding such the referrer has provided a significant degree of detail regarding the nature of works carried out and this location, the timeline and information from the contractors that carried out the drainage scheme. It is clear that a significant area fronting the Tulla

Road and to the rear of the site petrol station has been subject to importation and deposition of fill material to create a hardstanding area and the raising of ground levels infilled with material to provide a level hardcore surface. It is clear based on information on file that not all of this area fell within the scope of the drainage scheme. I would consider there is evidence to suggest that the works carried out at this location does not fall under the scope of the drainage works scheme to the River Fergus and would not be exempted development under the provisions of Article 8 Class 16 of Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended). The works carried out at this location have resulted in a significant area of to the rear and side of the existing petrol station being infilled and provided with a level hardcore surface. I would consider that there is sufficient evidence to indicate that the works carried out at this location exceed the scope of works and area that would have been part of the drainage works in relation to the River Fergus. I would be off the view that the works carried out including importation and deposition of fill material to create a hardstanding area and the raising of ground levels infilled with material to provide a level hardcore surface is not exempted development.

- 8.3.5. Part of the site is located within (south western portion) is within the Lower River Shannon River SAC (Site Code 2165) with the remainder adjacent the designated site. Having regard to the European site designation, and assessment of whether or not the works in question is or is not exempted development, is to carry out a Stage 1 Screening for Appropriate Assessment.

Stage 1 Screening for Appropriate Assessment

The referral site is located partly within and adjacent the Lower River Shannon SAC (Site Code 2165) which is designated for the following Annex 1 habitats and Annex 2 species:

Sandbanks which are slightly covered by sea water all the time [1110]

Estuaries [1130]

Mudflats and sandflats not covered by seawater at low tide [1140]

Coastal lagoons [1150]

Large shallow inlets and bays [1160]
Reefs [1170]
Perennial vegetation of stony banks [1220]
Vegetated sea cliffs of the Atlantic and Baltic coasts [1230]
Salicornia and other annuals colonising mud and sand [1310]
Atlantic salt meadows (*Glauco-Puccinellietalia maritima*) [1330]
Mediterranean salt meadows (*Juncetalia maritimi*) [1410]
Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitriche-Batrachion* vegetation [3260]
Molinia meadows on calcareous, peaty or clayey-silt-laden soils (*Molinion caeruleae*) [6410]
Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*) [91E0]
Margaritifera margaritifera (Freshwater Pearl Mussel) [1029]
Petromyzon marinus (Sea Lamprey) [1095]
Lampetra planeri (Brook Lamprey) [1096]
Lampetra fluviatilis (River Lamprey) [1099]
Salmo salar (Salmon) [1106]
Tursiops truncatus (Common Bottlenose Dolphin) [1349]
Lutra lutra (Otter) [1355]

The Conservation Objective for each of these Qualifying Interests seeks to maintain their favourable conservation condition, which is defined by a list of site specific attributes and targets. The Qualifying Interests for the SAC may occur adjacent the site/in the River Fergus site would include.

Margaritifera margaritifera (Freshwater Pearl Mussel) [1029]
Lampetra planeri (Brook Lamprey) [1096]
Lampetra fluviatilis (River Lamprey) [1099]
Salmo salar (Salmon) [1106]
Lutra lutra (Otter) [1355]

The qualifying interests are dependent on the maintenance of water quality and the works in question would have the potential for likely, significant, direct effects on

the Conservation Objectives for this European site and an Appropriate Assessment would be required. Having regard to the foregoing, I am not satisfied that the works that is the subject of this referral, individually, or in combination with other plans and or projects would not be likely to have had a significant effect on the Lowre Shannon River SAC (site code 002165), in view of the site's Conservation Objectives and an Appropriate Assessment would have been required. In this regard and having regard to Article 9(1)(viiB) such works would not be development to which article 6 relates and shall not be exempted development for the purposes of the Act. I would refer to the planning history of the part of the site and note that there is concurrent application for leave to apply for substitute consent on the lands fronting Tulla Road.

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 groundworks undertaken, including importation and deposition of fill material to create a hardstanding area and the raising of ground levels is or is not development or is or is not exempted development:

AND WHEREAS Pat Quinn requested a declaration on this question from Clare Council and the Council referrer such to An Bord Pleanála on the day of 30th of July 2020 stating that the matter was development and was not exempted development:

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) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 1 and 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) that the groundworks undertaken, including importation and deposition of fill material to create a hardstanding area and the raising of ground levels from 2013 onwards is development.
- (b) the works constitute development pursuant to section 3 of the Planning and Development Act, 2000;
- (c) the development does not come under the scope of Article 8 or Class 16 of Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended).
- (d) The works would not be exempt by virtue of Article 9(1)(ViiB) of the Planning and Development regulations 2001, (as amended).

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (2) of the 2000 Act, hereby decides that the groundworks undertaken, including importation and deposition of fill material to create a hardstanding area and the raising of ground levels from 2013 onwards is development and is not exempted development.

Colin McBride
Planning Inspector

19th February 2021