



An
Bord
Pleanála

Inspector's Report ABP-314860-22

Question

Whether the raising of a section of land by the entrance to agricultural lands by less than 1m with native soil and subsoil from existing lands of applicant is or is not considered development, and is or is not considered exempted development

Location

Mount Desert, Lee Road, Cork

Declaration

Planning Authority

Cork City Council

Planning Authority Reg. Ref.

R73722

Applicant for Declaration

Cork City Council

Referral

Referred by

Cork City Council

Owner/ Occupier

Kevin Fitzgerald

Observer(s)

None

Date of Site Inspection

07/04/2023

Inspector

Gillian Kane

1.0 Site Location and Description

- 1.1.1. The subject site refers to a parcel of land that straddles the Lee Road, to the east of Cork City.
- 1.1.2. The landholding maps submitted by the landowner to the Planning Authority show an irregularly shaped plot of land, to the north and south of the Lee Road. On the northern side, the steeply sloping plot accommodates the landowners dwelling with access road. The southern part of the landholding, lies adjacent to the River Lee and is currently an open field. On the date of the site visit sections of the field were under water. The topography of the area slopes steeply from north to south, with a ground level difference of 10m from the public road to the river bank. A dense hedgerow with sections of stone wall form the boundary between the public road and the field boundary. A watercourse runs along the western boundary of the site, joining the River Lee.
- 1.1.3. A construction entrance, approximately in the centre of the field runs to the west providing access to a dwelling under construction.

2.0 The Question

- 2.1.1. "Is the raising of a section of land by the entrance to agricultural lands by less than 1m with native soil and subsoil from existing lands of the applicant considered to be exempted development?"

3.0 Relevant Planning History

- 3.1.1. Planning Authority reg. Ref. **18/5297**: Planning permission was granted for the demolition of a single storey detached dwelling and the construction of a replacement dwelling.
- 3.1.2. Section 5 declaration under Planning Authority. reg. ref. **R711/22**: The Planning Authority, having regard to the question posed on behalf of the landowner, "Is the raising of a hollow section of land by less than 1m with native soil and subsoil from existing lands of the applicant considered to be exempted development?" concluded that it was development and was not exempted development. having regard to s177U of the Planning and Development Act 2000, as amended.

- 3.1.3. Section 5 declaration under Planning Authority. reg. ref. **R655/21**: The Planning Authority concluded that the raising of two areas of land by 0.95m was development and was not exempted development.

4.0 Policy Context

4.1. Cork City Development Plan 2022-2028

- 4.1.1. The subject site is zoned “Objective 20 City Hinterland”, which has the stated objective to protect and improve rural amenity and provide for the development of agriculture.
- 4.1.2. Section 6.37 of the development plan refers to Scenic Routes, Route ref. HVP1 is the road between Leemount and Macroom vis Coachford. Objective 6.15 refers to development on scenic routes as follows:

Development on Scenic Routes: a. To protect the character of those views and prospects obtainable from scenic routes identified in this Plan; b. To require those seeking to carry out development in the environs of a scenic route to demonstrate that there will be no adverse obstruction or degradation of the views towards and from vulnerable landscape features. In such areas, the appropriateness of the design, site layout, and landscaping of the proposed development must be demonstrated along with mitigation measures to prevent significant alterations to the appearance or character of the area; c. To encourage appropriate landscaping and screen planting of developments along scenic routes which provides guidance in relation to landscaping.

- 4.1.3. Objective 9.10 refers to development in Flood Risk Areas: a. To restrict development in identified flood risk areas, in particular flood plains. All new development proposals should comply with the requirements of the Planning System and Flood Risk Management – Guidelines for Planning Authorities (2009) and Department of Environment, Community and Local Government Circular PL2/2014, in particular through the application of the sequential approach and the Development Management Justification Test. b. All significant proposals for development identified as being vulnerable to flooding will be required to provide a site specific Flood Risk Assessment to identify potential loss of floodplain storage and proposals for the storage or attenuation (e.g. SUDS) of run-off discharges (including foul drains) to ensure development does not increase the flood risk in the relevant catchment. c.

Adopt a river catchment approach to rivers entering the City, practicing natural flood management wherever practical and appropriate.

- 4.1.4. Appendix 5 of the City Development Plan is the SFRA. The Indicative Flood Zones map shows the subject site in FloodZone A.

4.2. Natural Heritage Designations

- 4.2.1. The subject site is located 13.6km from the Great Island Channel SAC (001058) and 10.1km from the Cork Harbour SPA (004030).
- 4.2.2. The site is in the Lee Valley proposed National Heritage Area (000094).

5.0 The Referral

5.1. Referrer's Case

- 5.1.1. On the 13th October 2022, Cork City Council submitted the following question to the Board under section 5(4) of the Planning and Development Act 2000, as amended.
- “Is the raising of a section of land by the entrance to agricultural lands by less than 1m with native soil and subsoil from existing lands of the applicant considered to be exempted development?”
- 5.1.2. The submission from Cork City Council indicates that the question was posed to the Planning Authority by Ross O'Donovan on behalf of the landowner Kevin Fitzgerald.
- 5.1.3. Section 3 of the Planning Authority's submission to the Board states that
- Similar section 5 applications (Planning Authority reg ref.s R711/22 and R665/21) both determined that development was not exempt,
 - The proposed development does not relate to drainage or reclamation of wetlands and does not accord with the definition of land reclamation as set out in Schedule 2, Part 3, article 6, exempted development – Rural Class 11 of the Planning and Development Regulations 2001-2022 and
 - It has not been established to the satisfaction of the Planning Authority that the proposed works are exempted development.
- 5.1.4. Section 4 of the Planning Authority submission refers to screening for AA. It notes that the subject site is approx. 10.25km west of Cork Harbour SPA and that a field drain adjoining the eastern boundary of the site connects to the River Lee. The site is

70m due north of the River Lee which hydraulically links the Cork Harbour SPA (004030) and the Great Island Channel SAC (001058). This section of the submission states that as the current proposal is largely similar to that previously proposed, the previous screening report still applies. This screening concluded that it is not possible based on the information provided to ascertain whether the proposed development would have a significant effect on European sites downstream of the site.

5.1.5. The Planning Authority submission to the Board concludes by saying that they are unclear if the matter to which the referral relates (the infilling of 0.31 acres) is or is not exempted development.

5.1.6. The submission is accompanied by 4 appendices:

- 1 Legislative Provisions
- 2 Section 5 application to the Planning Authority
- 3 Copy of previous section 5 declarations (R711/22 and R665/21) and
- 4 Copies of planning permissions associated with the site.

5.2. **Owner/ occupier's submission to the Planning Authority**

5.2.1. On the 30th August 2022, an agent on behalf of the landowner Kevin Fitzgerald submitted a section 5 declaration application to the Planning Authority. The submission states that it is proposed to reclaim land at an existing agricultural entrance to his lands which run north and south of the Lee Road. The area to the south of the Lee Road will be filled with excavated soils and subsoils from the construction of his dwelling currently under construction.

5.2.2. The submission states that the current agricultural entrance to the site is unsafe due to the topography of the ground at the entrance. Agricultural machinery is having difficulty accessing and exiting the site which requires a level area at the entrance gate and a more gradual gradient from the gate to the field.

5.2.3. The submission states that the filling will be carried out in an area outside the existing flood plain and as such will not have any impact on these lands and flood storage capacity.

- 5.2.4. An NIS was carried out for the previous section 5 declaration for filling on a larger site. This assessment determined that the works would not have a significant impact on the Natura 2000 site and would not require an AA.
- 5.2.5. Describing the site, the submission states that the 4.8ha (11.8acres) are located to the south of the Lee Road. It is proposed to fill 0.3acres. The lands are used for agricultural purposes. The only materials to be used in the fill will be excavated soils and subsoils which have been excavated from the landowners site during the construction of his dwelling (granted permission under reg. ref. 18/5297). All rubble and waste has been segregated and disposed of by a licensed contractor. The recovery of soils and subsoils will involve only limited movements on the public roadways as the subject site is directly across from the source of the soil.
- 5.2.6. The landowners submission states that the proposed development is exempted development under Schedule 2, Part3, Class 11 of the Planning and Development Regulations as it is “development consisting of the carrying out, on land which is used only for the purpose of agriculture or forestry, of any of the following works”. Section (b) refers to land reclamation and section (e) refers to the improvement of hill grazing.
- 5.2.7. The submission notes that the construction of the dwelling will generate a significant amount of soil and subsoil, the removal off-site of which would generate significant traffic movements of HGV’s. The area to be filled is 0.31 acres with 1,500cubic meters which equates to 2550 tonnes or 130 loads. The material will generally consist of dense boulder clays and medium gravely clays with stones. Ground levels will not be raised by more than 1m above existing ground levels.

6.0 Landowners submission to An Bord Pleanála

- 6.1.1. An agent for the landowner has made a submission to the Board, the details of which can be summarised as follows:
- The site is used for agricultural purposes, in accordance with the agricultural zoning in the 2022-2028 Cork City Development Plan
 - The sole objective of the proposal is to make the existing agricultural entrance safe for agriculture and to maintain the existing wetlands. A more gradual incline than the existing steep topography is required.

- The proposed filling will be carried out in areas outside the existing flood plain and so will not have any impact on flood storage capacity.
- The land reclamation works are exempted development under Class 11 of Schedule 2, Part 3, Article 6 of the Planning and Development Regulations 2001-2022.
- The area of filling is 0.12ha but can be limited to 0.1ha if required.
- A natura screening assessment was carried out for a previous Section 5 declaration for filling on a larger area of the site. This assessment determined that the works would not have a significant impact on the Natura 2000 site.
- Inland Fisheries Ireland have no objection in principle to the works once the works are carried out in a manner that does not create the discharge of silt or other pollutants into the River Lee and are carried out between July and September.
- The filling works will be less than 1m and on ground that is below the existing public road and as such will have no impact on the Cork City Scenic Route Ref HVP1.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. The following statutory provisions are relevant in this instance.

7.1.2. Section 2(1): In this Act, except where the context otherwise requires

"**works**" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...;

"**structure**" means any building, structure, excavation or other thing constructed or made on, in or under any land, or any part of a structure so defined and

(a) Where this context so admits, includes the land on, in or under which the structure is situated".

7.1.3. "**agriculture**" – as including 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;

- 7.1.4. Section 3(1): in this Act, "**development**" means, except where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land.
- 7.1.5. Section 4(1): sets out developments that shall be exempted development for the purposes of this Act.
- 7.1.6. Section 4 (4) states that 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
- 7.1.7. Section 5(1): 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.
- (4): Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

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

- 7.2.1. **Article 6(1)** of the Planning and Development Regulations, 2001 states that “Subject to Article 9 development of a class specified in Column 1 and Part 1 of Schedule 2 shall be exempted development for the purposes of the Act”.
- 7.2.2. **Article 8C** states that “land reclamation works (other than reclamation of wetland) consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development”. Section 5 of Part 2 of the regulations provides definitions / interpretations. Of relevance to the subject referral is the **definition of wetlands**, which was inserted by article 3 of IS no. 454/2011 Planning and Development (Amendment) (No.2) Regulations 2011.

“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. **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 – **(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.

7.2.4. Schedule 2, Part 3, Article 6 details the exempted development for Rural. **Class 11** refers to land reclamations and provides that “development consisting of the carrying out of drainage and / or reclamation of wetlands” is exempted development providing that 1) the area to be affected shall not exceed 0.1ha and 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.

8.0 Precedents

8.1.1. **ABP-306103-19:** the Board when requested to consider whether land reclamation through re-contouring of lands within farm holdings in Donegal was or was not development and was or was not exempted development, concluded that

- (a) the excavation and removal of rock within the subject site constitutes development and falls within the definition of quarrying,

(b) the excavation and removal of rock from field B as identified on the mapping submitted by the landowners/occupiers is stated to form part of the land reclamation works carried out in part and proposed within fields A, B, C, E and F as identified on the mapping submitted by the landowners/occupiers, being the farm holding concerned,

(c) the excavation and removal of rock from field D as identified on the mapping submitted by the landowners/occupiers is not stated to form part of the land reclamation works at this farm holding, carried out in part and proposed within fields

A, B, C, E and F as identified on the mapping submitted by the landowners/occupiers,

(d) the excavation and removal of rock from field B as identified on the mapping submitted by the landowners/occupiers, where such rock is used solely for land reclamation within the farm holding that includes this field, comes within the scope of article 8C,

(e) the re-contouring of lands within fields A, B, C, E and F, consisting of land reclamation of the farm holding in question, comes within the scope of article 8C,

(f) the excavation and removal of rock from field D does not come within the scope of article 8C, as this field does not form part of the farm holding, and no other exempted development provision under the Regulations applies, and

(g) the development would not be likely to have a significant effect on North Inishowen Coast Special Area of Conservation (Site Code: 002012) or any other European site.

8.1.2. **ABP-303734-19:** The infilling and drainage of wetland and the construction of a road access within and adjacent to Lough Lene, Collinstown, County Westmeath was concluded by the Board to be development and not to be exempted development as follows:

- the said works do not clearly and unambiguously come within the scope of the exemption provided under article 6(1) and Part 1 and Part 3 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, (d) the said works do come within the scope of the restrictions on exemptions set out at
- article 9 (1)(a)(ii) of the Planning and Development Regulations, 2001, as amended, whereby the works consisted of the material widening of a means of access to a public road, the surfaced carriageway of which exceeds four metres in width;
- article 9(1)(a)(viiB) of the Planning and Development Regulations, 2001, as amended, whereby the works 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; and

- article 9(c) of the Planning and Development Regulations, 2001, as amended, whereby the need for Environmental Impact Assessment cannot be excluded. (e) Furthermore, the said works do come within the scope of the restrictions on exemptions, as set out under Section 4(a) of the Planning and Development Act, 2000, as amended, insofar as it is considered that the need for Appropriate Assessment and Environmental Impact Assessment cannot be excluded:

8.1.3. **RL3359:** Land infilling on lands that were proximate to and had hydrogeological connections to the Inagh River Estuary SAC. It appeared that some of the infilling works had been undertaken by the Local Authority, and that some had been undertaken by the landholder. The referral was made by a Third Party. The Board decided that the development was not exempted development, concluding as follows:

- The infill/reclamation of lands involved works, which were development; and the infill/reclamation of areas A, B, C and D constituted one project involving land improvements to facilitate the agricultural use of the landholding, which cumulatively exceeded two hectares in scale, and constituted wetlands as per Article 5 of PDR, 2001, and exceeded the EIA threshold.
- The likelihood of significant effects on the environment could not be excluded, given the direct hydrological link to the Inagh River Estuary SAC, - It could not be excluded that the development undertaken to date, and which was ongoing, did not have significant effects on the environment and therefore AA would have been required,
- Given the requirement for both EIA & AA, the restriction on exempted development per S.4(4) of PDA, 2000 applied.
- The development was not undertaken solely by or on behalf of the local authority and could not avail of the exemptions under section (4)(1).

8.1.4. **RL2479:** The referral related to the disposal of soil and topsoil for the purposes of land reclamation. The Board found that the disposal of soil and topsoil on the lands for the purposes of land reclamation and increased productivity of the agricultural

land constituted works under section 2(1) of the PDA, 2000, was 'development' under section 3(1) of the PDA, 2000 and subject to article 9 of the PDR 2001, the works generally came within the scope of the exemption provided at Class 11 of Part 3 of Schedule 2 of the PDR, 2001. However, the said works were deemed to come within the scope of the restriction on that exemption set out at article 9 (1)(a)(iii) of the PDR, insofar as it was considered that the proposal would endanger public safety by reason of traffic hazard and obstruction of road users, due to the traffic turning movements that the proposed development would generate on the Regional Road. The Board thereby decided that the said land recovery project for the importation of soil and topsoil for deposition and spreading on land was development and was not exempted development.

8.1.5. **RL2472:** The main issue of the case was the filling of 8.3 hectares with inert materials to enable beneficial agricultural after use (dairy farming) of the lands. The Board found that the activity was development but was exempted development as follows:

- the disposal of inert soil and stones on low-lying ground for the purposes of land reclamation for productive agricultural land constituted works under section 2 (1) of the PDA 2000, that these works constituted 'development' under section 3 (1) of the PDA 2000, and that they came within the scope of the exemption provided at class 11 of Part 3 of Schedule 2 to the PDR, 2001. The Board decided that the works did not give rise to traffic hazard nor obstruction of road users and, therefore, did not come within the scope of the restriction on that exemption as set out at article 9(1)(a)(iii)

9.0 **Assessment**

9.1. As noted above, the landowner has previously sought declarations regarding infilling of his land adjoining the River Lee.

9.1.1. In the first application (Planning Authority reg. ref. **R665/21**) the landowner sought to raise two areas of land by 0.95m. In the submission to the Planning Authority, the landowners agent noted that the operation of the Inniscarra Dam had created depressions in his field. He proposed to use material from the demolition of a dwelling and construction of a new dwelling (16/07114 and 18/05297) to restore the land to its original levels. In assessing the declaration, the Planning Authority

concluded that the question was development and was not exempted development. The Planning Authority's report referred to the possibility of builders waste being included in the material and referred to the hydrological link between the subject site and both the Cork Harbour SPA and the Great Island Channel cSAC. The determination of the Planning Authority had regard to sections 2,3,4 and 177U of the Planning and Development Act 2000, as amended and articles 6,8 and 9 of the Planning and Development Regulations 2001 (as amended).

- 9.1.2. In April 2022, an agent for the landowner applied for a further s5 declaration (**R711/22**). This application was accompanied by an Natura Screening Report. The report concluded that the proposed works would not result in likely significant effects to the Natura 2000 site occurring within the sphere of influence of the project. The planning report assessing the proposal referred to the lack of clarity regarding whether the two depressions qualified as wetland, what their extent was, whether additional soils would be required for the infilling and if the site formed part of a landholding. The report also noted the hydrological link between the subject site and the Cork Harbour SPA and the Great Island Channel cSAC. The Planning Authority determined that the proposal constituted works and did not constitute exempted development. The determination of the Planning Authority had regard to sections 2,3,4 and 177U of the Planning and Development Act 2000, as amended and articles 6,8 and 9 of the Planning and Development Regulations 2001 (as amended).
- 9.1.3. The proposal currently before the Board refers only to the infilling of land around the agricultural site entrance to the site.

9.2. **Is or is not development?**

- 9.2.1. The proposal involves the infilling of sections of a field adjoining an existing entrance with excavated material from an adjoining site. These acts of the importation of soil and top soil to create a less steep entrance involves the alteration of the land and therefore may reasonably be determined to comprise 'works' in accordance with the definition set out under section 2(1) of the Planning and Development Act 2000 (as amended). These works would be carried out on, in and over land and thereby would constitute "development" in accordance with section 3 of the Planning and Development Act, 2000 (as amended).

9.3. Is or is not exempted development?

- 9.3.1. There are no exemptions under section 4(1) of the Planning and Development Act 2000, as amended that would apply to the subject development.
- 9.3.2. Under Article 6 (3) of the Regulations (and subject to Article 9) development of a class specified in Column 1 of Part 1 of Schedule 2; and in Column 1 of Part 3 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in Column 2 of the said Part. The applicant, in their submission to Cork City Council state that the development is exempted development under schedule 2, part 3, class 11 of the Planning and Development Regulations.
- 9.3.3. As noted above Class 11 provides that development consisting of the carrying out of drainage and / or reclamation of wetlands is exempted development where it does not exceed an area of 0.1ha, to include any other such development within the farm holding.
- 9.3.4. Details provided by the landowners agent on the 14th November 2022 state that the area of fill previously shown on the drawings was 0.12ha but that this can be limited to 0.1ha without having any material impact on their proposal. I note that this does not correspond with the cover letter submitted with the S5 application (30th August 2022) which states that the area of the site to be filled is 0.31 acres. No detail of other landfilling or reclamation works, if any, within the landholding have been provided. I note that the landowners agent in that same submission to the Board (November 2022) states that the reclamation works will not take place on lands that are part of the flood plain but “by the entrance to facilitate safe access to the subject site”. The Board will note that drawing no. 600-686 that shows the proposed site entrance also shows the infilling of two areas of depression in the centre of the field.
- 9.3.5. It is my understanding that this statement refers to the previous proposal of the landowner to use the soil and topsoil from the construction of the dwelling on the northern side of the Lee Road to infill defined depressions on the lower part of the site. As noted above the status of the lands and the hydrological connection to the Natura 2000 sites essentially de-exempted the proposals in those two instances.
- 9.3.6. Notwithstanding the relocation of the sections of land to be infilled (ie from the depressions to the site entrance), the assessment of the proposal is largely the

same. The exact location and extent of the infill in the latest proposal is largely unknown, other than it *can* cover an area of less than 0.1ha, should the Board consider it necessary.

- 9.3.7. The subject proposal which now includes only the importation of soil to infill a section of steep topography is not 'reclamation' of wetlands as provided for under class 11. The landowners agent is clear that the section of the field lies outside of the floodplain. As such it does not fall within the definition of wetlands as per section 5 - "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.
- 9.3.8. The entrance of the site is not a wetland and therefore does not fall within the exemption provided under Class 11.

Article 8C

- 9.3.9. Article 8C refers to land reclamation works consisting of the re-contouring of land, including the infilling of soil (but not waste material) within a farm holding.
- 9.3.10. The Board has previously determined (RL3034) that the exemption under Article 8C of the Planning and Development Regulations 2001, is confined to land reclamation works including infilling of soil (but not waste material) where soil is sourced from within the farm holding. I note that the Planning Authority raised a concern that the lands subject of the two permissions for dwellings were not indicated as being part of the landholding when permission was being sought in those applications. A map submitted by the applicant to the Planning Authority in October 2022 shows the subject field and the sites of the two dwellings within the same landholding.
- 9.3.11. I note that Article 8C of the regulations specifically refer to a 'farm holding' rather than a landholding. In the ordinary understanding of the word the dwelling of the farmer would constitute part of the farm holding and I propose to accept that as the case in this instance.

9.4. Restrictions on exempted development

- 9.4.1. In accordance with article 6(3) of the Planning and Development Regulations, the exempted development provisions provided for under Class 9 of Part 3 of Schedule 2 are subject to article 9 of the Regulations. I note article 9(1) includes the following:

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 – ... (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.

9.4.2. The subject site is hydrologically connected to both the Cork Harbour SPA and the Great Channel Island SAC.

9.4.3. The Cork Harbour SPA (004030) is described by the NPWS as a large, sheltered bay system, with several river estuaries - principally those of the Rivers Lee, Douglas, Owenboy and Owennacurra. The SPA site comprises most of the main intertidal areas of Cork Harbour, including all of the North Channel, the Douglas River Estuary, inner Lough Mahon, Monkstown Creek, Lough Beg, the Owenboy River Estuary, Whitegate Bay, Ringabella Creek and the Rostellan and Poul nabibe inlets. The qualifying interests for the SPA are

- A004 Little Grebe *Tachybaptus ruficollis*
- A005 Great Crested Grebe *Podiceps cristatus*
- A017 Cormorant *Phalacrocorax carbo*
- A028 Grey Heron *Ardea cinerea*
- A048 Shelduck *Tadorna tadorna*
- A050 Wigeon *Anas penelope*
- A052 Teal *Anas crecca* A054 Pintail *Anas acuta*
- A056 Shoveler *Anas clypeata*
- A069 Red-breasted Merganser *Mergus serrator*
- A130 Oystercatcher *Haematopus ostralegus*
- A140 Golden Plover *Pluvialis apricaria*
- A141 Grey Plover *Pluvialis squatarola*
- A142 Lapwing *Vanellus vanellus*
- A149 Dunlin *Calidris alpina alpina*
- A156 Black-tailed Godwit *Limosa limosa*
- A157 Bar-tailed Godwit *Limosa lapponica*
- A160 Curlew *Numenius arquata*

- A162 Redshank *Tringa totanus*
- A179 Black-headed Gull *Chroicocephalus ridibundus*
- A182 Common Gull *Larus canus*
- A183 Lesser Black-backed Gull *Larus fuscus*
- A193 Common Tern *Sterna hirundo*
- A999 Wetlands

9.4.4. The conservation objectives for each of the qualifying interests are ‘to maintain the favourable conservation condition’.

9.4.5. According to the NPWS documentation, the Great Island Channel SAC (001058) stretches from Little Island to Midleton, with its southern boundary being formed by Great Island. It is an integral part of Cork Harbour which contains several other sites of conservation interest. The NPWS site synopsis notes that while the main land use within the site is aquaculture (oyster farming), the greatest threats to its conservation significance come from road works, infilling, sewage outflows and possible marina developments.

9.4.6. The two qualifying interests for the site are:

- [1140] Tidal Mudflats and Sandflats
- [1330] Atlantic Salt Meadows

9.4.7. The conservation objectives for both of the qualifying interests is ‘to maintain the favourable conservation condition’.

9.4.8. There is a direct source-pathway-receptor link between the subject site and both of the Natura 2000 sites. As the qualifying interests for both sites are water based, any change in water quality in the adjoining waterbody arising from works undertaken on the subject site could ultimately affect the conservation objectives of the two Natura 2000 sites.

9.5. Landowners AA Screening Report

9.5.1. I note the Screening report submitted by the landowners agent with the application. The report was undertaken in in late 2021 and early 2022, a time at which the proposed works were the deposition and spread of “about 755m³ of subsoil and covering topsoil onto the field”. It was proposed to infill the indentations and level the surface of the field.

- 9.5.2. The Report provides an introduction, a note on water conditions in Ireland, the requirement for screening, a detailed site description, details of the project, screening methodology, details of the designated sites and screening of EU sites.
- 9.5.3. Section 2.1 of the report, in detailing the proposal, states that the owner of the lands wishes to spread about 755 cubic metres of subsoil and covering topsoil. It is proposed to infill the indentations and level the surface of the field, with a 25m buffer to the River Lee on the western side and a 12m buffer at the nearest point on the eastern side. The material will not contain any C&D waste, will not be near any field drains and there will be no disturbance to vegetation adjoining the river.
- 9.5.4. The screening report notes that the risk to the River Lee is from increasing sedimentation and nutrient loads. The report states that site is not in a designated area, and if it was the reclamation including infilling would be subject to an NPWS Activities Requiring Consent. It is proposed to remove the topsoil from the site, infill with imported material and then the removed topsoil will be returned, graded and re-seeded. The material has been in storage across the Lee Road, with no evidence of invasive species. The material is to be spread 8m from the eastern drain in the field. This drain is stated to be mechanically cleared annually.
- 9.5.5. The screening report states that the Natura sites that may be affected are the Great Island Channel SAC (001058) and the Cork Harbour SPA(004030). In identifying the likely significant effect of the proposed project on the qualifying interests of the two sites, the screening report notes that disturbance to feeding or breeding grounds for qualifying species and impacts to habitats used by birds are likely to generate the most significant effects on qualifying species. The screening report notes that while the site is outside the SAC / SPA boundary, it is connected hydrologically and therefore direct impacts may arise. Disturbance from noise and dust is stated to be unlikely. All of the qualifying species of the SAC are dependent on the aquatic environment and are likely to occur downstream of the subject site. The screening report states that it is considered highly unlikely that changes in hydrology and / or water pollution will arise as a result of the proposed project. No impacts on qualifying habitats are expected.
- 9.5.6. Table 1 of the Screening report states that emissions from the proposed site during works are surface run-off and increasing sediment and nutrient loads which would

result in a change in the nutrient status of the waterbody. Another impact identified is surface water pollution from run-off from stockpiled soil and building materials. The most significant impact is stated to be disturbance of the soil profile. The report states that it is envisaged that riparian zones along the watercourses will be enhanced and restored.

- 9.5.7. The screening report concludes that the proposed works will not result in likely significant effects to the Natura 2000 sites occurring within the sphere of influence of this project. The proposed works do not require a stage two AA, as there will be no negative ecological impacts on the Great Island Channel SAC and Cork Harbour SPA.

Screening for AA

- 9.5.8. Article 6(3) of the Habitats Directive requires that any plan or project not directly connected with or necessary to the management of a European 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 sites in view of the sites' conservation objectives. The Board is the competent authority in this regard. The Board must be satisfied that the proposed development would not adversely affect the integrity of the European sites having regard to their conservation objectives.
- 9.5.9. There is a direct source-pathway-receptor link between the subject site and both of the Natura 2000 sites. As the qualifying interests for both sites are water based, the any change in water quality in the adjoining waterbody arising from works undertaken on the subject site could ultimately affect the conservation objectives of the two Natura 2000 sites.
- 9.5.10. Given the lack of detail regarding the extent of fill and the exact location of the re-filling and having regard to the precautionary principle, it is considered that it is not reasonable to declare that the proposed works would not be likely to have a significant effect on the integrity of the European sites.
- 9.5.11. I am satisfied that there are no other provisions, in the Planning and Development Act 2000, as amended, or in the Planning and Development Regulations, 2001, as amended, whereby this development would be classified as exempted development, and this development is, therefore, not exempted development.

10.0 Recommendation

10.1. 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 raising of a section of land by the entrance to agricultural lands by less than 1m with native soil and subsoil from existing lands of applicant is or is not development or is or is not exempted development:

AND WHEREAS Cork City Council referred this declaration for review to An Bord Pleanála on the 13th day of October, 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) Part 1 and Part 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that the raising of a section of land by the entrance to agricultural lands by less than 1m with native soil and subsoil from existing lands of applicant is development and is not exempted development:

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(4) of the 2000 Act, hereby decides that the raising of a section of land by the entrance to agricultural lands by less than 1m with native soil and subsoil from existing lands of applicant 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.

Gillian Kane
Senior Planning Inspector

02 May 2023