



An  
Bord  
Pleanála

## Inspector's Report PL93.RO3448.

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### Question

Whether the construction of a road is, or is not development, or is or is not exempted development.

### Location

Coum Mahon, Mahon Valley,  
Waterford.

### Declaration

Planning Authority

Waterford City and County Council

Planning Authority Reg. Ref.

D5/201527.

Applicant for Declaration

Declan McGrath.

Planning Authority Decision

It is development, and it is not exempted development.

### Referral

Referred by

Declan McGrath.

Owner/ Occupier

Comeragh Community Development  
Group.

Date of Site Inspection

July 2016.

Inspector

Philip Davis.

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## 1.0 Site Location and Description

Mahon Valley extends south-east from the Comeragh Mountains from the 600 metre high ridge near Corraduff Mountain down to Mahon Crossroads, where the landscape flattens out at around 100 metres AOD to form the lush undulating countryside between the Comeraghs and Waterford City. The back of the valley (known as Coum Mahon) is a corrie which features a fine waterfall, descending in a number of cascades from around 600 metres to 400 metres AOD. The corrie is flanked by high exposed cliffs of Devonian sandstone and Greywacke, with many large erratics scattered on the coum floor. At the base of the waterfall, the Mahon River descends along the valley as it opens out, and the valley then falls in a gentler manner for around 2 km, before it runs through Crough Wood, a conifer woodland in with leisure walks, and then reaches the small settlement of Mahon Crossroads, where the R676 runs along the eastern flank of the Comeraghs, linking Carrick-on-Suir to Dungarvan. The waterfall cascades fall over bare rock, with the area around the Mahon River further south-east characterised by heath and upland bog with some grassland mostly used for light sheep grazing on what appears to be commons. About 1 km south-east of the waterfall the land is mostly used for conifer plantation, with an area closer to the village allowed to mature as a recreation area. There is a small run-of-the-river hydroelectric scheme on the Mahon River about half way down the valley.

A minor third class road (known as the Magic Road) runs north-west from the village to within a few hundred metres of the falls, before turning south-west into the mountains – this road is widely signposted as a leisure driving route and as part of the ‘Kelly Challenge’ cycle route. At its closest point to the waterfall – about 1km away – there is a small carpark and an approximately 1.5-metre wide crushed limestone path providing foot access to the base of the waterfall.

In addition to this road and path, there are a series of marked leisure trails through the forest close to Mahon Crossroads in Crough Woods. These generally follow the southern side of the Mahon River. There are also forestry roads through the plantation, and a small access track connecting the public road to the hydroelectric

scheme. A recently constructed roughly surfaced track (using cut and fill with apparently no imported material) now runs parallel with the river on the southern side of the river for most of the way from the 'official' leisure walk, to near the top of the valley. The north-western end near the Falls is not complete, with a small 'gap' unconstructed. This extends up to about 400 metres of the Falls. It is around 3-5 metres in width, very unevenly surfaced, with open cross-drains. It is approximately 2,700 metres in length.

## **2.0 The Question**

The referrer requests a Section 5 declaration that the construction of the road is development, and is not exempted development.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

The planning authority issued a declaration that the construction of the road is development and is not exempted development. In this it had regard to:

The relevant designations pertaining to the lands as specified in the Development Plan and the provisions of the Environmental Impact Assessment and Habitats Directives in force at this time;

Sections 2, 3, 4 and Part XAB of the Planning and Development Act, 2000, as amended, and

Articles 5,6 & 9, Schedule 2 Part 1 Classes 13 and 33, Schedule 5 Part 2 Class 10 (dd) and Schedule 7 of the Planning and Development Regulations 2001, as amended.

### **3.2. Planning Authority Reports**

#### **3.2.1. Planning Reports**

- It is concluded that the works do not come within Class 13 or 33 of Part 1 of the 2001 Regulations.

- Having regard to the nature and extent of the development and its location within the Comeragh Mountain SAC (001952) and its associated pNHA, and its location within a designated visually sensitive area, it is argued that even if it could be argued as coming under Class 13 or 33, the exemption would be removed by virtue of Article 9(i)(vi). It is noted that no AA appears to have been carried out.
- It is considered that it is likely to have required an Environmental Impact Assessment and Appropriate Assessment (Schedule 5, Class 10(dd), and would thus not be exempted.

### 3.2.2. Other Technical Reports

- An AA screening checklist is attached which concludes that impacts cannot be ruled out due to the direct and indirect impacts on the conservation objectives of the habitat – it estimates that 1.1 hectares of habitat was lost, 0.4 hectares of which corresponds with dry and wet heath (Annex I habitats).
- A report dated December 2015 for Waterford City and County Council on the impacts on the Comeragh Mountains cSAC is attached. This concludes that impacts have occurred with direct relevance to the conservation status of the cSAC.

## 4.0 Planning History

The small hydroelectric scheme (a weir impoundment with a run-of-the river diversion) was granted permission under 03/1098 and 05/428 (EIA applications).

## 5.0 Policy Context

### 5.1. Development Plan

The site is in unzoned rural uplands with no specific development plan objectives, but subject to general policy objectives relating to recreational activities and the protection of designated habitats.

## 5.2. Natural Heritage Designations

The referral site runs partly through the Comeragh Mountains SAC, site code 001952. The Conservation Objectives cite the following Annex I habitats:

- [3110] Oligotrophic Waters containing very few minerals
- [3260] Floating River Vegetation
- [4010] Wet Heath
- [4030] Dry Heath
- [4060] Alpine and Subalpine Heaths
- [8110] Siliceous Scree
- [8210] Calcareous Rocky Slopes
- [8220] Siliceous Rocky Slopes
- [1393] Slender Green Feather-moss (*Drepanocladus vernicosus*)

## 6.0 The Referral

### 6.1. Referrer's Case

- The referrer outlines in very great detail his understanding of the background to the works on the site - in short, he understands that the works were carried out on the basis of a verbal approval from the planning authority that planning permission was not required, and funding was provided by the Council.
- He explains his motivation in taking the Section 5 referral to the Board in that he wishes to establish that an EIS/AA was required, and as such no retention application can be granted.
- It is noted that Part XAB of the 2000 Act relates to Appropriate Assessment, and other requirements under the Regulations, including Schedule 2, Part 1 Class 13 (private roads in excess of 2000 metres), but wishes to focus on the issue of the SAC.
- It is noted that there are a number of developments on the Mahon River at this point, including a run of the river hydro scheme which was granted permission in 2005 with an EIS.
- A timeline for the works and correspondence with various bodies is set out.

- It is submitted that it is a 'road' under the meaning as under the Roads Act, 1993 (As quoted in Section 2 of the 2000 Act, as amended), and as such is 'development'.
- It is argued that even if it is considered Local Authority works (which are exempted), it is de-exempted by the requirements of Articles 80(1)(b) and 81(2)(c) and 20(1)(k), due to its length.
- It is argued that it does not constitute a 'greenway', but is laid out as a full road.

## 6.2. **Planning Authority Response**

The planning authority did not respond directly – their view is contained in the planners report and the notice attached.

## 6.3. **Owner/ occupier's response**

### 6.4. Comeragh Community Development Group

- The background and justification for the works are outlined in some detail.
- It is denied that it is a 'roadway' or 'road' under the meaning set out in the Regulations. It is described as a 'wood walk'.
- It is submitted that the current situation is not a real reflection of what the final walk will look like once it is completed and landscaped – it is intended to blend into the landscape as with the present walk through Crough Woods.
- The response deals with a number of detailed statements made in the referrers letter.

## 6.5. **Further Responses**

The referrer notes that the planning authority consider it to be a road.

Further details are provided with regards to the background, including a detailed series of photographs.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

#### Section 2:

'appropriate assessment' shall be construed in accordance with section 177R;

"exempted development" has the meaning specified in *section 4*;

'Natura 2000 network' has the meaning assigned to it by Article 3, paragraph 1 of the Habitats Directive;

'Natura impact statement' shall be construed in accordance with section 177T;

"public road" has the same meaning as in the Roads Act, 1993;

"road" has the same meaning as in the Roads Act, 1993;

"statutory undertaker" means a person, for the time being, authorised by or under any enactment or instrument under an enactment to—

- (a) construct or operate a railway, canal, inland navigation, dock, harbour or airport,
- (b) provide, or carry out works for the provision of, gas, electricity or telecommunications services, or
- (c) provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking.

"unauthorised works" means any works on, in, over or under land commenced on or after 1 October 1964, being development other than—

- (a) exempted development (within the meaning of section 4 of the Act of 1963 or *section 4* of this Act), or
- (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G or 37N of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

#### Section 3

1) In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.



## Section 4

The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—

(i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or

(ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described).

(b) Regulations under *paragraph (a)* may be subject to conditions and be of general application or apply to such area or place as may be specified in the regulations.

(c) Regulations under this subsection may, in particular and without prejudice to the generality of *paragraph (a)*, provide, in the case of structures or other land used for a purpose of any specified class, for the use thereof for any other purpose being exempted development for the purposes of this Act.

(3) A reference in this Act to exempted development shall be construed as a reference to development which is—

(a) any of the developments specified in *subsection (1)*, or

(b) development which, having regard to any regulations under *subsection (2)*, is exempted development for the purposes of this Act.

(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.

## 7.2. Planning and Development Regulations, 2001

### Article 6(1)

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

### Article 9(1)(a)

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,

(ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width,

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special 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,

(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,

(viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.

## **Article 80**

Subject to sub-article (2) and sub-section (6) of section 179 of the Act, the following classes of development, hereafter in this Part referred to as “proposed development”, are hereby prescribed for the purposes of section 179 of the Act —

(a) the construction or erection of a house,

(b) the construction of a new road or the widening or realignment of an existing road, where the length of the new road or of the widened or realigned portion of the existing road, as the case may be, would be—

(i) in the case of a road in an urban area, 100 metres or more, or

(ii) in the case of a road in any other area, 1 kilometre or more,

(c) the construction of a bridge or tunnel,

## **Schedule 2 Part 1 Class 13**

The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving. The width of any such private footpath or paving shall not exceed 3 metres.

## **Class 33**

Development consisting of the laying out and use of land—

(a) as a park, private open space or ornamental garden,

(b) as a roadside shrine, or

(c) for athletics or sports (other than golf or pitch and putt or sports involving the use of motor vehicles, aircraft or firearms), where no charge is made for admission of the public to the land.

The area of any such shrine shall not exceed 2 square metres, the height shall not exceed 2 metres above the centre of the road opposite the structure and it shall not be illuminated

### **Schedule 5, Part 2, Class 10 (dd)**

All private roads which would exceed 2000 metres in length.

## **8.0 Assessment**

Before commencing this assessment, I would note that the referrer has submitted a very detailed overview which raises a significant number of issues surrounding the circumstances behind the development, and has requested that the Board address some of these. I would recommend that the Board read the referral and the occupiers response in detail as it is important in addressing the overall context and the history behind the works. This is quite important as there are no detailed plans presented of the final works, and the works were not completed, so it is difficult to judge the precise nature and motivation for the final intended structures on site. I would note in this regard that I have no reason to question the goodwill of the organisation behind the works, which is not the landowner, and neither do I question the motivation of the referrer. The situation on the ground appears to have resulted from a complex series of misunderstandings between the Council and other bodies which is beyond the scope of this report to address. The issue before the Board is a narrow one in regard to deciding if the works on the site constitute development, and if so, is or is not exempted development within the meaning of the Act and the Regulations. I will therefore confine my assessment to these questions only.

The development is located in the highly scenic valley of the Mahon River in the Comeraghs. This is a well signposted area off the main Dungarvan to Carrick-on-Suir Road, leading to the Mahon Falls. There is a woodland walk in Crough Woods close to the main road, and closer to the Falls, a carpark and a crushed limestone walkway providing access to the base of the Falls within Coum Mahon. The

walkway stretches from Crough Woods to the Falls along the southern bank of the Mahon River. No section has been completed, but there are visible earthworks along almost the entire stretch, with just a section of perhaps 2-300 metres closer to the Falls untouched. The works at present constitute largely an earthwork consisting of in most cases a double ditch with a compacted stone platform (without final finishing), constructed by a tracked excavator, with a number of cross-drains. The earthworks are occasionally in excess of 5 metres wide in width and quite crudely constructed – it was presumably intended to remove much of the spoil visible on the site and regrade some of the embankments, in addition to providing proper paving. There are no indications on file as to any type of finish or whether the drains are intended to be covered, but I assume it would be a crushed limestone topping similar to that of the walkway nearer within Crough Woods. There are many photographs on file, submitted by the parties and attached to the report commissioned by the Council. I can confirm that I consider these to be accurate representations of the earthworks on site. I do accept the point made by the occupier that the unsightly nature of the current works are due to their partially completed form, and that it was intended to create a final structure more appropriate for a leisure walk similar to that existing in Crough Woods.

I note that the occupier disputes the term ‘road’, and states that it is a ‘walkway’. Without prejudice to my conclusions I will use the term ‘road’ as this is the term used generally for such structures within the Act and Regulations. I do acknowledge that the likely final form and use of the structure is as a leisure walk.

## **8.1. Is or is not development**

- 8.1.1. The road is in excess of 2 km in length and is a substantial excavation with related structures including probable culverts and drains. As such I consider it unambiguously to be ‘development’ pursuant to Section 2 and 3(1) of the 2000 Act, as amended.
- 8.1.2. I would note in regard to the extensive submissions regarding the run-of-the-river hydroelectric scheme approximately half way up the river and route, that while the works pass close to the scheme there are no indications that it is functionally connected with these works (previously permitted by the Board), or any other works in the vicinity, and so should be considered as a stand alone development.

## **8.2. Is or is not exempted development**

- 8.2.1. With regard to the question of whether it is or is not exempted development, a relevant consideration is whether the works were carried out as part of the works of statutory undertaker or public body (Article 80). It appears public funding was used for the works, and the report from the planning authority does not address the issue, but it seems clear to me that it was undertaken by a private body on privately owned lands (which are not part of Coilte works), and the land is not part of the public highway, and is not part of an existing private street, road or way, and as such is not exempted under Schedule 2, Part 1, Class 13.
- 8.2.2. The land, while open and a mix of privately owned land and (possibly) commonage, is not a park, open space or ornamental garden, or used for athletics or sports. It is open ground used seemingly for sheep grazing, or is untended heath/bog. As such, I do not consider that it is exempt under Schedule 2 Part 1 Class 33.
- 8.3. As such, I do not consider that the development come within these, or any other exemption class and so is not exempted development.

## **8.4. Restrictions on exempted development**

- 8.4.1. Notwithstanding the issue of my assessment above of the works not being exempted development, works are not exempt if they would require an EIS or NIS.
- 8.4.2. The structure is in excess of 2 km, so would, under Schedule 5, Part 2, Class 10(dd) (private roads in excess of 2000 metres) require screening, and while I acknowledge some ambiguity about the nature of the structure, I would consider, having regard also to the provisions of Schedule 7 of the Regulations, that there is a reasonable likelihood that it would require an EIS, especially having regard to the likely environmental impact of the works and the cumulative impact with the hydroelectric scheme (which was granted permission in 2005 with an EIS).
- 8.4.3. The issue of Appropriate Assessment is much more straightforward. I would refer to Board to the document 'Assessment of Impacts on Comeragh Mountains cSAC' dated Dec. 2015, completed by Wetland Surveys Ireland on behalf of the Council. On the basis of my site visit, I can confirm that the survey details of the impacts are consistent with my observations. The upper levels of the works run directly through

part of the designated SAC. There is no question but that the works have caused significant direct effect on heathland (Annex I habitat) within the designated SAC by way of direct excavation and coverage by spoil – the report estimates that around 0.4 ha. of Annex 1 habitat has been destroyed – I would consider this an accurate assessment. There is also visible evidence of run-off to the stream, which includes another Annex 1 habitat ‘floating river vegetation’. As such, as there is the significant disruption/destruction of habitat identified as ‘Dry Heath’ [4030] and ‘Wet Heath’ [4010], there is a significant effect on a Natura 2000 site in view of the sites conservation objectives. An NIS would therefore have been required. As such, the works cannot be considered to be exempted development by virtue of Article 9(i)(viiB) as it would have required an NIS.

## 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 construction of a road is or is not development or is or is not exempted development:

**AND WHEREAS** Mr. Declan McGrath requested a declaration on this question from Waterford City and County Council and the Council issued a declaration on the 17th day of December, 2015 stating that the matter was development and was not exempted development:

**AND WHEREAS Mr. Declan McGrath** referred this declaration for review

to An Bord Pleanála on the 16th day of May, 2016:

**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(1viiB) of the Planning and Development Regulations, 2001, as amended,
- (d) Parts 1 and 3 of Schedule 2 and Schedule 5 Part 2 Class 10(dd) and Schedule 7 to the Planning and Development Regulations, 2001, as amended,
- (e) The nature, scale, and extent of the earthworks required for the road, notwithstanding the possibility of mitigation and landscaping,
- (f) The upland nature and agricultural use of the lands,
- (g) The location of part of the earthworks within a designated Special Area for Conservation (Comeragh Mountains, site code 001952) and the disruption to dry and wet heaths within this SAC, which it is considered would have a significant effect on this designated EU site having regard to its conservation objectives and so would have required an NIS.
- (h) The potential impact of the environment of the road and its length, which, it is considered, would require an EIS.

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) The construction of a road is development
- (b) The construction of a road is not exempted development

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Act, hereby decides that the construction of a road is development and is not exempted development.

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Philip Davis  
Planning Inspector

6<sup>th</sup> April 2017