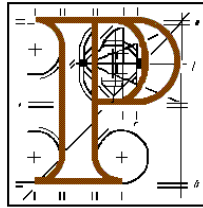


An Bord Pleanála



Inspector's Report

Referral Reference No.:	RL3413
Question:	Whether the partial removal of a weir is or is not development or is or is not exempted development.
Location:	Glashaboy River, Ballinriskig and Sarsfieldscourt, Upper Glanmire, Co. Cork.
Referrer:	Inland Fisheries Ireland
Planning Authority:	Cork County Council
Owners / Occupiers:	Coilte, Anne Guardé, Elaine Guardé-Wulf
Date of Site Inspection:	9 th December 2015
Inspector:	Kenneth Moloney

1.1. SITE DESCRIPTION

The subject site is located in rural area and situated approximately 3km north-west of Sallybrook, Co. Cork. The weir, the subject of this referral, is located within the River Glashaboy. The river at the location of the weir is situated approximately 15 metres off the regional road R616. The river is situated at a significantly lower level than the public road.

The river edge and the weir are accessible by a grass path off the R616. At the time of my site inspection there was debris on top of the weir mainly comprising of branches etc and there was a large river flow.

The banks of the river rise steeply on either side and they are heavily vegetated with mature coniferous and deciduous trees.

1.2. BACKGROUND

Inland Fisheries Ireland sought a Section 5 Declaration, in accordance with Section 5 (3) of the Planning and Development Act, 2000 – 2010, from the planning authority as to whether the partial removal of a weir on the Glashaboy River is development and/or is exempted development.

1.3. THE DECLARATION

The Planning Authority issued a Declaration on 8th of September 2015 to the effect that the partial removal of the weir at Glashaboy River is not exempted development. This Declaration has now been referred to the Board, pursuant to Section 5 of the Act, for review.

The Planner's report, upon which the Declaration decision was based, makes the following points: -

- Class 35, Part 1, Schedule 2 of the Planning and Development Regulations, 2001, is relevant.
- The proposed works are covered within the meaning of this exemption.
- The purpose of the works, proposed by the IFI, is to improve the passage of migratory fish and restore the channel to its natural width and depth.
- The site falls within the Great Island Channel SAC and accordingly a more detailed method statement is required.
- The weir is part of the former Spade Mill Complex and this is confirmed by a report from the Local Authority Archaeology Officer and it is a recorded archaeological monument.
- The County Development Plan has relevant policy objectives and this includes Objective HE 3-1, Objective HE 3-2, and Objective HE 3-3 and Objective HE 3-4.
- Although the weir itself is not included on the recorded monument inventory it is considered that given its intrinsic connection the weir forms part of the associated archaeology of the mill complex.

- Part 2, Article 9 (1) of the Planning and Development Regulations is relevant.
- The Archaeology Officer is clear that the weir is archaeological heritage for which County Development Plan objectives seek its preservation and protection.
- The proposed partial removal of the weir is not exempted development having regard to Part 2, Article 9 (1) (viii) of the 2001 – 2013 Planning and Development Regulations, 2001, and Policy objectives HE 3-1, HE 3-2, HE 3-3 and HE 3-4 of the County Development Plan.

1.4. THE QUESTIONS

The question before the Board is: -

Whether the partial removal of a weir is or is not development and/or is or is not exempted development.

2.0 REFERRER

McCutcheon Halley Walsh, Chartered Planning Consultants, on behalf of Inland Fisheries Ireland, lodged a submission. The following is a summary of the main grounds of the submission; -

Purpose of Restoration Works

- The main purpose of the works is to allow;
 - The passage of migratory fish including salmon
 - The continuity of the river as habitat thus allowing all fish pass freely upstream or downstream
 - The productivity of the river due to the impoundment of a 200m section of river upstream
- Class 35(a) of the Planning and Development Regulations is relevant.

Description of the Proposed Restoration Works

- The partial removal of the existing weir.
- The weir is a rough masonry structure with a partial skin of reinforced concrete.
- The weir is currently covered with trees and with flood debris. (See photographs in Appendix 2).
- The weir no longer serves any useful purpose as it is partially collapsed.
- The weir was originally built to provide a millrace for the former Spade Mill at Upper Glanmire Bridge, 400m to the south.
- The weir was subsequently rebuilt to provide water to a local fish farm.
- Appendix 3 shows the location of the existing weir in relation to the Spade Mill and the former millrace and fish farm.
- The proposal is to remove the weir to bed level and thereby restore the channel of the river to its natural width and depth.

Declaration by Cork County Council

- The Planning Authority contended that the partial removal of the weir is not exempted development due to Article 9 (1) (vii) of the Regulations and Policy Objectives HE 3-1, HE 3-2, HE 3-3 and HE 3-4 of the County Development Plan.
- Although not explicitly stated in the Local Authority reports it is implied that the weir is a protected structure or a recorded site or monument.

The grounds of the Referral

- As a state agency the IFI is entitled to an exemption under Class 35(a) of the Regulations. This exemption can only be denied by Article 9 (1) (a) (vii) of the Regulations.
- There is no reference in the County Development Plan or the Local Area Plan to any protected weir on the Glashaboy River.
- There is no evidence in the Local Authority technical reports that the weir could be considered to be underwater archaeology (HE 3-2) or that it is located within a zone of archaeological potential.
- It is contended that the declaration relies solely on Policy HE 3-1 and Policy HE 3-4.
- The grounds of referral will therefore be based on the assumption that the weir is deemed listed on the Sites Monuments and Records (SMR) and that the weir is a valued piece of industrial archaeology.
- It is contended that the Article 9(1) (a) (vii) does not apply as (i) the site is not listed on the SMR and (ii) the planning authority has failed to comply with the Heritage Guidelines which set out mandatory procedures which must be followed before the site or structure falls within scope of Article 9(1)(a) (vii).

Policy Objective HE 3-1: The Sites and Monuments Record

- There is no evidence on the national SMR that the protection of the Spade Mill under the National Monuments Act (1930 – 2004) extends to any features including the mill race and weir.
- A description of the Spade Mill is provided.
- The Sites and Monuments Act provides a definition of a monument.
- It appears that the Local Authority have incorrectly applied the term 'curtilage' or 'attendant grounds' which is only formally relevant to structures on the RPS.
- In the case of SMR any ancillary features are contained within the notification distance as indicated on the attached Appendix 5.
- As there is no map or text reference to the weir in the SMR database it could not be considered to form part of the site or the monument recorded under CO063-004 There is therefore no basis on the Planning Authority assumption that the listing of the former spade mill extends to the weir.

Policy Objective HE 3-1: The Industrial Archaeology of the Existing Weir

- The industrial archaeology of the weir is best assessed in terms of the relationship between the weir and the spade mill.

- Although originally connected this connection was broken several decades ago and they are now separate planning units.
- The land from the weir south forms part of the curtilage of the Garde family.
- The Spade Mill and land extending to the south is part of an industrial complex owned by Crowley Engineering.
- Within the Garde complex permission was granted (L.A. Ref. 528/84) in 1984 for a fish farm and a dwelling. At this point there was no trace of the mill race and the weir was in a derelict condition.
- The weir was partially reconstructed to support the fish farm.
- The fish farm discontinued in 2006 and a single pond remains.
- The exact route of the mill race is unknown and the only remaining feature is a culvert under the public road.
- The former Spade Mill is now used as a store.
- A previous planning application (L.A. Ref. 03/5355) contained an Archaeology Assessment and this confirmed;
 - the SMR listing was confined to the mill building
 - the only surviving evidence of the millrace was the northern wall of the mill
 - no further archaeological investigations were required
- It is contended that the functional relationship between the mill race and the Spade Mill was severed when the mill race was removed. The Garde family have confirmed that the mill race was removed over 100 years ago.
- The weir as it currently exists was reconstructed and resurfaced in 1984 for the use of a fish farm. As there was an intervening use of the weir as part of a separate holding this would further diminish the relationship between the weir and the Spade Mill.

Procedural Issues in regard to the use of Article 9(1) (a) (vii)

- Each Local Authority is required to maintain a RPS.
- The implication of the Declaration (D/257/15) by Cork County Council is that the subject weir has been deemed to be added to the RPS.
- It is contended that if the weir in question is considered to be of archaeological value, Cork County Council contravened the Planning Act 2000, (as amended) by not including the site on the RPS.
- The Local Authority have acted ultra vires by using Article 9 (1) (a) (vii) to de-exempt works which would otherwise be exempted under Article 35(a) of the Planning and Development Regulations, 2000.

3.0 THE PLANNING AUTHORITY'S CASE

The Planning Authority submitted a response stating that they had no further comments.

4.0 EVALUATION

4.1 The Facts Of The Case

The facts of this matter include the following:

- On the **14th of August 2015** a first party **Section 5 application** was submitted to Cork County Council asking the question whether the partial removal of a weir at Glashaboy River is or is not development or is or is not exempted development.
- On the **8th September 2015** Cork County Council issued a determination that the planning authority considered that the partial removal of the weir is development and is not exempted development.
- On the **2nd October 2015** a first party **referral** was received by McCutcheon Halley Walsh, Chartered Planning Consultants, on behalf of Inland Fisheries Ireland, in accordance with the provisions of Section 5(3)(a) of the 2000 Act.

4.2 Statutory Provisions

I consider the following statutory provisions relevant to this referral case:

Planning and Development Act, 2000

Section 2 (1) states: -

‘development’ has the meaning assigned to it by Section 3, and ‘develop’ shall be construed accordingly;

“structure” means any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined.”

“works’ includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...”

Section 3 (1) states:-

“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 of use of any structures or other land.”

Section 4 (2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations 2001.

Planning and Development Regulations, 2001

Article 6(1) of the Regulations states as follows:- *“(a) Subject to article 9, development consisting 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 (1) of the Regulations sets out circumstances in which development to which Article 6 relates shall not be exempted development.

Article 9 (1) (a) (vii) is relevant and this provision states ‘*consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places caves, sites, features or other objects of archaeological, geological or historical, scientific or ecological interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan, save any excavation, pursuant to and in accordance with a licence granted under section 26 of the National Monuments Act, 1930 (No. 2 of 1930)*’.

Class 35(a) of Part 1 of the Second Schedule to the Regulations states as follows:-

<i>Column 1 Description of Development</i>	<i>Column 2 Conditions and Limitations</i>
<i>The carrying out by or on behalf of a statutory undertaker of any works for the maintenance, improvement, reconstruction or restoration of any watercourse, canal, river, lake or other inland waterway, or any lock, quay, mooring, harbour pier, dry-dock, or other structure forming part of the inland waterway or associated therewith, and any development incidental thereto,</i>	

4.3 Assessment

Is the proposal development

In relation to whether the partial removal of a weir is development I would consider that this proposal involves “works” within the meaning of Section 2 of the Planning and Development Act, 2000 (as amended). Such works constitute “development” within the meaning of the Act.

Is the proposal exempted development

I am of the opinion, based on the information on the file, that the most relevant consideration is whether the partial removal of the weir would be considered

exempted development under Class 35, Part 1, Schedule 2, of the Planning & Development Regulations, 2001 (as amended).

Class 35, of Part 1 states the following is exempt '*the carrying out by or on behalf of a statutory undertaker of any works for the maintenance, improvement, reconstruction or restoration of any watercourse, canal, river, lake or other inland waterway*'.

Although Class 35 of Part 1 would allow an exemption for a statutory undertaker it is important to note that Article 9 (1) (a) (vii) of the Planning Regulations, 2001, would de-exempt the partial removal of the weir. Article 9 (1) (a) (viii) essentially stipulates that any alteration to a site, feature or object of archaeological interest for which there is a statutory objective, in the County Development Plan or Local Area Plan to protect, then the exemption under Class 35, Part 1 of the Planning Regulations would not apply.

As such I would consider that should the Cork County Development Plan, 2014, contain a policy objective to protect and retain the weir in question then the partial removal of the structure would not be exempted development having regard to Article 9 (1) (a) (vii) of the Planning and Development Regulations, 2001 (as amended).

The documentation submitted to the Local Authority from Inland Fisheries Ireland indicates that the subject weir was constructed to power a wheel some distance downstream of the weir. It is also indicated that the weir is no longer used for the purpose for which it was constructed as the mill it served is long since closed and the mill race was removed or filled in. Therefore according to the IFI submission the subject weir has no relationship with any mill or the remains of the any mill in the area.

The Cork County Development Plan, 2014, provides protection for features, objects or structures of archaeological heritage and these can be listed under the following protection measures;

- Record of Protected Structure
- National Inventory of Architectural Heritage
- Records of Monuments and Places

Should the subject weir be listed on any of the above then its partial removal would be contrary to County Development Policy objectives and therefore Class 35, Part 1 of Schedule 2 would not apply due to Article 9 (1) (a) (vii) of the Planning and Development Regulations, 2001. I have reviewed the RPS in accordance with the provisions of the Cork County Development Plan, 2014, and the weir, the subject of this referral, is not listed as a protected structure or indeed is the weir identified within the curtilage of a protected structure on the RPS.

I have reviewed the National Inventory of Architectural Heritage and although there are two weirs identified in County Cork as having architectural heritage neither of these weirs is the weir the subject of this referral.

In relation to the Records of Monuments and Places the Local Authority archaeologist makes the case that the weir the subject of this referral has archaeological heritage.

According to the Local Authority archaeologist the weir and associated mill race is an integral part of the Spade Mill complex (CO063-004) which is a Recorded Archaeological Monument. I would note that the Spade Mill, which is located approximately 400 metres downstream of the subject weir, has statutory protection under the Records of Monuments and Places in accordance with the National Monuments Act, 1930.

Policy Objective HE 3-1 'Protection of Archaeological Sites' of the Cork County Development Plan, 2014, is relevant as part (b) states it is an objective to '*secure the preservation (i.e. preservation in situ or in exceptional cases preservation by record) of all archaeological monuments including the Sites and Monuments Record (SMR) and the Record of Monuments and Places as established under Section 12 of the National Monuments (Amendment) Act, 1994, as amended and of sites, features and objects of archaeological and historical generally*'.

I would conclude, having regard to Policy Objective HE 3-1 above, that should an archaeological monument be afforded protection under the National Monuments Act, 1930, then it is an objective of the Cork County Development Plan, 2014, to protect this archaeological monument.

The significant issue before the Board therefore is whether the weir is protected in accordance with the National Monuments Act, 1930, and should this be the case there is clearly a County Development Plan policy objective to secure the protection of this weir.

The Record of Monuments and Places (RMP) is a provision of the National Monuments Act, 1930. It comprises of a list of recorded monuments and places and accompanying maps and as part of this assessment I have reviewed this list. The Spade Mill is a protected monument and the reference is CO063-004. The accompanying map includes a circle enclosure of the protected site and this includes the immediate vicinity of the mill in question however the boundary of this circle is some 350 metres south of the weir in question for the purpose of this referral. I would further note that, of relevance to the subject referral, is the definition of a national monument in accordance with the National Monuments Act, 1930. It is stated that a national monument '*shall be construed as including, in addition to the monument itself, the site of the monument and the means of access thereto and also such portion of land adjoining such site as may be required to fence, cover in, or otherwise preserve from injury the monument or to preserve the amenities thereof*'. This level of protection is important as it is distinctively different than the level of protection attributed to a protected structure under the provisions of the Planning and Development Act, 2000 (as amended).

In accordance with paragraph 13.1.1 of the Architectural Heritage Guidelines for Planning Authorities, 2004 (revised in 2011), the curtilage of a protected structure is referred to as '*the parcel of land immediately associated with that structure and which is (or was) in use for the purpose of the structure*'. A protected structure therefore includes land lying in the curtilage of the protected structure. Whereas having regard to the definition of a monument in the National Monuments Act, 1930, the curtilage is not defined as part of the protection for a site identified by the Record of Monuments and Places.

It is my view that that level of archaeological protection available to the Spade Mill in accordance with the National Monuments Act, 1930, is not afforded to the weir the subject of this referral and this conclusion is largely based on the following;

- Having regard to the definition of a national monument in accordance with the National Monuments Act, 1930,
- The separation distance of approximately 400 metres between the weir and the Spade Mill, and
- The lack of any functional relationship between the weir and the Spade Mill

I would conclude that as the weir is not protected in accordance with any County Development Plan policy objective that its partial removal by the Inland Fisheries Ireland is exempted development in accordance with Class 35, Part 1, Schedule 2 of the Planning and Development Regulations, 2001.

5.0 RECOMMENDATION

Conclusions and Recommendations

It is considered that the partial removal of the weir on the River Glashaboy is exempted development having regard to Class 35, Part 1, Schedule 2 of the Planning and Development Regulations, 2001.

DRAFT ORDER

WHEREAS a question has arisen as to whether the partial removal of a weir is or is not development and is or is not exempted development at Glashaboy River, Ballinrviskig and Sarsfieldscourt, Upper Glanmire, Co. Cork

AND WHEREAS the said question was referred to An Bord Pleanála by Inland Fisheries Ireland, of Macroom, Co. Cork.

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

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) Article 9 (1) (a) (vii) of the Planning and Development Regulations, 2001,
- (c) Class 35 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001,
- (d) National Monuments Act, 1930,

AND WHEREAS the Board has concluded that the partial removal of a weir;

- (a) would constitute the carrying out of works which comes within the meaning of development in section 3(1) of the Planning and Development Act 2000, (as amended),
- (b) comes within the scope of Class 35, Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended),

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 partial removal of the weir on the Glashaboy River is exempted development.

Kenneth Moloney
Planning Inspector
19th January 2016