



An
Bord
Pleanála

Inspector's Report ABP-320259-24

Question

Whether the piping and filling in of an open stream is or is not development and is or is not exempt development

Location

Grangebeg, Dunlavin, Co. Kildare

Declaration

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

ED1130

Applicant for Declaration

Thomas Moore

Planning Authority Decision

No declaration

Referral

Referred by

Thomas Moore

Owner/ Occupier

Andrea Moore

Observer(s)

None

Date of Site Inspection

09/12/2024 and 16/12/2024

Inspector

Gillian Kane

1.0 Site Location and Description

- 1.1.1. The appeal site is located approximately 1.5 kms east of the R-412 along a local road in the townland of Grangebegg, approx. 3.5 kms north of Dunlavin and approx. 1km from the County Wicklow border. The area in which the site is located is rural in character with a number of recently constructed large suburban dwellings located nearby.
- 1.1.2. The subject site comprises a single storey bungalow with hedging / fencing on the eastern and southern boundaries. A watercourse runs to the east. It is open to a point at the north-eastern corner of the subject site (field entrance culvert), then is piped and covered over for the length of the subject site, then is open as it runs along the eastern boundary of the Referrers property.

2.0 The Question

- 2.1.1. Whether the piping and filling of an open stream is or is not development and is or is not exempted development.
- 2.1.2. The Board may wish to reformat the question of the referral to: Whether the piping and filling of an open watercourse within the curtilage of a house is or is not development and is or is not exempted development. Please see section 8.4.2 below.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. No declaration made within the required timeframe.

4.0 Planning History

- 4.1.1. **ED/1103:** In March 2024, Kildare County Council declared that the piping and filling of an open stream was development and was exempted development.
- 4.1.2. **PL09.248060:** Permission granted for the construction of a new dwelling, new vehicular entrance, domestic garage, new treatment systems and percolation. Conditions of note include:

- 1 The development shall be carried out and completed in accordance with the plans and particulars lodged with the application as amended by the further plans and particulars submitted the 5th day of January, 2017,

except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interest of clarity

4. All existing planting (hedgerow and trees) on and bounding the site shall be retained and maintained, except at the proposed entrance and where altered or amended by conditions in this permission.

Reason: In the interest of visual amenity and traffic safety

5. (a) Prior to commencement of development a detailed landscaping plan shall be prepared for the overall site, submitted to, and agreed in writing with, the planning authority. Such landscaping shall be carried out within the first planting season following the commencement of the development.
(b) A timber post and rail fence shall be erected around the perimeter of the site.
(c) All new boundary and screen planting on the site shall comprise indigenous hedgerow and tree species to the area.

Reason: In the interest of the rural character and visual amenity of the area

- 4.1.3. **PL09.244046:** Permission refused for the erection of a two-storey dwelling, domestic garage, Platinum P8 wastewater treatment system and percolation area and all associated works at Grangebeg, Dunlavin, County Kildare for the following reason:

Having regard to the nature and scale of the proposed dwelling and its context and setting in close proximity to a vernacular style single storey cottage, the Board considered that by reason of its two-storey height, bulk and discordant fenestration pattern, the proposed development would fail to integrate successfully within the site and could be better integrated through a single storey design solution and would seriously injure the visual amenities of the area and be contrary to the objectives as set out in Policy RH 19 and Chapter

16 of the Kildare County Development Plan 2011 – 2017 regarding rural house design. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.

5.0 Policy Context

5.1. Kildare County Development Plan 2023-2029

- 5.1.1. The subject and adjoining sites are located in an unzoned rural area, designated as Policy Zone 1.

5.2. Natural Heritage Designations

- 5.2.1. The subject site is 6.5km from the Poulaphouca Reservoir SPA (004063)

6.0 The Referral

6.1. Referrer's Case

- 6.1.1. An agent for the applicant Tom Moore notes that a referral was made to Kildare County Council on the 31st May 2024 but that no declaration issued from the Planning Authority within the required time frame. The submission states that the applicant is the adjoining landowner, bounding the subject site to the east and south.
- 6.1.2. The case of the referrer can be summarised as follows:
- Under file ED1109 the Planning Authority declared that the piping and filling of an open stream at Grange Beg is development and is exempted development. This declaration relied on article 6 and schedule 2, Part 3, class 3 of the regulations to determine that the development is exempted. The case officer also referred to article 9(1)(a)(i) and stated that none of the categories applied.
 - The landowner received planning permission under Planning Authority reg. ref. 16/823, An Bord Pleanála ref. PL09.248060. The application included a detailed flood risk assessment.
 - It is strongly suggested that the FRA relies entirely on the stream remaining an open stream. The integrity of the FRA requires that the stream be reopened and returned to an open watercourse.
 - Condition no. 1 of the grant requires that the development be carried out in accordance with the drawings and documents lodged with the application. The

pipings and filling of the stream ignore the contents and conclusion of the FRA and so is in contravention of condition no. 1. An exemption under article 6 cannot be applied as article 9(1)(a)(i) applies. Therefore the development cannot be considered exempted development.

- Landscape drawing no. DR-178 was submitted in compliance with condition no. 5 clearly shows the stream as open and is referenced in the notes – “1.8m high treated timber post and rail fence with ‘childproof’ chain link fencing incorporated into functional design alongside open stream’. On foot of this submission the Planning Authority confirmed that condition no.s 4 and 5 were complied with. This means the Planning Authority agreed to the stream remaining open.
- The piping and filling of the stream is in direct contravention of the agreement reached between the developer and the Planning Authority under the conditions. This means the exemption provide for under article 6 cannot be applied and the development cannot be declared exempted development.
- The serious implications of ignoring the FRA must be considered.

6.1.3. The submission is accompanied by:

- a place map showing the referrers land and the subject site,
- drawing showing the subject site and the stream / pipe,
- photos of the stream,
- report on recent flooding on the referrers land which includes a map and photos,
- letter from Teagasc on the condition of the referrers landholding,
- correspondence from the Planning Authority regarding enforcement file UD7742 stating that works were carried out outside of the site boundaries and therefore did not breach conditions of PL09.248060,
- extracts from FRA,

6.2. Planning Authority Response

6.2.1. None on file.

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. 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.
- 7.1.4. Section 4(1): sets out developments that shall be exempted development for the purposes of this Act.
- 7.1.5. 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.
- 7.1.6. 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. (b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).
- 7.1.7. Section 5(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. Part 2 of the Planning and Development Regulations, 2001 refers to Exempted Development.

7.2.2. Of relevance to the subject proposal is article 6(1), which 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".

Article 9(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act, (a) if the carrying out of such development would, (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

7.2.3. **Part3, 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.

8.0 Assessment

8.1.1. The purpose of this referral is not to determine the acceptability or otherwise of the above proposal in terms 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.

8.2. Is or is not development

8.2.1. I note that in describing the site subject of the permission (PL09.248060), the inspector noted that a watercourse ran along the rear / eastern boundary of the site. this watercourse has now been covered over and a dense hedge planted within the subject site.

8.2.2. As per section 3(1) of the Act, "development" is 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. I am satisfied that the piping and filling in of a formerly open watercourse is works, and that such works would be carried out on land and

therefore constitute “development” as per section 3(1) of the Planning and Development Act 2000, as amended.

8.3. Is or is not exempted development

- 8.3.1. The second question to be addressed is whether that development constitutes exempted development.
- 8.3.2. I note that when assessing the same question under a previous referral (ED/1103), the Planning Authority stated that under Part3, Class 3, the construction of a culvert is exempted development and that the subjects works fit within that scope. Regarding restrictions on exemption, the report stated that while there are a number of categories under article 9(1)(a)(i) but that not were applicable. The declaration that issued from that section 5 states that Kildare County Council considered the proposal to be development and to be exempted development having regard to article 6 and class 3 of the regulations.
- 8.3.3. In other planning history on the subject site, I note that enforcement file UD7742 refers to the works being carried out outside of the site boundaries of the permission PL09.248060 and therefore there is no breach of conditions.
- 8.3.4. In the current referral, the referrer Thomas Moore states that the subject watercourse is within the red line site boundary of the landowner Andrea Moore’s site, which was subject to a Board appeal PL09.248060. Mr Moore states that this application refers to an open watercourse in the drawings, landscape plan and FRA and therefore any deviation from those documents represents a breach of condition no. 1. Mr Moore also submits that as the compliance drawing for condition no. 5 referred to an open watercourse, then that condition is also breached.
- 8.3.5. Mr Moore included a copy of drawing no. 4111-02 with his referral request. This drawing was submitted to Kildare County Council in January 2017 as part of a Further Information response within application ref. 16/823 (subsequently appealed to the Board under PL09.248060) which shows a straight blue line within the site boundaries. This feature is not labelled but occurs within the approximate location of the watercourse.
- 8.3.6. That planning application was accompanied by a site specific FRA (August 2016), sections of which are included with the current referral. The FRA refers to the Ballybought stream “which flows adjacent to the eastern boundary of the site” and

also “The Ballybought stream generally flows in a south to north direction in the vicinity of the proposed development site”.

- 8.3.7. Part 3, Class 3 of the Regulations provides that 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 are exempted development.
- 8.3.8. The subject works which refer to the piping and filling in of an open watercourse does constitute the construction of a culvert and therefore the exemption provided for under part 3, class 3 would apply should no restriction on exemption apply.

8.4. Restrictions on exempted development

- 8.4.1. The question before the Board is whether the works carried out are within the site boundaries as submitted by the referrer or outside the site boundaries as stated by the Planning Authority. It appears from the documentation on file and the planning history that the watercourse *is* within the site boundaries, but it is not for the Board to definitively declare such a matter within a section 5 referral.
- 8.4.2. Therefore the Board may wish to reformat the question of the referral to: whether the piping and filling of an open watercourse within the curtilage of a house is or is not development and is or is not exempted development.
- 8.4.3. The drawings and documents submitted with the planning application that permitted the development on site include an open watercourse. That watercourse has now been piped and covered over, a situation that is not provided for in the planning permission. In that instance, the works undertaken have been implemented in a manner that is in accordance with the conditions attached to a valid planning permission. In that instance, the development could not be considered exempted development having regard to article 9(1)(a)(i) which states that development to which article 6 relates shall not be exempted development if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission.
- 8.4.4. No other restrictions on exemption apply.

9.0 Recommendation

9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the piping and filling of an open watercourse within the curtilage of a house is or is not development and is or is not exempted development:

AND WHEREAS Thomas Moorer requested a declaration on this question from Kildare Council and the Council did not issue a declaration,

AND WHEREAS Thomas Moore referred this declaration for review to An Bord Pleanála on the 24th day of July, 2024:

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) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (d) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that the piping and filling of an open watercourse within the curtilage of a house are works that constitute development, is development that has been implemented in a manner that is not in accordance with the conditions of a valid planning permissions and accordingly is not exempted development

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3)(b) of the 2000 Act, hereby decides that the piping and filling of an open watercourse within the curtilage of a house 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

20 December 2024