



An
Bord
Pleanála

Inspector's Report ABP-317396-23

Question

Whether the removal of top soil and sub soil from one area and spreading it on land for agricultural use is or is not development or is or is not exempted development

Location

Curraghgraique, Enniscorthy, Co. Wexford.

Declaration

Planning Authority

Wexford County Council

Planning Authority Reg. Ref.

EXD01013

Applicant for Declaration

John & Marie Sinnott

Planning Authority Decision

Is exempted development

Referral

Referred by

John & Marie Sinnott

Owner/ Occupier

Kearns Fruit Farm

Observer(s)

None

Date of Site Inspection

15th of February 2024

Inspector

Angela Brereton

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1.1. **Site Location and Description**

- 1.2. The site which is the subject of this referral, is located in the townland of Curragh garigue, c.3km south of Ballindaggan and to the north west of Milehouse and Enniscorthy, Co. Wexford. The site is accessed via a private lane from the L-6134, a local county road. It comprises an agricultural field and to the rear of 2no. rural dwellings.
- 1.3. The referral site is within the same landholding as Kearns Fruit Farm, located to the south of the site. The latter includes the buildings and yard area associated with the Fruit Farm. The strawberries are grown in a large glasshouse complex located on raised ground to the north of the Fruit Farm buildings. This is accessed via an unsurfaced track to the side of the glasshouses. The raised land which is the subject of this referral is to the north of the glasshouses and can be seen above the grass line. The access track leads to the agricultural land to the rear which has raised topsoil levels.
- 1.4. There are 2no. houses visible in the distance across the Kearns agricultural landholding. The more distant to the north is the Referrers house.

2.0 **The Question**

- 2.1. Whether the removal of top soil and subsoil from one area and spreading it on lands for agricultural use is or is not development or is or is not exempted development. On lands at Curraghgraique, Enniscorthy, Co. Wexford.

3.0 **Request to the Planning Authority**

- 3.1. A Request under Section 5 of the Planning and Development Act 2000, as amended was made to the Planning Authority by John and Marie Sinnott of Curraghgraique Wexford on the 8th of May, 2023 and is summarised under the following headings:

Background

The Referrer refers to the works that have taken place and includes a number of attachments:

- The attached map scale 1/2500 shows the subject site, comprising of an area of 1.28 hectares shown coloured green. On this entire area has been deposited top soil and sub soil to a depth of between 1.5m and 2m.
- The Referrer provides that on a rough calculation it is estimated that the movement of c. 16,000 cubic metres has been made from the area coloured orange on attached map scale 1/10,500.
- The attached photographs, taken from the Referrers property (Note - they area named as appellant in the Referral which is in error), shows the degree and extent to which the subject site has been changed.
- They provide that unfortunately the only way to gauge the exact volume of earth which has been moved would have been to establish the contours of the land before and after development took place.

Precedent Cases

The Referrer sets out a number of references which have been determined by An Bord Pleanala. They refer to and summarise these Board decisions relevant to referrals of which they consider to be precedent cases. These are discussed in the context of the Assessment below and the case reference numbers are as follows:

- RL07. 311284
- RL05E. 305482
- RL26.303109
- RL065.RL3540
- RL065.RL3609

Copies of these decisions are included in the Appendix to the subject Report.

4.0 Planning Authority Declaration

4.1. Declaration

On the 2nd of June 2023, Wexford County Council, concluded that –

- a) The removal of top soil and sub soil from one area and spreading it on lands for agricultural use is development.
- b) The works comply with Part 2, Exempted Development (8C) of the Planning and Development Regulations 2001 and constitute exempted development.

They, therefore, declared that the removal of top soil and sub soil from one area and spreading it on lands for agricultural use is development and is exempted development.

4.2. Planning Authority Reports

The Planner noted the Section 5 Referral made to the Council and the Question asked and their Report included the following:

- They noted that the application site is associated with Kearns Fruit Farm, located to the south of the site. They had regard to the Planning History of the site and its use for horticultural purposes.
- They also noted Enforcement History – possible unauthorised ground works.
- They had regard to the provisions in the planning legislation and its relevance to exempted development.
- They concluded that the removal of topsoil and subsoil from one area and spreading it over lands for agricultural use constitutes exempted development.

4.3. Other Technical Reports

None noted.

5.0 Planning History

The Planner's Report includes note of a list of applications and permissions granted subject to conditions to Kearns Fruit Farm Limited by the Council. Copies of these are included in the History Appendix to this Report. The following are the most recent:

- Reg.Ref. 20221300 – To erect glasshouses for horticultural purposes with all ancillary and associated site works.

- Reg.Ref. 20201133 – To construct a shed for horticultural purposes, in lieu of sheds granted under previous planning reg. no. 20191325 to also include loading bay to rear & demolish part of an existing shed to allow for an exit route for lorries, all with associated site works.

Enforcement

- Ref. 0043/2023 – Possible unauthorised ground works.

6.0 Policy Context

6.1. Wexford County Development Plan 2022-2028

Volume 1: Written Statement

Chapter 6 refers to Economic Development and Section 6.7.6 to the Rural Economy. Rural Economy Objectives ED89 – ED98 refer.

Objective ED98 - *To ensure all developments permitted in rural areas in accordance with Objective ED49, including agricultural, horticultural and rural diversification do not impact negatively on the quality of the environment or character of the rural area or rural settlement. Applications for all such developments will be required to submit details to demonstrate that the proposed development:*

This includes a number of criteria.

Section 6.7.6.1 refers to Agricultural Development and notes that this includes horticulture and fruit and seed growing. Also reference is made to the use of land for market gardens and nursery grounds. It is noted that Agriculture is hugely important to the County's economy (see Figure 6.5) and that practices are continually changing and modernising. That the Council will facilitate and encourage best practice in terms of new agricultural development.

Section 6.7.6.2 refers to Rural Diversification including Agri-food. The latter describes a wide variety of food based on agricultural produce.

Objectives: ED104-109 refer.

Section 6.7.6.3: *Horticulture includes the production of fruit and vegetables, in addition to amenity products such as Christmas trees, nursery stock and cut foliage.*

The importance of horticulture to Wexford's rural economy is recognised and the potential for further growth and development of this sector will be facilitated in accordance with the proper planning and sustainable development of the County.

Objectives ED 110 - ED111 refer.

6.2. Natural Heritage Designations

The site is some distance away (in excess of 6kms) from the Blackstairs Mountain SAC to the west (site code: 00077) and the Slaney River Valley SAC to the east (site code: 000781).

7.0 The Referral

7.1. Referrer's Case

Frank Finnegan on behalf of the Referrers, John and Marie Sinnott made a referral for a formal declaration to the Board under Section 5 (3)(a) of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended). This included the following:

Regard to Legislative Provisions

- The Planning Authority in making its declaration failed to comply with requirements of Section 5(2)(a) of the Planning and Development Act 2000 where it states that "a planning authority shall issue the declaration on the question that has arisen and reasons and considerations on which its decision is based". In ignoring this requirement the planning authority has failed to make its decision in compliance with the Act.
- It is clear in Section 3(1) of the Act that 'Development' is defined as carrying out of any works in, on, over or under land. They question why did the planning authority not decide when it is so clear in the Act.
- Regarding the question of whether the works were or were not exempted development the planning authority failed to make any effort to explain or justify its decision.

- Due to the nature and composition of the decision document, the declaration is incomplete. They consider there should be a Planner's Report explaining the logic of the decision.
- In most case when development is deemed exempted it is due to reliance on an article under the Exempted Development Regulations. The planning authority also failed in this aspect of their decision.
- The only reference to change in level of ground, which is a major consideration in this application, is referred to is Class 6 of Part 1 of the Exempted Development Regulations where it is stated that the level of ground, must not be altered any more that one metre higher or lower.
- In the absence of inclusion of other heights in the Regulations the height of 1metre would seem to be a reasonable standard to apply which, if applied to this case, would fail the one metre test even as the subject case contains alterations in elevations substantially in excess of one metre.

Precedent Cases

The Referral to the Board includes reference to what they consider are five no. precedent cases and provides a discussion of these. These are noted and regard is had to each in the Assessment below. The reference numbers for Precedent nos. 1-5 are as follows:

- RL07. 311284
- RL05E. 305482
- RL26.303109
- RL065.RL3540
- RL065.RL3609

Copies of these decisions are included in the Appendix to the subject Report.

7.2. Planning Authority Response

This includes the following:

- They include documentation submitted relative to the Referral.

- They note that Kearns Fruit Farm are the owners of the lands at Curraghgraique, Enniscorthy, Co. Wexford.
- They note that the Council issued their decision on the 2nd of June 2023.

7.3. Owner/ occupier's response

A response has been received from Peter Thomson, Planning Solutions on behalf of the owner/occupier Kearns Fruit Farm. This includes the following:

Background

- The site is part of a wider farm-holding belonging to Kearns Fruit Farm which comprises land and structures used for horticultural purposes and growing crops.
- They are one of the largest strawberry growers in County Wexford which produces 500 tonnes of fruit each year and details are provided of the numbers of staff they employ. Noting that additional jobs will be created once their new glasshouses will be completed.
- They are grateful for the opportunity to rebut the terms of the Referral which they consider ill-conceived.
- The relevant background to this Referral is that Kearns Fruit Farm was granted planning permission (Reg.Ref. 2022/1300 refers) for glasshouses for their horticultural business on the land immediately to the south of the field which has been up-filled and is the area of ground the referrers have concern.
- The planning history of this landholding dates back to 2001 and is detailed in the planner's report in respect of the Section 5 Declaration application (copy attached – Attachment 1).
- The planner's report confirms that the Referrers did not object to the proposed development.
- Planning application 2022/1300 involved cutting and filling the ground on which the permitted glasshouses are being erected. They provide details of the topsoil filling on the adjoining 1.28ha parcel of land which is part of the same farm holding.

Section 5 Declaration

- They have regard to the Referral made and note that the supporting letter estimated 16,000m³ of material had been deposited on the upfill parcel of land. It also listed previous Board Referral cases in which it was considered demonstrated the land reclamation works in question were not exempted development.
- They have regard to and quoted the Planning Authority's Declaration and note that the "works" and the "use" of the land were covered.
- For clarification "8C" refers to: "*Land reclamation works (other than reclamation of wetlands) consisting of recontouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development*" and is found under Article 8 of the Planning and Development Regulations 2001 -2023.

Regard to Referral to An Bord Pleanala

- They note that this seeks to challenge the Declaration of the Planning Authority on a number of grounds and they provide a summary of these.
- They consider that the planner's report and decision gives full details of the considerations and reasons.
- They refer to the exemption provided by Class 6 of Part 1 of the Planning and Development Regulations 2001, relative to the exemption clause: "*1 meter above or below the level of the adjoining ground*". They note that as this land is not within the curtilage of a dwelling this class is not relevant.
- They refer to Article 8C as being more relevant as it refers to works for land reclamation and does not include the 1m restriction.
- They consider that the only other restriction, which applies to all categories of exemption in the Regulations is that of Section 4(4) of the Planning and Development Act 2000 (as amended).
- They note that the Planning Authority screened out EIA for the works (Attachment 4).

- They refer to AA Screening and provide that in view of the distance and there being no hydrological links between the site and the closest (over 6kms away) Natura 2000 sites that these can be screened out. Noting that the Board is the competent authority in this regard.

Precedent Cases

They provide comments on each of the following precedent cases raised by the Referrer.

- RL07. 311284
- RL05E. 305482
- RL26.303109
- RL065.RL3540
- RL065.RL3609

Copies of these decisions are included in the Appendix to the subject Report.

As has been noted above these cases are included in the Assessment Section of this Report.

Other Observations

- The land on which the glasshouses were erected and the surplus material used for re-contouring before returning to agricultural use, were acquired by Kearns Fruit Farm in 2018 from an uncle of Marie Sinnott (one of the Referral applicants). They provide details and note that the Referrers live 3km by road to the northwest of the fruit farm.
- A map showing the land ownership of Kearns Fruit Farm is included in Attachment 5. Same farm-holding, the use of only non-waste material from within the farm-holding and not filling wetlands are all prerequisites for exemption, which Kearns Fruit Farms satisfy on all counts.

Conclusion

- The works which were carried out are exempted development under the provisions of Article 8C of the Planning and Development Regulations 2001 – 2023.

- The Referral is incorrectly based on the premise that the restrictive condition of Class 6 of Part 1 of the Regulations, which restricts the carrying out of any landscaping works where the level is altered by more than 1 metre above or below the level of adjoining ground, applies in this case.
- Class 6 relates to works within the curtilage of a dwellinghouse, which does not apply in this case which involves as agricultural farmholding and not the curtilage of a house.
- Article 8C exemption does not restrict the height of the land reclamation works, only that the works are for the purposes of recontouring the land and for the purposes of agriculture on the farmholding. That was the purpose of the works which were carried out.
- Precedent for the works being exempted can be found in the Referrers precedent case ref. ABP 311284. The works carried out on the same farm holding were confirmed to be exempted development under Article 8C.
- All of the other cases referenced, including that believed to be identical to this case, were not comparable and did not involve works within a single farm-holding.
- The Board is requested to uphold the decision of the Planning Authority and to confirm that the works carried out to recounter the land for the purpose of agriculture on the farm-holding were exempted development.

7.4. Further Responses

None noted on file.

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000 (as amended)

Section 2(1) of the 2000 Act provides Interpretations and includes the following:

- “agriculture” includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the

production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and “agricultural” shall be construed accordingly;

- ‘development’ has the meaning assigned to it by Section 3;
- ‘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 situated on 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. Of note 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 4(1)(l) *development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced F50[or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.]*

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.

Section 5

This section provides the details of the process of a declaration and referral on development and exempted development and facilitates a review by An Bord Pleanála on the determination.

Section 5(1) provides in summary that any person may seek a declaration on a referral from the planning authority.

Section 5(2)(a) provides that a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.

Section 5(3)(a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

Part XAB – Appropriate Assessment

Section 177U refers to Screening for AA by the competent authority.

— (1) A screening for appropriate F930[assessment of a draft Land use plan or application for consent for proposed development] shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that Land use plan or proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site.

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

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;

Article 8 Works specified in a drainage scheme

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

8C Land reclamation works (other than reclamation of wetlands) consisting re-contouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development.

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
<i>Development within the curtilage of a house</i> Class 6 (a) The construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house.	The level of the ground shall not be altered by more than 1 metre above or below the level of the adjoining ground.

Part 3 – Exempted Development Rural

Column 1 – Description of Development	Column 2 – Conditions and Limitations
<i>Land Reclamation</i> Class 11	1. The area to be affected shall not exceed 0.1 hectares. 2. Where development has been carried out within a farm holding under this

Development consisting of the carrying out of drainage and/or reclamation of wetlands.	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.
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9.0 Assessment

9.1. Introduction

- 9.1.1. The purpose of a 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. It should be stated at the outset, that this is not a planning application under consideration. Reference is had to the Referrer rather than the Appellant. The planning merits as to whether or not the development should take place is not the basis on which to determine the referral.
- 9.1.3. In addition, it must be noted that, 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. The owner/occupier Kearns Fruit Farm response to the Referral provide some background information noting that they are the owners of the land that is the subject of this Referral and that it was purchased in 2018 to be used in conjunction with the existing horticultural business (strawberries) and for growing crops. They have included a map (Attachment 5 of their response to the Referral) which they provide confirms that the land from which the surplus inert material was excavated and where it was deposited for the purposes of re-contouring before returning to agricultural use is adjoining land within the same farm holding. They provide that this confirms the land from which the surplus inert material was excavated and where it was deposited for the purposes of re-contouring before returning to agricultural use. During my site visit I noted that for the most part the land to the rear of the glasshouses has been raised (which are the subject of this referral) and that the works appear to be almost completed.

9.2.3. While the background is noted it is clear that the removal of topsoil and subsoil from one area and spreading it on lands within the same farm-holding (owner/occupier – Kearns Fruit Farm) for agricultural purposes involves the carrying out of works and therefore constitutes development, within the meaning of Section 3(1) 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. Article 9(1)(a)(i) of the Regulations states that development to which Article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of the development would contravene a condition attached to a permission issued under the Act or if it would be inconsistent with any use specified in a permission under the Act.

9.3.3. Reference is had to the planning history relative to Kearns Fruit Farm Ltd. The background information submitted by them as owner/occupier in response to the

Referral refers to the more recent planning history and in particular to Reg.Ref. 2022/1300 where permission was granted by the Council subject to conditions to erect glasshouses for horticultural purposes. As per the documentation submitted Kearns Fruit Farm note that Reg.Ref. 2022/1300 involved cutting and filling the ground on which the permitted glasshouses are being erected.

- 9.3.4. The red line boundary for that application site is to the southeast and adjoining that of the Referral site (shown yellow to the north of this site) in the owner/occupier response. Therefore, that application site, did not include the Referral site. There are no conditions in Reg.Ref. 2022/1300 relating to the raising of the land at the rear. Therefore, it could not be said that the works that have taken place would contravene a condition of this permission.
- 9.3.5. The Request to the Council refers to the subject site, comprising an area of 1.28 ha and that on the entire area has been deposited topsoil and subsoil to a depth of 1.5m to 2m i.e c.16,000m³. They attach a map to show the area and photos as to how the area has changed.
- 9.3.6. The owner/occupier response provides that the topsoil on the adjoining 1.28ha parcel of land immediately to the north of the glasshouse site, which is part of the same landholding, was removed and stored in the corner of a separate field, also in the same farmholding. The surplus excavated ground from the glasshouse site was then spread on the 1.28ha of adjoining farmland. The increase in height of the adjoining parcel of land varied between 0.28m and 1.85m (see survey plan in Attachment 2). The land was then planted with cereal crops for agricultural use. The exemptions for agricultural use are noted in Section 4(1)(a) and relative to land reclamation in Section 4(1)(l) of the Planning and Development Act 2000 (as amended).

9.4. **Restrictions on exempted development**

Schedule 2, Part 1, Class 6 of the Regulations

- 9.4.1. The Referral to the Board considers that the only reference to change in level of ground which is of major consideration in this application, is referred to is Class 6 of Part 1 of the Exempted Development Regulations. The restriction on the exemption provides that “the level of the ground shall not altered by more than 1 metre above or

below the level of the adjoining ground”. I would note that this Class refers specifically to “works within the curtilage of a house” and not to agricultural land so I would not consider this Class or restriction on exemption to be relevant.

Article 8B, Part 2 of the Regulations

- 9.4.2. While this Article is not referred to in the subject Referral it provides an exemption for works consisting of field drainage for agriculture other than drainage and /or reclamation of wetlands, shall be exempted development. It does not appear to be relevant in that there has been no reference to the raising of the land being relevant to field drainage purposes.

Article 8C – Part 2 of the Regulations

- 9.4.3. The Planning Authority Declaration includes that the works comply with Part 2 Exempted Development (8C) of the Regulations and constitute exempted development. As noted in the Statutory Provisions Section above Article 8 relates to works specified in a drainage scheme. Article 8C refers to: *Land reclamation works (other than reclamation of wetlands) consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development.*
- 9.4.4. The response to the Referral from Kearns Fruit Farm notes that the land is high quality agricultural land and not wetland. They consider that the use of only non-waste material from within the same farm holding, and not filling wetlands are all prerequisites for exemption. I would concur that the exemption provided in Article 8C would appear to be the relevant one.

Class 11 – Part 3 -Planning and Development Regulations – Article 6

- 9.4.5. This refers to Land Reclamation and refers to *Development consisting of the carrying out of drainage and/or reclamation of wetland.* This also refers to agricultural land and includes a restriction on the exemption: *The area to be affected shall not exceed 0.1 hectares.*
- 9.4.6. As noted above and as seen on site, the area in question is not wetland or land that needed to be reclaimed. Rather it is agricultural land that has been raised on the same farm holding due to the surplus of topsoil/subsoil arising from the construction of the glasshouses. Therefore, this Class is not considered to be relevant.

9.5. Regard to Precedent Cases

9.5.1. While there are no Board decisions relating to the question raised as per the current scenario/case, there have been several (Precedents 1–5), that the Referrer has raised as possibly having some similarities to the current case, and note is also had of these referred to in the documentation submitted and to the owner/occupier response relative to these cases. These are referred to below:

9.5.2. **ABP-311284** – A question arose as to ‘Whether the deposition of construction and demolition waste at Na Tuairíní, Maigh Cuilinn, Co. Galway is or is not development or is or is not exempted development.

The Board decided that the deposition of construction and demolition waste on the lands is development and is not exempted development.

It is noted that section (c) of their conclusion provided:

There is no provisions under either the Planning and Development Act, 2000, as amended, or the Planning and Development Regulations, 2001, as amended, which provide an exemption for the deposition of construction and demolition waste.

9.5.3. The Referrer notes that this Referral found that in accordance with Section 3(1) of the Planning and Development Act 2000 development includes “the making of any material change in use of any structure or other land the proposal is considered to constitute development”. Their request to the Council provides that this means that the only issue to be decided is whether or not the removal of top soil is or is not exempted development.

9.5.4. The response on behalf of Kearns did not consider the current Referral comparable to the land use changing from agricultural to use for depositing of C&D waste. They noted that the current proposal involved moving of inert excavation material within the farmholding and improving the profile of agricultural land and for the land use to remain agricultural. They considered that this precedent case is not comparable.

9.5.5. **ABP-305482** – A question arose as to whether quarrying of lands at Binnion, Clonmany, County Donegal is or is not development or is or is not exempted development.

In this case the Board concluded:

- (a) *Is development and is exempted development, where it has taken place within field B insofar as the material removed is used/to be used solely for land reclamation works within the remainder of the farm holding, and*
- (b) *Is development and is not exempted development, where it has taken place with field D as this field does not form part of the farm holding.*

9.5.6. The Referrer provides that this found that where material was removed and used for land reclamation purposes within the remainder of the farm holding is development and is not exempted development.

9.5.7. The Kearns response to the Referral had regard to this split decision and considered it not comparable to their situation as in their case all work undertaken resulted in improving the profile of agricultural land and for the land use to remain agricultural.

9.5.8. **ABP-303109** – A question arose as to whether (a) the removal of trees and other vegetation from the site is or is not development and/or is or is not exempted development, and (b) the infilling of the existing hole with unknown infill material and top soiling of the filled hole and the carrying out of works to allow water held in the hole to discharge to natural drainage network at Crosstown, Ardcavan, County Wexford is or is not development or is or is not exempted development.

The Board decided that the said works is development and is not exempted development. Part (d) of their conclusion provided:

The infill development does not come within the scope of the exemption set out in Article 8C of the Planning and Development Regulations, 2001, as amended, in respect of Land Reclamation, because the material used for infill is unknown which may give rise to filling with waste material, as defined in the Waste Management (Facility Permit and Registration) Regulations 2007 (as amended), and the site is a former wetland, and..

9.5.9. Kearns response noted this Board decision and that the land in question was former wetland (former marl hole), the unknown infill material imported was not exempted development. Also, that the land was not in agricultural use and was proposed to be developed for housing. That it was concluded - *inter alia*, that the works were not exempted under Article 8C.

9.5.10. **02.RL.3540** – A question arose as to whether the recovery of surplus excavated inert soil and the importing of that soil for infilling low lying area at Dunancory, Virginia, County Cavan is or is not development or is or is not exempted development

The Board decided that the said works is development and is not exempted development. Part (c) of their conclusion provided:

The development does not come within the scope of the exemption set out in Article 8C of the Planning and Development Regulations, 2001, as amended, in respect of Land Reclamation, because it is proposed to import material from outside the landholding in order to carry out the development, and furthermore the material proposed to be imported is a waste material (noting that the recovery of excavated inert soil, for the purpose of the improvement or development of land, is identified as a waste activity in the Waste Management (Facility Permit and Registration) Regulations 2007 (as amended)).

9.5.11. The Kearns response noted that this case involved the importing of inert material onto a farm holding and therefore did not come within the scope of Article 8C, or other classes of exemption and, therefore was a development which was not exempted development. They provide that the current proposal involved moving inert excavation material within the same farm holding and improving the profile of agricultural land and for the land to remain agricultural. They consider that this precedent case, is therefore not comparable.

9.5.12. **RL.065. RL3609** – A question has arisen as to whether the spreading of clean topsoil and subsoil on lands for agricultural use and the importing of that soil for recontouring of land at Oldcourt Lane, Oldcourt, Ballycullen, Dublin is or is not development or is or is not exempted development.

The Board decided that the said works constituted development and is not exempted development. Section (d) of their Conclusion provides:

Land reclamation comes within the scope of works referred to in the Land Reclamation Act, 1949, and would normally constitute exempted development as set out in section 4(1)(l) of the Planning and Development Act, 2000, as amended. However, the works in question, comprising infilling of land, by imported material which the Board is not satisfied is not waste material, do not

come within the meaning ascribed to land reclamation, as set out in article 8C of the Planning and Development Regulations, 2001, as amended, and therefore, do not constitute exempted development under section 4(1)(l) of the Act.

9.5.13. The Kearns response notes that in this case it was determined that the works involving the importing of waste from outside of the farm holding the material was being spread, did not come within the scope of Article 8C, or other classes of exemption and therefore was a development that was not exempted development.

Precedent Cases Conclusion

9.5.14. The Referrer considered that the Precedent references numbered 2,3, and 4 in their Referral are similar to that to be considered and were all determined by the Board to be development and not exempted development. However, they considered that Precedent no.5 (RL3609) is not only similar but is identical to the application to be considered and was also determined by the Board to be development and is not exempted development.

9.5.15. The Kearns response provided that on examination of the precedent cases presented in the Referral, only part of precedent 2 ref. ABP 305482 is compatible. In that case, the Board found that the excavation of material on the landholding for the purposes of land reclamation on the same farmholding was development, and was exempted development, as per Article 8C of the Regulations. That all other precedent cases were not comparable.

9.5.16. I have noted these cases referred to as precedent cases by the Referrer, and the Kearns response. I would note that the current case is somewhat different in that it refers to the 'Removal of top soil and sub soil from one area and spreading it on the farm holding lands for agricultural use'. It is noted that the said lands are within the same Kearns landholding. I would conclude that each case is considered on its merits and while there may be some similarities they are not comparable, to the question raised or the context of the current Referral.

9.6. Conclusion

- 9.6.1. The 'agricultural use' is as defined by the 'Interpretations' in Section 2(1) of the Planning and Development Act 2000 (as amended). Section 4(1)(a) of the Act refers to exempted development for agriculture. Section 4(1)(l) is relative to exempted development consisting of land reclamation works. It is clear from the documentation submitted that land reclamation works to facilitate agriculture on the landowner's lands have been carried out and that these works would constitute development.
- 9.6.2. The land reclamation works, which consist of re-contouring of land (other than drainage and/or reclamation of wetlands), including infilling of soil (but not waste material) within a farm holding fall under Exempted development in Class 8C of Part 2 of the Planning and Development Regulations 2001 (as amended).
- 9.6.3. Taking all of the above considerations and statutory provisions into account, I would conclude that the works that are the subject of this Referral constitute development and are exempted development.

9.7. Screening for Appropriate Assessment

- 9.7.1. 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.

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 removal of top soil and sub soil from one area and spreading it on lands for agricultural use is or is not development or is or is not exempted development:

AND WHEREAS John & Marie Sinnott requested a declaration on this question from Wexford Council and the Council issued a declaration on the 2nd day of June, 2023 stating that the matter was development and was not exempted development:

AND WHEREAS John & Marie Sinnott referred this declaration for review to An Bord Pleanála on the 16th day of June, 2023:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1), 3(1),4(1)(a), 4(1)(l) of the Planning and Development Act, 2000, as amended,
- (b) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Article 8C Part 2 of the Planning and Development Regulations, 2001, as amended,
- (d) Class 6 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended,
- (e) Class 11 of Part 3 of the Planning and Development Regulations, 2001, as amended.
- (f) the planning history of the site and adjoining lands,
- (g) the submissions on file
- (h) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The removal of top soil and sub soil from one area and spreading it on lands within the farm holding for agricultural use for the purpose of raising and recontouring land constitutes works, and is, therefore,

development as defined in Section 2 and Section 3, respectively, of the Planning and Development Act, 2000, as amended.

- (b) As noted on the documentation on file and onsite the development which is the subject of this Referral, consists of the use of the lands for agriculture and would fall under the scope of exempted development under Section 4(1)(a) of the Planning and Development Act 2000, as amended.
- (c) Land reclamation that would not include fencing or enclosure of land or reclamation of estuarine marsh or callows, comes within the scope of works referred to in the Land Reclamation Act, 1949, and would be exempted development as set out in Section 4(1)(l) of the Planning and Development Act 2000, as amended.
- (d) The works for the purposes of agriculture are not within the curtilage of a house and therefore would not fall within the scope or limitations of Class 6 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended.
- (e) The works for the purposes of agriculture do not comprise drainage and/or reclamation of wetlands and therefore would not fall within the scope or limitations of Class 11 of Part 3 of Schedule 2 of the Planning and Development Regulations, 2001, as amended.
- (f) The works for the purposes of land reclamation (other than reclamation of wetlands) consisting of the raising and re-contouring of land, including infilling of soil (but not waste material) within the same farm holding, would, fall within the scope of Article 8C of Part 2 of the Planning and Development Regulations, 2001, as amended, and would, therefore, comprise 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 said removal of top soil and sub soil from one area and spreading it on lands for agricultural use is development and is 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.

Angela Brereton
Planning Inspector

12th of April 2024