



An  
Bord  
Pleanála

## Inspector's Report ABP308854-20

<b>Question</b>	Whether land reclamation works is or is not development or is or is not exempted development.
<b>Location</b>	Knocknadoose, Valleymount, County Wicklow.
<b>Declaration</b>	
Planning Authority	Wicklow County Council.
Planning Authority Reference.	EX411/202
Applicant for Declaration	Department of Housing, Local Government and Heritage
<b>Type of Application</b>	Section 5 referral.
<b>Planning Authority Decision</b>	Is Exempted Development.
<b>Referral</b>	Third Party
<b>Referred by</b>	Department of Housing, Local Government and Heritage
<b>Owner/Occupier</b>	Joe Nolan
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	17 <sup>th</sup> September 2024.
<b>Inspector</b>	Derek Daly.

## **1.0 Site Location and Description**

- 1.1. The proposed site is located in an upland rural area in the townland of Knocknadroose approximately nine kilometres southeast of Hollywood and approximately five kilometres south of the village of Valkeymount in County Wicklow. The lands are accessed from a track which in turn has access from a local road which in turn has access onto the R756.
- 1.2. The general area and the site is characterised by sloping land which falls in level in a northerly direction to the Kings River. The area predominantly bogland and with extensive conifer planting with small areas of improved pasture accessed via roadways/ tracks running south off the public road. The lands between the public road and the Kings River is mainly pasture land.

## **2.0 The Question**

- 2.1. The question before the Board relates to whether the land reclamation works is development and whether it is exempted development.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

- 3.1.1. Wicklow County Council issued a declaration dated the 12<sup>th</sup> November 2020 (with the following reason;

*The agricultural activities, namely ploughing and harrowing, have that have been carried out on the subject site do not come within the definition of “development” as defined within the Planning and Development Act 2000 (as amended). It is considered that ploughing and harrowing by themselves do not constitute land reclamation or the recontouring of land. The Planning Authority considers that land reclamation is not development.*

### **3.2. Planning Authority Reports**

- 3.2.1. Planning Report dated 25<sup>th</sup> August 2020 refers to the location of the site within the Wicklow Mountains SPA/SAC and that the majority of the site is registered as

wetlands, that there is no planning history, to relevant legislative provisions, to submissions received and an assessment of the matters raised in the referral.

The report considers that ploughing and harrowing is considered to be agricultural practice and further information was requested by way of clarification in relation to details of works that have taken place on the site.

The planning report dated the 10<sup>th</sup> November 2020 having considered the further information dated the 30<sup>th</sup> October 2020 received which referred to the works as reclamation of wetland over 0.1 hectares and considered development within the definition of the Planning Act

The planning authority considered that only ploughing and harrowing has taken place which are considered to be agricultural activities, do not come within the definition of development and it is considered ploughing and harrowing by themselves do not constitute land reclamation or the recontouring of land.

## **4.0 Planning History**

- 4.1. The site has no relevant planning history as recorded in the planning report.

## **5.0 Policy Context**

- 5.1. Local Planning Policy

- 5.1.1. The current statutory plan is the Wicklow County Development Plan 2022-2028.

The plan outlines policies and objectives on a wide range of matters and Chapter 17 which refers to Natural Heritage and Biodiversity with an overall strategy to avoid negative impacts upon the natural environment and promote appropriate enhancement of the natural environment as an integral part of any development including objective CPO 17.4 *to contribute, as appropriate, towards the protection of designated ecological sites including Special Areas of Conservation (SACs) and Special Protection Areas (SPAs).*

- 5.2. Natura Sites

- 5.2.1. The site and lands are located within or predominantly two Natura Sites,

- 5.2.2. Wicklow Mountains SAC Site Code: 002122 which is a complex of upland areas in Counties Wicklow and Dublin, flanked by the Blessington reservoir to the west and Vartry reservoir in the east, Cruagh Mountain in the north and Lybagh Mountain in the south. Most of the site is over 300m, with much ground over 600m. Wicklow Mountains is considered important as a complex, extensive upland site with a range of protected habitats and species and the vegetation provides examples of the typical upland habitats with heath, blanket bog and upland grassland covering large, relatively undisturbed areas.
- 5.2.3. Wicklow Mountains SPA Site Code 004040 which is an extensive upland site, comprising a substantial part of the Wicklow Mountains and which is of high ornithological importance as it supports nationally important populations of Merlin and Peregrine, both species that are listed on Annex I of the E.U. Birds Directive.

## **6.0 The Referral**

### **6.1. Referrer's Case**

- 6.1.1. The referrer in the submission to the Board has submitted the correspondence submitted to the planning authority and the correspondence relating to a request of further information.
- 6.1.2. It is the contention of the referrer that reclamation of more than 0.1 hectares of a wetland requires planning.
- 6.1.3. Reference is made to works carried out which were the alteration and renewal of lands instanced as blanket bog which was carried out by the use of a plough and a device used for harrowing.
- 6.1.4. Reference is made to the amendment of the planning regulation in S.I 454/2011 with the additional of Article 8B and further amended in S.I. 464/2011 by the substitution of "drainage and/or reclamation of wetlands" for "drainage of wetland".
- 6.1.5. Reference is made to the definition of wetlands in the planning regulations.
- 6.1.6. The works on a wetland are a form of reclamation which does constitute development once over 0.1 hectares.
- 6.1.7. Clearly the intention is reclamation of a wetland over 0.1 hectares.

- 6.1.8. Maps were submitted indicating the location of the lands the area of the land and location within Natura sites.

**6.2. Planning Authority Response**

- 6.2.1. No response was received

**7.0 Statutory Provisions**

- 7.1. Planning and Development Act, 2000

Section 2 – Interpretation

“agriculture” includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and “agricultural” shall be construed accordingly.

“development” has the meaning assigned to it by section 3 and ‘develop’ shall be construed accordingly.

“exempted development” has the meaning specified in section 4.

“unauthorised use” means, in relation to land, use commenced on or after 1 October 1964, being a use, which is a material change in use of any structure or other land and being development other than-

(a) Exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) Development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G, 37N or 293 of this Act being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject.

Section 3 – Development

In this Act, except where the context otherwise requires, "development" means—

(1) (a) the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land,

#### Section 4 – Exempted Development

Section 4 (1) The following shall be exempted developments for the purposes of this Act—

(a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used;

(2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act.

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

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

(a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and

(b) as respects which an environmental impact assessment or an appropriate assessment is required, to be exempted development.

Section 5 (1) states: If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter. In assessing Section 5 applications regard is given to Section 3 (1), which states in this Act, “development” means, except where the context otherwise 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. Planning and Development Regulations, 2001

### 7.2.1. Part 2 refers to Exempted Development.

### 7.2.2. Article 5 Part 2 – Exempted Development Interpretation for this Part.

“Wetlands” means 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.

### 7.2.3. Works specified in a drainage scheme

Article 8B. Works consisting of field drainage for agriculture, other than drainage and/or reclamation of wetlands, shall be exempted development.

Article 8C. 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.

### 7.2.4. Article 9 sets out a number of restrictions on exempted development.

Article 9 (1) Development to which article 6 relates shall not be exempted development for the purposes of the Act—

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

### 7.2.5. Schedule 2 Part 3 Article 6 Exempted Development — Rural

#### Land Reclamation

Class 11 Development consisting of the carrying out of drainage and/or reclamation of wetlands.

#### Conditions and limitations

1. The area to be affected shall not exceed 0.1 hectares.
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.

- 7.2.6. Schedule 5 Environmental Impact Assessment. Development for the purposes of Part 10 Article 93. Part 2

*Part 2 Agriculture, Silviculture and Aquaculture*

1 (c) Development consisting of the carrying out of drainage and/or reclamation of wetlands where more than 2 hectares of wetlands would be affected.

## **8.0 Assessment**

- 8.1. The purpose of this referral is not to determine the acceptability or otherwise of the development referred to in the question but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.
- 8.2. The question put forward by the referrer relates to land reclamation works.
- 8.2.1. Is or is not development.
- 8.2.2. In the declaration of the planning authority, it is stated that the agricultural activities, namely ploughing and harrowing, have been carried out on the subject site and do not come within the definition of “development” as defined within the Planning and Development Act 2000 (as amended). The Planning Authority considered that only ploughing and harrowing has taken place and may not be within the remit of reclamation works and ploughing and harrowing by themselves does not constitute land reclamation or the contouring of land.
- 8.2.3. The referrer submitted that reclamation of more than 0.1 hectares of a wetland requires planning and works were carried out which were the alteration and renewal of lands instanced as blanket bog which was carried out by the use of a plough and a device used for harrowing.
- 8.2.4. In relation to development the definition of development as stated in section 3(1) (a) of the Planning and Development Act 2000 as amended defines it as the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land,
- 8.2.5. The basis of the declaration of the planning authority I would interpret to be that the agricultural activities, that have been carried out on the subject site do not come



within the definition of development and it is considered ploughing and harrowing by themselves do not constitute land reclamation or the recontouring of land.

The significance of this interpretation is if it is considered to be land reclamation or the contouring of lands outside of standard agricultural activities it would be considered to be development and not provided for under Section 4 (1) (a) of the Planning and Development Act 2000 as amended which provides for development consisting of the use of any land for the purpose of agriculture and also the Planning Regulations 2001 as amended which specifically identifies works in relation to reclamation which are deemed development but proscribed to be exempted development subject to conditions and limitations stated.

- 8.2.6. In relation to the subject lands while it is accepted by all parties that ploughing and harrowing have occurred the activity has occurred on a bog and not on farming lands used for a form of intensive agricultural such as tillage or grassland pasture and in this regard, I would refer to the interpretation of agriculture and agricultural as defined in section 2 of the Planning and Development Act 2000 as amended. Applying an agricultural activity such as ploughing and harrowing in itself does not necessarily infer an exemption applies. The works which have occurred on the land and the use of the land can I consider be taken as having materially changed and is therefore development.

### 8.3. Is or is not exempted development

- 8.3.1. The Planning and Development Regulations 2001 as amended have specific provisions in relation to what is considered to be exempted development in relation to reclamation of lands. In this regard I would refer to Articles 8B and 8C on the matter of field/land drainage which are considered exempted development.
- 8.3.2. Article 8B provides for works consisting of field drainage for agriculture, other than drainage and/or reclamation of wetlands, shall be exempted development. In relation to this article, the exemption is clear in providing for field drainage for agriculture and very specifically excludes a wider consideration of drainage and / or reclamation of wetlands. Article 8C provides clearly for reclamation works which are other than reclamation of wetlands consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding. There is a clear distinction in articles 8B and 8C between wetlands and other land.

- 8.3.3. Further in relation to exempted development Schedule 2 Part 3 Article 6 Exempted Development Rural in relation to land reclamation in Class 11 provides for in relation to wetlands an exemption for development consisting of the carrying out of drainage and/or reclamation of wetlands subject to conditions and limitations which specify the area to be affected shall not exceed 0.1 hectares and 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 which in this case is 0.1 hectares. The area of ploughed and harrowed lands exceed the area stated in the conditions and limitations.
- 8.3.4. The question arises in relation to whether these lands constitute wetlands and the referrer clearly consider the lands in question constitute wetlands based on the definition in the Planning and Development Regulations 2001 as amended.
- 8.3.5. Article 5 Part 2 – Exempted Development Interpretation for this Part has defined wetlands as meaning 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. Wetlands applies to a wide range of ground conditions based on this definition which would include blanket bogs and other peatland.
- 8.3.6. The ploughing and harrowing of the lands in question has an intention to alter the bogland altering its natural drainage to in effect dry out the land and reclaim it for another uses other than as bogland.
- 8.3.7. Based on the provisions as set out in Article 8B and to a lesser degree 8C which more specifically refers to re-contouring of land but does exclude wetlands and the conditions and limitations of Schedule 2 Part 3 of Class 11 which limits the area to not exceed 0.1 hectares the works as carried out exceed the conditions and limitations and are therefore not exempted development.
- 8.4. Other considerations.
- 8.4.1. Although not specific to the question it is noted that Schedule 5 in relation to Environmental Impact Assessment. development for the purposes of Part 10 Article 93 in part 2 relating to Agriculture, Silviculture and Aquaculture in class 1 (c) refers to development consisting of the carrying out of drainage and/or reclamation of

wetlands where more than 2 hectares of wetlands would be affected. Based on the documentation submitted the lands in question would appear to exceed the area which requires EIAR.

- 8.4.2. This would raise the question of Section 4 (4) of the Planning and Development Act 2000 as amended which indicates “notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required” would apply and also deem the development not to be exempted development.

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

(b) as respects which an environmental impact assessment or an appropriate assessment is required, to be exempted development.

This would not appear to be provided for.

- 8.4.3. I would also refer to Article 9 which sets out a number of restrictions on exempted development including (1) (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.

In this regard I would note the land in question is largely within two Natura sites and the matter of whether appropriate assessment stage 1 to consider the issue of a significant effect on the integrity of a European site would require to be addressed.

## 8.5. Environmental Impact Assessment (EIA) Preliminary Examination

- 8.5.1. Development in respect of which an environmental impact assessment or appropriate assessment is required cannot be exempted development (Section 4(4) of the Planning and Development Act 2000 (as amended)). Schedule 5, Part 1 and Part 2 of the Planning and Development Regulations, 2001 (amended) sets out specified development for which EIA is mandatory and development which requires screening for EIA.

Having regard to Schedule 5 Part 2 relating to Agriculture, Silviculture and Aquaculture Class 1 (c) refers to development consisting of the carrying out of drainage and/or reclamation of wetlands where more than 2 hectares of wetlands would be affected. Based on the documentation submitted the lands in question would appear to exceed the area which requires screening for EIAR and the need for environmental impact assessment cannot, therefore, be excluded at preliminary examination and a screening determination is required.

#### 8.6. Appropriate Assessment

- 8.6.1. Having regard to the land's location within wholly and partially within two Natura 2000 sites, the Wicklow Mountains SAC Site Code: 002122 and Wicklow Mountains SPA Site Code 004040 it is concluded that Appropriate Assessment issues arise as the development cannot be excluded not having a significant effect individually or in combination with other plans or projects on a European site without further assessment.

### 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 Land reclamation works is or is not exempted development: AND

WHEREAS the Department of Housing, Local Government and Heritage requested a declaration on this question from Wicklow County Council and the Council issued a declaration on the 12<sup>th</sup> day of November 2020 stating that the matter was not development: AND WHEREAS the Department of Housing, Local Government and Heritage referred this declaration for review to An Bord Pleanála on the 8<sup>th</sup> day of December 2020: 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 of the Planning and Development Act, 2000:
- (c) Section 4 of the Planning and Development Act, 2000, as amended:
- (d) Section 5 of the Planning and Development Act, 2000, as amended:
- (e) Articles 5, 6, 8 and 9 of the Planning and Development Regulations, 2001, as amended:
- (f) Schedule 2 Part 3 Article 6 Exempted Development — Rural Land Reclamation Class 11 of the Planning and Development Regulations, 2001, as amended:
- (g) Schedule 5 Environmental Impact Assessment. Development for the purposes of Part 10 Article 93. Part 2 *Agriculture, Silviculture and Aquaculture* 1 (c)
- (h) the planning history of the site:
- (i) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) reclamation works constitutes development as defined under section 3(1)(a) of the Planning and Development Act 2000 (as amended),
- (b) it is not exempted development as it does not come within the scope of Section 4 (1), (2) and (4) of the Planning and Development Act 2000 as amended or Part 3 Class 11 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended) or, Part 2 1 (c) of Schedule 5 of the Planning and Development Act 2000 as amended
- (c) there are no exemptions provided for in the said Planning and Development Act, 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended), and

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act (as amended), hereby decides that;

The land reclamation works is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

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Derek Daly  
Planning Inspector

9<sup>th</sup> October 2024