



An  
Bord  
Pleanála

## Inspector's Report ABP-314075-22

### Question

Whether the construction of a pond and it's natural habitat/ private amenity space is or is not development or is or is not exempted development

### Location

Pembrokestown, Duncormick, Co. Wexford.

### Declaration

Planning Authority

Wexford County Council

Planning Authority Reg. Ref.

EXD00952

Applicant for Declaration

Julian & Claire Hastings

Planning Authority Decision

Is not exempted development

### Referral

Referred by

Julian & Claire Hastings

Owner/ Occupier

Julian & Claire Hastings

Observer(s)

None

Date of Site Inspection

3<sup>rd</sup> of October 2023

Inspector

Angela Brereton

## Contents

|   |    |
|---|----|
| 1.0 Site Location and Description .....               | 4  |
| 2.0 Planning History.....                             | 4  |
| 3.0 The Question .....                                | 5  |
| 4.0 The Referrer’s Case to the Council.....           | 5  |
| 5.0 Planning Authority Declaration.....               | 7  |
| 5.1. Declaration .....                                | 7  |
| 5.2. Planning Authority Reports .....                 | 7  |
| 5.3. Other Technical Reports .....                    | 8  |
| 6.0 The Referral to the Board .....                   | 8  |
| 6.1. Referrer’s Case .....                            | 8  |
| 6.2. Planning Authority response .....                | 10 |
| 7.0 Policy Context.....                               | 10 |
| 7.1. Wexford County Development Plan 2022-2028 .....  | 10 |
| 7.2. Natural Heritage Designations .....              | 11 |
| 8.0 Statutory Provisions.....                         | 11 |
| 8.1. Planning and Development Act, 2000 .....         | 11 |
| 8.2. Planning and Development Regulations, 2001 ..... | 12 |
| 9.0 Assessment .....                                  | 14 |
| 9.1. Introduction .....                               | 14 |
| 9.2. Is or is not development .....                   | 15 |
| 9.3. Is or is not exempted development .....          | 15 |
| 9.4. Restrictions on exempted development .....       | 15 |
| 9.5. Other issues raised .....                        | 16 |

10.0 Other Referral Cases ..... 19

    10.2. Cases referred to by the Referrer ..... 19

11.0 Environmental/Hydrological issues ..... 21

12.0 Appropriate Assessment ..... 21

13.0 Recommendation ..... 22

## 1.0 Site Location and Description

- 1.1. The application site is located in the rural area to the southeast of the village of Duncormick and to the south of the village of Rathangan. It is located on a cul-de-sac narrow lane in the townland of Pembrokestown, that serves other sporadic housing development and is accessed via the local road network to the south of the junction with the R736.
- 1.2. The road frontage of the site is bounded by hedgerows and in view of this and an embankment, the pond is secluded and is not visible from the road. There is a locked gate to the site entrance, and an appointment had to be made to gain admittance. The Referrers house to the north is accessed via a tree lined avenue and the pond is on the landholding to the southeast. The pond area is sizable and has been dug out and contains a small central island. A number of plants and species were noted within the vicinity on the day of the site visit.
- 1.3. There is a dwelling house, close to the road frontage to the west of the site, but in view of the trees/hedgerows and the embankment on the site, the pond is not visible from this site or in the wider landscape context. There are wind turbines seen in the distance to the southeast of the site, which adjoins agricultural land.

## 2.0 Planning History

### *Subject site*

- Reg.Ref.20220472 – Permission granted subject to conditions to Julian Hastings for the upgrade of existing wastewater treatment system and associated site works and permission for retention of erection of replaced domestic store and studio, both in-lieu of derelict stone outbuildings of similar footprint.

Condition no.2 provided for a temporary permission of 5 years for the semi-permanent structures on site.

### 3.0 The Question

- 3.1. Whether the construction of a pond and its natural habitat/private amenity space, is development and is exempt development.

### 4.0 The Referrer's Case to the Council

Cullen Design & Build on behalf of Julian & Claire Hastings have made a request of a formal declaration to the Council under Section 5 of the Planning and Development Act 2000 (as amended) and Exempted Development Regulations 2000 (as amended).

It is the applicant's view that the construction of a pond and its natural habitat/private amenity space, is development and is exempt development and that specifically the development is exempt under the following statutory provisions:

#### **a) 4(1)(a) of the Planning and Development Act 2000**

- This provides an exemption for agricultural development. The applicants are taking their own initiative to construct a pond and create a habitat with major biodiversity benefits for surrounding agricultural lands and also in itself, creating buffer zoned, nature corridors, creating new habitats, which are now all needed and part of mainstream agriculture.
- The land in question is low lying, can be waterlogged and has poor drainage with pond levels reducing over the summer but never dry. The owners are allowing nature take its course and increase biodiversity on the site, which would be difficult to keep in grassland for grazing or other main stream agricultural uses.

#### **b) Planning and Development Regs 2001, Schedule 2, Part 1, Class 33**

- The construction of a pond is exempted under Class 33(a) with no Column 2 Condition or Limitations or pond definition either.
- They provide details of the man-made pond and consider it meets the Ramsar definition of a 'Permanent Freshwater Marsh/Pool – Ponds (below 8h).

### **c) Planning and Development Regulations 2001, Schedule 2, Part 3, Class 3**

- They believe that the pond in question is a minor works development and is rural and again with no clear definition of a pond or minor works and also no Column 2 Conditions or Limitations and is therefore exempt development.

#### Rationale

- They provide that they moved to the subject site in June 2020. They bought a piece of land containing an old farmhouse (c. 250 years old) and they provide details of this and the adjoining lands they purchased totalling 3.6 acres.
- They note that part of the land was wet and overgrown and considered the best solution was to create a wildlife pond. That it is now a success and is flourishing with flora and fauna.
- They refer to the neighbouring window turbine farm and note that the pond has created shelter and biodiversity.
- The clay dug out to form the pond was used to create banks to shelter the water from the prevailing winds. They note details of the height of the banks and of the planting they have carried out to encourage biodiversity.
- They decided to leave an island in the middle of the pond to act as an undisturbed site to encourage nesting birds.
- They note that they have introduced a range of water plants and refer to insect life and pollinators.
- They provide details of the depth of the pond and note that this varies between less than 1m to 1.4m in the deeper areas. The pond is only fed by rainwater, so it is essential to have these depths to balance the evaporation.
- The pond is continuously increasing biodiversity and it is an absolute success and they provide details. They support the diversity of wildlife including birdlife, that are attracted to their pond area.

## Conclusion

- They are of the opinion that the pond is development and is exempted development under the above 3 sections of the current legislation. That it supports biodiversity and is much needed in the locality.
- They requested the Council to issue a declaration in accordance with the findings and information under Section 5 of the Planning and Development Act 2000 and as revised and be declared exempt.
- They include photographs showing the extent of and views of the 'pond' on site.

## 5.0 **Planning Authority Declaration**

### 5.1. **Declaration**

Wexford County Council decided that the construction of a pond within the curtilage of a dwelling house is development and is not exempted development.

### 5.2. **Planning Authority Reports**

#### 5.2.1. Planning Reports

They noted that no details had been submitted on the following:

- The pond's construction,
- Whether the lake has been lined,
- Appraisal of the hydrological impact of the lake on the existing ground water, or adjacent water supplies.

They had regard to the Statutory Provisions relative to exempted development including the following:

- Section 4(1)(j) of the Planning and Development Act 2000 (as amended)
- Class 6 of Part 1(a) of Schedule 2 of the Planning and Development Regulations (as amended).

They considered that given the size of the 'lake', it is the view of the Planning Authority that this development does not fall within this exemption and is not 'incidental' to the enjoyment of the house. Wexford County Council concluded that the creation of a pond within the curtilage of a dwelling house is development and is not exempted development.

They included a note to the applicant that a retention application for the retention of the lake will be required. That the application must include a full hydrological impact report carried out by a suitably qualified person.

### 5.3. Other Technical Reports

None noted on file.

## 6.0 The Referral to the Board

### 6.1. Referrer's Case

On the 12<sup>th</sup> of July 2022, An Bord Pleanála received a request from Cullen Design & Build on behalf of the Referrers Julian & Claire Hastings for a review of the decision of Wexford County Council to declare that the development is not exempt under a Section 5 application for declaration of exempted development. It is their opinion that the Council have not assessed and reported on what they were requested to make a decision on, and they consider there have been errors made and query their decision. Their Referral to the Board includes in summary the following:

#### Referrer's consideration of Declaration by Wexford County Council

- They query the definition of 'pond' and provide that the development is a pond and not a lake for many reasons. It is manmade and all the pond/water is in the photic zone as it is quite shallow and approx. 0.5acres.
- The Council have incorrectly suggested that the pond is within the curtilage of the dwelling where it is not and in an adjoining field with the overall property of some 3.5 acres. They provide details of the usage of the landholding.



- They consider that there are errors in statutory requirements and these include the following:
  - The decision has the development location noted incorrectly as Pembrokestown, Duncormick, Co. Wexford, Y35 E025.
  - Lack of accountability in decision making by the Council.
  - No advice on the availability of the appeals process relative to a Section 5 has been provided by the Council.

### Application

- The basis of the application was made on the precedence shown in other applications and the belief the development is a pond in a rural location and not within the curtilage of a dwelling.
- They refer to other applications and provide that their application has claimed the same exemption under the same 2 or 3 sections of the Regulations, with Wexford County Council only reporting on and making declaration on Schedule 2 Part 1 Class 6.

### Errors in Report used to make Declaration

- The Council's Report suggests that the Referrers have requested a declaration as to 'whether the construction of a 'pond' within the curtilage of a dwelling house is development and is exempted development', which they consider not to be the case.
- The Referrer's explanation does not mention a liner, but does explain the heavy water logged soils, does provide the ponds depth and that excavated soil has been used in the needed shelter banks. It also explains that the pond fills and overflows naturally so no impact on adjoining ground water in an area served mainly by mains water.

### Conclusion

- Wexford County Council's assessment and conclusion that the development is a lake and within the curtilage of a dwelling are incorrect. They have provided no explanation or evidence as to why the development is a lake or is within the curtilage of a dwelling.

- They submit that there are many errors in the Council's assessment of the application and they have made the declaration as non-exempt to the applicant for sections the applicant has not claimed for.
- They include supporting documentation (letter sent to the Planning Inspectorate dated 11<sup>th</sup> of July 2022) which provides a detailed account of the site, Record of Biodiversity and photographs in their Appendices.

## 6.2. Planning Authority response

Their response to the Referral to the Board included the following:

- They include reference to history file 20220472 (referred to in the Planning History Section above).
- They include reference to copies of documentation submitted with this Referral.
- They note that Julian and Claire Hastings have stated that they are the owners of the land in question and cannot confirm any other owners.
- They note that the Council issued their decision on the 17<sup>th</sup> of June 2022.

## 7.0 Policy Context

### 7.1. Wexford County Development Plan 2022-2028

This plan came into effect on the 25<sup>th</sup> of July 2022. It sets out the policies and objectives for the County over the plan period.

#### Chapter 10: Environment Management

Section 10.5 refers to Water Quality and has regard to water bodies.

Section 10.5.1 refers to the Water Framework Directive

Section 10.5.4 to Protecting and Improving Water Quality

Objectives include:

Objective WQ15: *To ensure that development permitted would not negatively impact on water quality and quantity, including surface water, ground water, designated*

*source protection areas, river corridors and associated wetlands, estuarine waters, coastal and transitional waters.*

#### Chapter 11: Landscape and Green Infrastructure

Section 11.6 refers to Landscape Character Assessment.

Section 11.10.2 : Landscape and Visual Impact Assessment.

Objectives include:

*Objective L04: To require all developments to be appropriately sited, designed and landscaped having regard to their setting in the landscape, ensure that any potential adverse visual impacts are minimised and that natural features and characteristics of the site are retained.*

#### Chapter 13: Heritage and Conservation

Section 13.2 refers to Natural Heritage and Section 13.2.1 to Biodiversity Restoration.

Section 13.2.2 to Natura 2000 Sites – Table 13.1 refers.

Section 13.2.12 refers to Invasive Species.

Natural Heritage Objectives include:

*Objective NH03: To promote biodiversity protection, restoration and habitat connectivity both within protected areas and in the landscape through promoting the integration of green infrastructure and ecosystem services, including landscape, heritage and biodiversity and management of invasive and alien species in the plan making and development management processes.*

## **7.2. Natural Heritage Designations**

Ballyteigue Burrow SAC and SPA are c. 2.9kms to the south of the site.

## **8.0 Statutory Provisions**

### **8.1. Planning and Development Act, 2000**

Section 2(1) of the 2000 Act states the following:

- ‘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 ....’

Section 3(1) states that:

- 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 over land’.

Section 4(1) of the Act sets out various forms and circumstances in which development is exempted development for the purposes of the Act. This includes:

Section 4(1)(a) *development consisting of the use of any land for the purpose of agriculture and development consisting of the use that purpose of any building occupied together with land so used.*

Section 2 provides Interpretations and this notes that: *“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;*

Section 4(1)(j) *development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;*

Section 4(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.

## 8.2. Planning and Development Regulations, 2001

### Article 6(1)

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.

**Article 9** Restrictions on exemption.

(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act. The Restrictions on Exemption are listed and these include:

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under 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.

Schedule 2 of Part 1 to the Regulations set out the classes of exempted development including those pertaining to ‘general development within the curtilage of a house’ and separately for ‘amenity and recreational purposes’:

| Column 1- Description of Development  | Column 2 – Conditions and Limitations  |
|---|--|
| <p><i>Development within the curtilage of a house</i></p> <p>Class 6</p> <p>(a) The construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house.</p><br><p><i>Development for amenity or recreational purposes</i></p> <p>Class 33</p> | <p>The level of the ground shall not be altered by more than 1 metre above or below the level of the adjoining ground.</p> |

|  |  |
|--|--|
| Development consisting of the laying out and use of land—<br><br>(a) as a park, private open space or ornamental garden, |  |
|--|--|

Part 3 – Exempted Development - Rural Article 6

| Column 1- Description of Development  | Column 2 – Conditions and Limitations |
|---|---------------------------------------|
| <p><i>Minor works and structures</i></p> <p>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.</p> |                                       |

## 9.0 Assessment

### 9.1. Introduction

- 9.1.1. It should be stated at the outset, that the purpose of this referral is not to determine the acceptability or otherwise of the subject matter in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so falls within the scope of exempted development, within the meaning of the relevant legislation. The onus of proof is on the party seeking to prove the exemption, and the development in question must fall clearly and unambiguously within the terms of the exemption claimed.
- 9.1.2. Likewise, planning enforcement is a matter for the planning authority, and does not fall within the jurisdiction of the Board.

## 9.2. Is or is not development

- 9.2.1. Section 3(1) of the Planning and Development Act, 2000 (as amended) states that 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 over land”.
- 9.2.2. It is clear that the construction of a pond, which involved excavations, would constitute development as defined, under Section 3(1) and as such is development within the meaning of the Act.

## 9.3. Is or is not exempted development

- 9.3.1. Under the Irish planning system, development can lawfully be carried out in either of the following circumstances:
- In accordance with the terms of the planning permission granted for it; or
  - In the case of an exempted development, without planning permission but in accordance with the terms of the exemption.
- 9.3.2. In this case there is no record of planning permission having been granted for this development. While the Council’s Declaration has decided that the subject of this Referral constitutes development and not exempt development, the Referrer queries this and considers that while the works constitute development, that the construction of the pond is exempt. They consider that this exemption is claimed under the following:
- Section 4(1)(a) of the Planning and Development Act
  - Planning and Development Regulations 2001, Schedule 2, Part 1, Class 33
  - Planning and Development Regulations 2001, Schedule 2, Part 3, Class 3.

These are considered further, relative to the issues raised as noted below.

## 9.4. Restrictions on exempted development

### Section 4(1)(a) of the Act

- 9.4.1. As has been noted in the Statutory Provisions above Section 2 of the Planning and Development Act 2000 (as amended) provides an Interpretation of 'Agriculture' and the construction of a pond is not referred to in this interpretation. It is also not included in the Exemption provided for in Section 4(1)(a) in that it has not been provided that the use of the land is for the purpose of agriculture.

Schedule 2, Part 1, Class 33 of the Regulations

- 9.4.2. This relates to *Development for amenity or recreation purposes* and has been quoted in the Statutory Provisions Section above.

It is noted that this exemption does not specifically mention a pond. Therefore, the exemption offered by this Class does not apply to the Construction of a Pond.

Schedule 2, Part 3, Class 3 of the Regulations

- 9.4.3. Part 3 refers to Exempted Development – Rural and has been quoted in the Statutory Provisions Section above. This refers to *Minor works and structures*. This includes reference to: *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.*
- 9.4.4. The Referrers believe that the pond in question is a minor works development and is rural and again with no clear definition of a pond or minor works and also no Column 2 Conditions or Limitations is therefore exempt development. I note that this Class does not include any restrictions on exemption. However, it is of note that the Council have queried in view of the scale of the project, as to whether the works constitute minor works or a 'pond'. This is discussed further below.

**9.5. Other issues raised**

These issues have been raised in the context of the Referral:

Curtilage of a House

- 9.5.1. The Referrers are concerned that the Council's Declaration referred incorrectly in this case to: *the use of any land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such*. That Section 4(1)(j) of the Planning and Development Act 2000 (as amended) or Class 6(a) of Part 1, Schedule 2 of the



Regulations, which refer to development within the curtilage of a house are not relevant in this case.

- 9.5.2. They submit that the Council have incorrectly suggested that the pond is within the curtilage of the dwelling, where is it not and that it is in an adjoining field with the overall property of some 3.5 acres. They provide details of the usage of the landholding.
- 9.5.3. There is no definition given of what is considered to be the curtilage of a house in the Planning and Development Act 2000 (as amended) or in the Planning and Development Regulations 2001 (as amended).
- 9.5.4. The Architectural Heritage Protection Guidelines 2011, include in Chapter 13 reference to 'Curtilage and Attendant Grounds' relevant to Protected Structures. Section 13.1.1 includes:

*The notion of curtilage is not defined by legislation, but for the purposes of these guidelines it can be taken to be the parcel of land immediately associated with that structure and which is (or was) in use for the purposes of the structure. It should be noted that the meaning of 'curtilage' is influenced by other legal considerations besides protection of the architectural heritage and may be revised in accordance with emerging case law.*

- 9.5.5. This is relevant to Protected Structures and it is realised that this is not the case with the current application. However, it is of interest relative to the determining of notion of curtilage, which as provided by these Guidelines (Section 13.1.4 relates) is determined on *a case by case basis*.
- 9.5.6. Section 4(1)(j) of the Planning and Development Act 2000 (as amended) refers to development within the curtilage of a house for any purpose incidental to the enjoyment of the house as such. The Referrers submit that this is not a consideration in the case of the pond which they provide is not within the curtilage of the house.
- 9.5.7. As has been noted in the Statutory Provisions Section above, Part 1 of Schedule 2 refers to *Development within the curtilage of a house*. Class 6(a) which is referred to by the Council includes reference to a pond. The restriction on exemption provides that: *the level of the ground shall not be altered by more than 1 metre above or below the level of the adjoining ground*.

- 9.5.8. The details submitted by the Referrer to the Council provide that the pond is shallow and in the deeper places that it is 1 to 1.4m in depth. Therefore, it would not fit into the exemption in Class 6(a). However, they query the concept of it being within the curtilage of a house.
- 9.5.9. In the current case as noted on my site visit, the site of the pond is accessed via the driveway to the existing house and the gated entrance to the landholding of c.3.5m. There is a hedgerow separating the site of the pond area, from that of the house area. It is not ascertained in the documentation submitted, as to what is the curtilage. I would consider that it appears that the site within the landholding as a whole could be considered to be within the curtilage of the dwelling. However, I would submit that in view of the question raised and the ambiguity concerning the issue of curtilage, that it does not have to be considered in the context of the current case.

#### Pond definition

- 9.5.10. The Planner's Report considers the issue as to the determination as to whether the expanse of water is a pond or a lake. It provides that given the size and scale of the 'lake', it is the view of the Planning Authority that the development does not fall within this exemption and is not 'incidental' to the enjoyment of the house. They consider that the lake as constructed is development and is not exempted development.
- 9.5.11. The Referral to the Board refers to other applications and provides that the development is a pond and not a lake for many reasons as it is manmade and all the pond/water is in the photic zone as it is quite shallow and approx. 0.5acres. They include photographs to show the final depth of the pond during the digging in 2020. They note that this varied from 75cm depth at the shallow end to 1m further back behind the island. However, it is noted that in the winter months the pond can go up to 1.3m due to the natural level of the surrounding field. They emphasise the function of the pond for amenity and biodiversity.
- 9.5.12. They submit that it meets the 'pond' definition as set out by the British Pond Conservation. That it also meets the Ramsar definition of a 'Permanent Freshwater Marsh/Pool – Ponds (below 8ha).
- 9.5.13. It is noted that a definition of what constitutes a pond or a lake or the differences between them is not given in the Planning and Development Act 2000 (as amended) or in the Planning and Development Regulations 2001(as amended). However, I

would refer the Board to other Referral Cases as noted and in particular to Ref.RL2175 in the Section below.

## 10.0 Other Referral Cases

10.1.1. These include those considered of relevance to the context of the Referral, and while they refer to different circumstances and different locations, in summary they include the following:

Ref.17.RL.2681 A Question arose as to 'Whether the construction of three integrated constructed wetland ponds (as modified) and a hole in the ground for the storage of slurry at Rathfeigh, Tara, County Meath is or is not exempted development'. The Board concluded in summary that integrated constructed wetlands do not come within the meaning of 'pond' as referred to at Class 3 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2001 and that they are not exempted development.

Ref.RL2175 A Question arose as to 'Whether a man-made lake on lands at Ballinure, Rathangan, County Kildare' is or is not exempted development'. The Board concluded in summary that the works comprises development and that:

*(b) the laying out and use, as a landscape/amenity feature, of the land as a manmade lake (entailing excavation of significant quantities of soil and its deposition on adjoining lands) does not come within the scope of –*

*(i) class 33(a) of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, not being the laying out of a park, private open space or ornamental garden, or*

*(ii) class 3 of Part 3 of Schedule 2 to the said Regulations, not being a pond.*

The Board decided that the construction of a man-made lake for use as a landscape/amenity feature is development and is not exempted development.

## 10.2. Cases referred to by the Referrer

10.2.1. The following cases in the Wexford area, were referred to in the Referral:

EXD00931

The Referrer – Rosslare Harbour/Kilrane Environment Group

The Question as noted relates to whether the proposal to develop a pond feature in the wetland area in the southern end of the garden which is outside the extent of the historic landfill waste area is or is not development and is or is not exempted development. The primary aim of the project is to increase the biodiversity in the gardens. An associated path around the proposed pond to extend the village loop to incorporate this new feature, constitutes exempted development under Part 1, Class 36(a) of the Planning and Development Regulations 2001 (as amended).

Details on the Planners Report note that this is the site of Rosslare Harbour Village Park and Gardens. Also, that the lands are owned by Wexford County Council.

The Council declared that this was Exempted Development. They noted that it complied with Class 36(a), Part 1 Schedule 2 of the Planning and Development Regulations 2001.

It is of note that the said Class 36(a) refers to: *Development consisting of the carrying out by or on behalf of a State authority or other public body, on land used by the authority or body as a public park, of works incidental to that use, including the provision, construction or erection of any structure in connection with or for the purposes of the enjoyment of the park or which is required in connection with or for the purposes of the management or operation of the park.*

The Referrer in the subject case is a private individual and these are private lands, therefore this exemption would not apply.

#### EXD00289

The Question arose as to whether the Construction of a Pond and its use as a natural habitat/private amenity space at Raheen Foulksmills Co. Wexford constituted exempted development. The Council's declaration provided:

*From the information submitted on the 4<sup>th</sup> of July 2009 and 31<sup>st</sup> of July 2009, it is considered that the development is exempt under Part 3 Class 3.*

As has been quoted in the Statutory Provisions Section above, this exemption in Part 3 Exempted Development Rural, Class 3 relates to *Minor works and structures*. It includes reference to the construction of a pond. It does not provide a definition as to what constitutes a pond.

## **11.0 Environmental/Hydrological issues**

- 11.1.1. The Referral to the Council noted the ground was very wet and boggy and they decided that the best solution was to create a wildlife pond. That the clay dug out to form the pond was used to create banks to shelter the water from the prevailing winds and that none of these banks exceed the height of their hedgerows. They provide details of trees and vegetation they have planted and note that wetland biodiversity has been created in the area.
- 11.1.2. The Planner's Report has raised a number of issues, relative to the construction of the pond, including whether it has been lined and noting that an appraisal of the hydrological impact of the lake on the existing ground water, or adjacent water supplies has not been made.
- 11.1.3. The Referral to the Board notes that there has been no mention of a liner, but that there are heavy water logged soils, the pond depth has been provided (i.e. 1 – 1.4m as noted in the details submitted) and that excavated soil has been used in much needed shelter banks. They also note that the pond fills and overflows naturally so they provide, that there is no impact on adjoining ground water in an area served mainly by mains water.
- 11.1.4. There is a river c.500m south of the site and it is not known whether there are hydrological links from the subject development site to the river or if there are any springs in the vicinity of the site or whether there is any impact on the groundwater in the area. I would consider that having regard to the limited information submitted that environmental/hydrological issues cannot be ruled out. However, any such impacts would not be the subject of a Referral and would be addressed by way of a planning application.

## **12.0 Appropriate Assessment**

- 12.1.1. The lands which are the subject of the Section 5 Referral at Pembrokestown, Duncormick, Co. Wexford, are located c.2.9kms from Ballyteige Burrow SPA and SAC and c.5.7kms from the Saltee Islands SAC.
- 12.1.2. The Council have included an Appropriate Assessment Screening Report. The Habitats Directive Screening Conclusion Statement – Determination concludes that

having regard to the limited extent of the proposed works and the substantial distance to the nearest Natura 2000 sites, no element of the proposed project alone or in combination is likely to give rise to any impacts on the Natura 2000 sites. They provide that having regard to the precautionary principle, that it is considered that significant impacts can be ruled out and a stage 2 AA is not required.

- 12.1.3. Having regard to nature and scale of the development and the nature of the receiving environment and the distance and lack of connections to the nearest European sites, no Appropriate Assessment issues arise and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

## 13.0 Recommendation

- 13.1. 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 construction of a pond and its natural habitat /private amenity space, is or is not development or is or is not exempted development:

**AND WHEREAS** Julian & Claire Hastings requested a declaration on this question from Wexford County Council and the Council issued a declaration on the 17<sup>th</sup> day of June, 2022 stating that the construction of a 'pond' within the curtilage of a dwelling house was development and was not exempted development:

**AND WHEREAS** Julian & Claire Hastings referred this declaration for review to An Bord Pleanála on the 11th day of July , 2022:

**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) The construction of a pond and it's natural habitat/private amenity space, constitutes 'works' and 'development' as defined in Section 2 and Section 3, respectively, of the Planning and Development Act, 2000, as amended.
- (b) the laying out and use, as a landscape/amenity feature, of the land as a man-made lake (entailing excavation of significant quantities of soil and its deposition on adjoining lands) does not come within the scope of –
  - (i) Section 4(1)(a) of the Planning and Development Act ,2000 (as amended) not being a development for the purposes of agriculture,
  - (ii) Class 33(a) of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001 (as amended), not being the laying out of a park, private open space or ornamental garden, or

(iii) Class 3 of Part 3 of Schedule 2 to the said Regulations, not being a pond:

- (c) the potential consequences in planning terms, having regard to the scale, nature and depth of the development including relative to hydrological and environmental considerations, being development of a man-made lake that does not come within the scope of any of the legislative provisions for exempted development.
- (d) There are no provisions in the Planning and Development Act 2000 (as amended) or in the Planning and Development Regulations 2001 (as amended), that would afford the said development to be deemed exempted 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 construction of a man-made lake for it's natural habitat/private amenity space is development and is not exempted development.

---

.Angela Brereton  
Planning Inspector

13<sup>th</sup> of October 2023