



An
Bord
Pleanála

Inspector's Report ABP-311284-21

Question	Whether the deposition of construction and demolition waste on land is or is not development or is or is not exempted development.
Location	Na Tuairimí, Maigh Cuillinn, Galway.
Planning Authority	Galway County Council
Planning Authority Reg. Ref.	ED/2164
Planning Authority Decision	Is development and is not exempted development.
Referred by	Abaigéal Smyth
Owner/Occupier	Unknown
Observer(s)	None.
Date of Site Inspection	26th day of January 2022.
Inspector	Fergal Ó Bric.

1.0 Introduction

- 1.1. This Section 5 referral was submitted to the Board by Abaigéal Smyth (the referrer), a resident of Stillorgan, Dublin who states that she is acting on behalf of herself and the Wild Ireland Defence. The referrer has requested a determination from the Board under the provisions of Section 5(3)(a) of the Planning and Development Act 2000 (as amended). The referral relates to the deposition of construction and demolition waste on lands at Na Tuairímí, Maigh Cuillinn, Co. Galway.
- 1.2. The site comprises an agricultural field, accessed directly off the N59, a national secondary route linking Galway City with Clifden. The site is located approximately 8.5 kilometres north-west of Galway City centre and approximately 2.6 kilometres south-east of the town of Maigh Cuillinn (Moycullen). There are a number of stockpiles of material deposited on site in the form of soils, sub-soils, stones and some construction waste in the form of rock, stone and builders' rubble. There was evidence of water ponding in proximity to the stockpiles of material on site and there were track marks evident on the ground within the site relating to heavy machinery depositing/moving material.
- 1.3. The site is located within a rural and unserved area where the lands are unzoned and identified as agricultural. There is sporadic development of rural dwellings and agricultural structures in this area. The nearest dwelling is located approximately 70 metres from the site on the opposite side of the N59, and south-west of the site.

2.0 The Question

- 2.1 The question posed by the referrer in the documentation submitted to the Planning Authority on the 16th day of July 2021 is as follows:

Whether the deposition of construction and demolition waste at Na Tuairímí, Maigh Cuillinn, Co. Galway is or is not development, and is or is not exempted development.

3.0 Planning Authority Declaration

3.1 Galway County Council issued a declaration on the 16th day of August 2021 in accordance with Section 5(2)(a) of the Planning and Development Act (PDA) 2000 (as amended), in respect of the development. The Planning Authority determined that the deposition of construction and demolition waste is development, and is not exempted development, having regard to the provisions of the Planning and Development Regulations 2001 (as amended).

4.0 Planning Authority Reports

4.1 Planning Report

A report was prepared by the Planning Authority and the main focus of attention related to the definition of works, development and exempted development, as set out within Sections 2, 3, and 4 of the Planning and Development Act (PDA), 2000 (as amended), and Articles 6 and 9 of the Planning and Development Regulations (PDR,s) 2001, (as amended).

The Planning Authority stated that having regard to the provisions of Sections 2, 3, 4(i) (h) and 4 (4) of the PDA and Articles 9(1) (a) (ii) (iii) (vi) (viiB) and (viiC) of the PDR's 2001 (as amended), that the works on site, would constitute development, as defined under Section 3 of the Act.

They stated that as there are no planning exemptions for the deposition of construction and demolition waste, set out within the PDR's, the works are not exempted development, and would require planning permission.

The Planning Authority did not screen the works in relation to the need to carry out Environmental Impact Assessment, nor assess whether a mandatory EIA is triggered by the extent of deposition that has occurred on the lands.

In relation to Appropriate Assessment, the Planning Authority concluded that the works could be screened out, by virtue of the separation distance to the nearest Natura 2000 site, the Lough Corrib SAC, being 250 metres north of the appeal site and stated that there is no direct hydrological pathway connecting the site to the SAC.

5.0 Planning History

I am not aware of any relevant planning history pertaining to the site.

6.0 Natural Heritage Designations

The site is not located within the bounds of any European site. The closest European site to the subject site is the Lough Corrib SAC (site code 000297), located approximately 185 metres north-west of the site at its closest point.

The Lough Corrib pNHA (site code 000297) is located approximately 245 metres north-west of the site at its closest point.

7.0 The Referral

7.1 Referrer's Case

The referral by Abaigéal Smyth can be summarised as follows:

- The Planning Authority declared that the development, past and ongoing, at Na Tuairimí, is unauthorised, and would require planning permission. The decision as set out by the Planning Authority is correct in principle, however the decision that issued was flawed for the following reasons:
- The decision of Galway County Council was made three days after the end of the 4-week period, the last date for making the decision. This leaves the decision legally flawed for the purposes of enforcement action.

- The decision of the Planning Authority did not assess the requirement to submit an Environmental Impact Assessment (EIA) and/or a Natura Impact Statement (NIS).
- The past and ongoing development on the site cannot be regularised through Section 34, as such an application is precluded under Section 34(12).
- The decision of the Planning Authority speaks of “proposed development”, whereas unauthorised development has been ongoing on this site for years. The Board is requested to clearly address past, as well as ongoing development in its decision.

7.2 Planning Authority Response

The Planning Authority made no comment to the Board in relation to this Section 5 referral case.

8.0 Statutory Provisions

8.1 Planning and Development Act, 2000 (as amended)

Section 2(1)

In this Act, except where the context otherwise requires—

“works” include 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)

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.

Section 4 ‘Exempted Development’.

Section 4(1)(a) – Provides that the use of land for the purpose of agriculture and development for the use of agriculture is exempted development.

Section 4(2) – Provides that the Minister can make regulations to provide classes of development to be exempted development.

Section 4(4A) (b) – Provides that development shall not be exempted if it requires the preparation of an Environmental Impact Assessment or an Appropriate Assessment.

8.2 **Planning and Development Regulations, 2001 (as amended)**

PART 2 - Exempted Development

Article 6(1)

Subject to Article 9, development of a class specified in Column 1, Part 1, Schedule 2, shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in Column 2 of the said Part 1, opposite the mention of that class in the said Column 1.

Article 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 –
 - (i) Contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act, ...
 - (iii) Endanger public safety by reason of traffic hazard or obstruction of road users.

9.0 Assessment

9.1 Is or is not development?

9.1.1 Section 3(1) of the Planning and Development Act 2000 (as amended) defines development as ‘the carrying out of works on, in, over or under land or the making of a material change in use of any structures or other land’. Section 3(2) states, “For the purposes of subsection (1) and without prejudice to the generality of that subsection (b) where land becomes used for any of the following purposes— (iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders’ waste, rubbish or debris, the use of the land shall be taken as having materially changed.

9.1.2. The referrer states that the deposition of construction and demolition (C & D) waste has occurred on the lands at Na Tuairimí which constitutes ‘development’, as set out within Section 3(1) of the Act.

9.1.3 The deposition of the C & D waste may reasonably be determined to be actions that would comprise ‘works’ in accordance with the definition set out under section 2(1) of the Planning and Development Act 2000 (as amended). The carrying out of these works on, in and over land and would also constitute “development” in accordance with Section 3 of the Planning and Development Act, 2000 (as amended). The Board will also note that the making of any material changes in the use of land, including the deposit of builder’s waste, constitutes ‘development’ as set out within Section 3 (2) (b) (iii) of the Act.

9.1.4 In conclusion, I would concur with the Planning Authority that the deposit of C & D waste is development, as set out within Section 3(1) of the PDA, as they are works on and over land.

9.2 Is or is not exempted development

9.2.1 The referrer submits that the lands have been subject to the deposition of construction and demolition material. Furthermore, from the information on file and from an inspection of the subject site, I can confirm that the lands are and have been subject to the deposition of construction waste (e.g., there were a number of

stockpiles of bricks, stones, soils, sub-soils and builders' rubble on site and photographic evidence of construction and demolition waste has been submitted by the referrer). I am satisfied that the use of the land has materially changed from agricultural use to use for the deposition of C & D Waste. Section 3 (2) (b) (iii) of the PDA, specifies the deposit of builder's waste constitutes a material change of use of lands, which I am satisfied would also cover C & D waste. I note that there are no exemptions provided in relation to deposit of C & D waste within the PDA or the PDR's which provide for such a material change of use. I, therefore, consider that the deposition of construction and demolition waste on the lands represents a material change of use on the lands at Na Tuairimí, and is not exempted development.

9.2.2 Article 9 (1) (b) (iii) sets out that development to which article 6 relates shall not be exempted development for the purposes of the Act, if the carrying out of such development would endanger public safety by reason of a traffic hazard or cause obstruction of road users. The site is accessed directly off the N59, National secondary route, at a point where the maximum speed limit applies. Therefore, I consider that the deposition of C & D waste which would involve the use of heavy large machinery maneuvering in and out of the site, would interfere with the safety and free flow of traffic on the adjoining N59 and could potentially endanger public safety by reason of a traffic hazard, on a road that experiences a high volume of traffic on a daily basis.

9.3 Change of use of lands

9.3.1 Would the deposit of C & D waste represent an intensification of use, such that a material change in the use of the site arises, resulting in development and the subsequent requirement for planning permission?

Judge Barron held in the case of Galway County Council v Lacknagh Rock, that the onus is on the Planning Authority (decision maker) to prove that the intensification of activity amounted to a change of use which was material. Given the site is located within a rural and unserved area, it is apparent that a change of use has occurred, from agricultural use to use of the lands for the deposition of construction and demolition waste. Therefore, as per the provisions of Section 3 (2) (b) (iii) of the

PDA, I am satisfied that a material change of use of the lands has occurred in this instance.

9.4 Environmental Impact Assessment (EIA)

- 9.4.1 The next element of the question is whether the development would trigger a requirement to prepare an Environmental Impact Assessment Report (EIAR)? In this regard, I would refer the Board to the provisions Schedule 5, Part 2, Article 11(b) (ii), of the Regulations. This particular provision could trigger a requirement for the submission of a mandatory EIAR, and hence the requirement to submit a planning application, if the thresholds as set out are exceeded. The thresholds set out relate to installations for the disposal of waste with an annual intake greater than 25,000 tonnes, not included in Part 1 of this schedule.
- 9.4.2 From my site inspection, I observed a small number of stockpiles of C & D waste deposited on the site. I am satisfied that the volume of C & D waste deposited on site would be significantly below the 25,000-tonne threshold. Schedule 5, Part 2, Article 13(a) (ii), of the Regulations sets out that where an increase in size greater than 25%, or an amount equal to 50% of the appropriate threshold, whichever is the greater, this would trigger the requirement to submit an EIAR, and hence the requirement to submit a planning application. The appropriate threshold in this instance is 25,000 tonnes as set out within Article 11 (b) within the Regulations, and 50% of this figure, would amount to 12,500 tonnes. I am satisfied that the volume of C & D waste deposited within the site would be below both of these thresholds. Therefore, I am satisfied that the submission of a mandatory EIAR is not required in this instance, under these provisions within the PDR's.
- 9.4.3 Schedule 7 of the Regulations sets out the criteria that must be considered in determining whether 'sub-threshold' projects should be subject to an EIA. These criteria relate to the characteristics of the development, the location of the development, and the type and characteristics of potential impacts. Given the proximity of the site to Loch an Chaolaigh and Lough Corrib, I consider that there is potential for groundwater to be adversely impacted upon by the deposition of the C & D waste. Lough Corrib which is an important source of drinking water for Galway city and the surrounds. I consider that an EIA screening would be required at a minimum in this instance, given the potential for groundwater quality to be adversely impacted

upon by the deposition of the C & D Waste. The screening would determine if a full EIAR, would be required to assess the full extent of potential adverse impacts upon the local groundwater system which in turn could adversely impact upon habitats within the local water bodies, and whether or not the adverse impacts identified, could be mitigated.

10.0 **Appropriate Assessment**

10.1 The subject site is removed from nearby European sites, with the nearest occurring approximately 185 metres north-west of the site, that being Lough Corrib SAC. Loch an Chaolaigh is partly located within the subject lands and also north-east of the subject lands. It is very likely that the SAC and Loch an Chaolaigh, by virtue of their proximity to each other, are replenished by the same aquifer and therefore, there is a strong likelihood that there is an indirect hydrological pathway between the subject site and the Lough Corrib SAC. Therefore, a screening or Appropriate Assessment would be required at a minimum, and this would determine if a Stage 2, Natura Impact Assessment would be required to assess the extent of potential adverse impacts upon the SAC, and whether or not the adverse impacts identified, could be mitigated.

10.2 In conclusion, it is considered that there is potential for the development to have an adverse effect individually, or in combination with other plans or projects on a European site.

11.0 **Conclusion and Recommendation**

WHEREAS a question has arisen as to whether the deposition of construction and demolition waste on lands at Na Tuairimí, Maigh Cuillinn is or is not development and is or is not exempted development:

AND WHEREAS the said question was referred to An Bord Pleanála by Abaigéal Smyth. on the 3rd day of September 2021:

AND WHEREAS An Bord Pleanála, in considering this referral, had particular regard to:

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Sections 3(1) and 3(2) (b) (iii) 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) Schedule 5, Part 2, Articles 11 and 13 of 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-

The deposition of construction and demolition waste, comprises a material change of use/ and development of land by reason of Section 3 (2) (b) (iii) of the Planning and Development Act 2000 (as amended), and no relevant exempted development provisions apply in the Act or the Regulations in relation to this type of development.

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 deposit of material is development is not exempted development

Fergal O'Bric

Planning Inspectorate

14th day of September 2022.