



An
Bord
Pleanála

Inspector's Report 02.RL3540

Referral

Question

Whether the recovery of surplus excavated inert soil and the importing of that soil for infilling low lying area is or is not development or is or is not exempted development.

Location

Dunancory, Virginia, Co. Cavan

Referred by

Cavan County Council

Owner/ Occupier

Wilton Waste Recycling Ltd

Observer(s)

None

Date of Site Inspection

2nd May 2017

Inspector

Deirdre MacGabhann

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1.0 Introduction

- 1.1. Cavan County Council has referred to the Board, for their determination, an application for a declaration made under Section 5 of the Planning and Development Act, 2000 (as amended) to them, by Wilton Waste Recycling Ltd. The proposed development comprises the importation of material to fill up low lying area.

2.0 Site Location and Description

- 2.1. The application site lies c.750m to the north west of Virginia, Co. Cavan. It lies to the north of the R194 a regional road that runs between Virginia and Ballyjamesduff. The site comprises part of an agricultural field. Access to the field is via two gates, a single gate to the north of the site and a double gate to the south. Sightlines at both entrances to the field are restricted in both directions due to roadside vegetation.
- 2.2. The agricultural field is undulating and generally falls from the public road to the north east. Along the eastern boundary of the site and crossing the site are small streams/drainage ditches. The south eastern part of the field has been filled with soil to a height of c.1.7m. At the time of site inspection, the northern part of the site appeared wet underfoot and was dominated by rushes.

3.0 The Question

- 3.1. In December 2016, Wilton Waste Recycling Ltd sought a declaration from Cavan County Council whether the importation of excavated inert soil to an agricultural field of 1.44ha site, to a maximum depth of 2.2m and an average depth of 1.08m, is or is not development, or is, or is not exempted development (maximum volume 11,187m³ or 16,780.5 tonne using density of 1.5). The applicant states, in correspondence to the planning authority (16th December 2016), that:
- The development is designed to facilitate the recovery of excavated inert soil,
 - The recovery of soil will benefit the agricultural activity of the site/field, and
 - The proposed development is therefore land reclamation.

4.0 Planning Authority Declaration

4.1. Declaration

Cavan County Council did not issue a declaration in respect of the proposed development. Instead, the application was referred to the Board (23rd January 2017). (The declaration was due to be issued by the planning authority on the 12th December 2016).

4.2. Planning Authority Reports

4.3. There are no planning authority reports or other technical reports on file in respect of the referral.

5.0 Planning History

5.1. On file are two planning applications made in respect of the western part of the subject site.

- PA ref. 01/1279 – Planning permission refused for the erection of two no. dwellings on the grounds that the development was located on the line of the proposed bypass and associated link roads for the town and would, therefore, be contrary to the County Development Plan and premature pending the final determination of the bypass road layout for the area.
- PA ref. 00/1679 - Planning permission refused for the erection of three no. dwellings on the same grounds (above).

5.2. In addition, under PA ref. 17/58 an application was made for (1) the restoration of lands for the purpose of agricultural gain through importing and depositing of inert material comprising natural minerals of clay, silt, sand, gravel or stone, and (2) all ancillary site development works. Total quantity of waste to be recovered is stated to not exceed 25,000 tonnes. The facility would require a 'Certificate of Registration' which will be sought through a separate application to Cavan County Council. The application included an appropriate assessment screening report and was granted permission by the planning authority on the 11th April 2017 subject to 8 conditions.

6.0 Relevant Board Cases

6.1. A search of the Board's database has identified a small number of cases which are similar in nature to this referral and which have been determined by the Board since changes were introduced to Class 11 (Land Reclamation), Part 3, Schedule 2 of the Planning and Development Regulations, by the Planning and Development (Amendment) (No. 2) Regulations, 2011:

- RL2987 – The Board decided that, in the question of whether the importation of soils and overburden materials for spreading on agricultural land at Bantick, Clarecastle, Co. Clare is or is not development or is or is not exempted development:
 - The importation of soils and spreading on agricultural land constituted development (Section 3, P&D Act, 2000, as amended),
 - The soils and overburden materials to be imported to the farm holding constituted 'waste', and
 - The activity, therefore, did not come within the scope of Article 8(c) of the Planning and Development Regulations, 2001, as amended.
- RL3034 – The Board decided that, in the question of whether land reclamation for agricultural purposes involving the re-contouring of land using soil as infill material at Bunnahowen, Belmullet, Co. Mayo is or is not development or is or is not exempted development:
 - The importation of soil for infilling of land constitutes 'works' (Section 2(1) P&D Act 2000, as amended) and 'development' (section 3(1) P&D Act, 2000, as amended),
 - Article 8C of the Planning and Development Regulations, 2001, as amended does not provide an exemption for the importation of soil from external sources to a farm holding for the purpose of re-contouring of land,
 - It is not possible to state beyond reasonable doubt that the infilling of soil on this particular site would not have a significant negative impact on European sites.

- The act of works referred to therefore was determined to be development and not exempted development (Section 4(4) P&D Act 2000, as amended).
- RL3116 – The Board decided that, in the question of whether a waste recovery site involving the deposition, over a period of less than two years, of less than 100,000 tonnes of fill consisting of clays and topsoil, at Woodford, Listowel, Co. Kerry, is or is not development or is or is not exempted development:
 - The reclamation and re-contouring of land through deposition of fill constitutes an act of works and development (Sections 2 and 3 of the P&D Act 2000, as amended).
 - Land reclamation coming within the scope of works referred to in the Land Reclamation Act, 1949, would normally constitute exempted development (Section 4(1)(l) P&D Act 2000, as amended),
 - The deposition of a significant quantity of clays and topsoil alongside a stream that is directly connected to and in close proximity to an SAC would be likely to cause environmental pollution by way of siltation and it could not be excluded that the development would be likely to have a significant effect on a European site,
 - The works also come within the scope of section 4(4)(a) of the Planning and Development Act, 2000 (as amended) and therefore do not constitute exempted development, and (e) for the avoidance of doubt, the fill material of clays and topsoil that are imported from outside the landholding constitutes waste, and the development, therefore does not come within the scope of article 8C of the Planning and Development Regulations, 2001, as amended.
 - The act of works referred to therefore was determined, therefore, to be development and not exempted development.

7.0 Development Plan

- 7.1. The application site lies within the administrative area of the Cavan County Development Plan 2014-2020. The site lies in to the northwest of Virginia town in a rural area and is generally removed from any protected features e.g. scenic views, protected landscape, protected structures, sites of nature conservation interest or geological heritage. However, the site, situated c.7km to the north west of the River Boyne and Blackwater SAC, lies within the designated buffer zone associated the Natura 2000 site (see attachments).

8.0 The Referral

8.1. Referrer's Case

- 8.1.1. The applicant states that the development is designed to facilitate the recovery of surplus excavated inert soil, shall benefit the agricultural activity of the site/field and therefore comprises 'land reclamation'.
- 8.1.2. Plans submitted by the applicant indicate that it is proposed to import fill to approximately one third of the overall landholding comprising the area closest to the public road, with access from the existing gated entrance to the south east of the site.
- 8.1.3. Land to the north of the infill area is indicated to lie within the 100 to 1000 year and the 100-year fluvial flood zones. Two drainage ditches run along the eastern and western boundary of the site and drain into the River Blackwater which runs in an east-west direction along the northern boundary of the site.
- 8.1.4. A 'Certificate of Registration' application was lodged with the Waste Management Section of Cavan County Council on the 18th November 2016 (Ref. COR-CN-16-0004-01).

9.0 Statutory Provisions

9.1. Planning and Development Act, 2000

9.1.1. Section 2 of the Planning and Development Act, 2000 (as amended) defines 'works' to include:

'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal'.

9.1.2. Section 3 defines development as *'the carrying out of any works on, in over or under land or the making of any material change in use of any structures or other land'*.

9.1.3. Section 4 sets out categories of development which are considered to be exempted development, including:

- Under section 4(1)(l) development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949 (excluding the fencing or enclosure of land which has been open to or used by the public or works constituting the reclamation of estuarine marsh land and of callows).

9.1.4. Section 4(4) states that development shall not be exempted if it requires an environmental impact assessment or appropriate assessment.

9.1.5. Section 1 of the Land Reclamation Act, 1949, lists activities that constitute 'works' under the Act. These include the term 'land reclamation' (see attachments).

9.2. Planning and Development Regulations, 2001

9.2.1. Under article 6(3) the Regulations state that 'Subject to article 9, in areas other than a city, a town or an area specified in section (1)(b) of the Act or the excluded areas as defined in section 9 of the Local Government (Reorganisation) Act, 1985 (No. 7 of 1985), development of a class specified in column 1 of Part 3 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 3 opposite the mention of that class in the said column 1'.

9.2.2. Class 11, of Part 3 of the Regulations refers to Land Reclamation, as follows:

<p>Land Reclamation</p> <p>CLASS 11</p> <p>Development consisting of the carrying out of drainage and/or reclamation of wetlands</p>	<p>The area to be affected shall not exceed 0.1ha.</p> <p>Where development has been carried out within a farm holding under this class, the total area of any such development taken with the area of any previous such development within the farm holding shall not exceed the limits set out in 1, above.</p>
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9.2.10. Under article 5(1) Exempted Development, the Planning and Development Regulations, 2001, as amended, defines the term wetland *‘natural or artificial areas where biogeochemical functions depend notably on constant or periodic shallow inundation, or saturation, by standing or flowing fresh, brackish or saline water’*.

9.2.11. Article 8 of the Regulations, provides that certain works specified in a drainage scheme shall be exempted development. These include in article 8C *‘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’*.

9.2.12. Article 9 of the Regulations, sets out a number of circumstances in which development to which article 6 relates shall not be exempted development. This includes:

- Where the development would endanger public safety by reason of traffic hazard or obstruction of road users (article 9(1)(a)(iii)).
- Development, which comprises development for which the Board or a planning authority is the competent authority, and which would require appropriate assessment (article 9(1)(a)(viiB)).

9.3. Waste Management

9.3.1. Waste activities that require a certificate of registration are listed in Part II of the Third Schedule of the Waste Management (Facility Permit and Registration)

Regulations 2007 (as amended by SI No. 86 of 2008). The list of waste activities includes, in Class 5 of Part II:

'Recovery of excavation or dredge spoil, comprising natural materials of clay, silt, sand, gravel or stone and which comes within the meaning of inert waste, through deposition for the purposes of the improvement or development of land and the total quantity of waste recovered at the site shall not exceed 25,000 tonnes'.

9.3.2. The Regulations define "inert waste" as that which:

(a) does not undergo any significant physical, chemical or biological transformations,

(b) will not dissolve, burn or otherwise physically or chemically react, biodegrade or adversely affect other matter, or be adversely affected by other matter, including waters, with which it comes into contact in a way that causes or is likely to cause environmental pollution, or

(c) in particular, will not endanger the quality of surface water or groundwater;

10.0 **Assessment**

10.1. **Is or is not development**

10.1.1. The proposed development comprises the importation of inert soil to an existing agricultural field, with the effect of raising the level of the field by an average depth of 1.08m across the site. Having regard to the statutory definition of the terms 'works' and 'development', referred to above, which define works as, amongst other things, any act or 'operation of construction' or 'alteration' and development as the 'carrying out of works on land', I would consider that the creation of new surface layers and the alteration of the existing land form by importation of soils would comprise both 'works' and 'development', as defined in the Planning and Development Act, 2000 (as amended).

10.2. Is or is not exempted development

Article 6 and Class 11, Part 3, Schedule 2 Planning and Development Regulations, 2001 (as amended)

- 10.2.1. Article 6 provides that Land Reclamation, consisting of the carrying out of drainage and/or reclamation of wetlands (Class 11, Part 3 of the Schedule 2 of the Regulations) is exempted development, subject to the area affected not exceeding 0.1ha (including any such previous development).
- 10.2.2. I note that the application site lies to the south of the identified 1 in 100-year and 1 in 1000-year flood zones. However, at the time of site inspection the northern part of the site appeared very wet and was dominated by rushes. These typically indicate wet, or saturated, ground conditions. Consequently, it is possible that part of the site falls within the statutory definition of wetlands (article 5(1) P&D Regulations, 2001) and that the proposed works would, in effect, provide for the drainage of these lands.
- 10.2.3. Notwithstanding this, the appeal site comprises a site of 1.44ha and is, therefore, inconsistent with the conditions set out in the second column of the schedule.

Further:

- a. The application site lies on a busy, narrow, regional road where traffic speeds are high. At the proposed entrance to the site, sightlines are restricted in both directions due to roadside vegetation. I would consider, that in these circumstances, traffic movements generated by the proposed development, would be likely to give rise to traffic hazard. The proposed development would be de-exempted by virtue of the provisions of article 9(1)(a)(iii) of the Regulations, and
- b. For the reasons set out below (under section 10.3 of this report) the proposed development would require an appropriate assessment and would also, therefore, be de-exempted by virtue of provisions of article 9(1)(a)(viiB) of the Regulations.

Article 8C, Planning and Development Regulations, 2001 (as amended)

- 10.2.4. Article 8C of the Regulations provides an exemption for land reclamation works, other than (a) the reclamation of wetlands and (b) infilling with waste material. Further, the Board has traditionally held that the exemption provided by article 8C is

confined to land reclamation works where soil is sourced from within the landholding (RL3304 and RL3116).

10.2.5. As stated above, it is unclear whether or not part of the application site comprises wetlands. Notwithstanding this, the applicant proposes importing recovered inert soil to the application site. Consequently, as it would not be sourced within land holding, the proposed development would be inconsistent with the Board's interpretation of article 8C of the Regulations. Further, the Waste Management (Facility Permit and Registration) Regulations, 2007, as amended, define the recovery of natural materials (clay, silt, sand, gravel or stone) as a waste activity. I would infer from this, therefore, that recovered soil is a waste material, and that the proposed development, would not, therefore, comply with this requirement either of article 8C of the Regulations.

Section 4(1)(l) Planning and Development Act, 2000 (as amended)

10.2.6. Section 4(1)(l) provides that development consisting of the carrying out of any the works referred to in the Land Reclamation Act, 1949 (not comprising the fencing or enclosure of land which has been open to the public, or works consisting of the reclamation of estuarine marsh land and of callows), is exempted development.

10.2.7. Section 1 of the Land Reclamation Act, 1949 sets out what the term 'works', in the Act, refers to and the list of activities referred to includes the term 'land reclamation'. The Act does not define the term but land reclamation, but as stated previously, the term is referred to and described, in Article 8 of the Planning and Development Regulations, 2001 (as amended). Specifically, article 8C states:

'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'.

10.2.8. I would infer from the above that the re-contouring of land by way of infilling with soil constitutes land reclamation works. However, as stated above, (a) the application site may comprise in part a wetland and (b) the proposed development comprises the importation of a waste material to the landholding.

10.2.9. Consequently, in so far as the Planning and Development Regulations, 2001, define land reclamation, I consider that the proposed development, which involves the importation of waste material to a site which may in part comprise wetlands, does not

constitute land reclamation. The proposed development, therefore, would not benefit of the exempted development provisions set out in Section 4(1)(l) of the Planning and Development Act, 2000 (as amended).

10.3. Restrictions on exempted development

- 10.3.1. Notwithstanding the above, relevant restrictions on exempted development are also referred to in Section 4 of the Planning and Development Act, 2000 (as amended). Section 4(4) of the Act, states that development referred to in Section 4(1)(l), above, consisting of the carrying out of any works referred to in the Land Reclamation Act, shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.
- 10.3.2. Section 172 of the Planning and Development Act, 2000 (as amended) requires an environmental impact assessment, if the proposed development falls within Part 1 or 2 of Schedule 5 of the Planning and Development Act, 2001 (as amended), or is below the thresholds set out in Part 1 and Part 2 but is likely to give rise to significant environmental effects. The proposed development, does not comprise a type of development which is referred to in Part 1 of Schedule 5 of the Regulations. Further, the applicant has stated that a total of 16,780.5 tonnes of waste will be imported to the site, making the proposed development fall below the threshold for environmental impact assessment, set out in Part 2 of the Schedule (Item 11 'Other Projects'). In addition to the above, the proposed development is unlikely to produce significant waste or give rise to significant nuisance, and does not, therefore, have the characteristics that are likely to give rise to significant environmental effects. Further, the application site is not based in a particularly sensitive environment where significant environmental effects are likely to be triggered as a consequence of the development. I would not consider therefore that an environmental impact assessment is required.
- 10.3.3. With regard to appropriate assessment, the application site lies c.7km north east of the nearest Natura 2000 sites, the River Boyne and River Blackwater SAC and SPA, (site codes 002299 and 004232 respectively). However, streams/drainage ditches running along the eastern and western boundaries of the site and through the proposed infill area discharge to Nadreegeel Lough Stream. This stream discharges into Lough Ramor, which discharges into the River Blackwater (see attachments).

The main risk to the Natura 2000 site arises from potential pollution of the drainage ditches/streams on or in the vicinity of the site which is carried downstream.

However, at a distance of 6.6km from the SAC and SPA, the risk of pollution is extremely limited.

- 10.3.4. As stated previously, the applicant for the original referral, Wilton Waste Recycling Ltd, has made an application to Cavan County Council for the restoration of lands on the application site for the purpose of agricultural gain through importing and depositing of inert material comprising natural minerals of clay, silt, sand, gravel or stone. This application was accompanied by an appropriate assessment screening report. Having regard to the nature, scale and location of the proposed development from the Natura 2000 sites, it concludes that there is no potential for significant effects either from the proposed development, or in combination with other plans or projects.
- 10.3.5. Notwithstanding the conclusions of the appropriate assessment screening report, and my own view of the limited risk to downstream habitats, the proposed development does raise issues in respect of appropriate assessment.
- 10.3.6. Section 4(4) of the Planning and Development Act, 2000, as amended, de-exempts specified development (including that described in section 4(1)(l) in respect of works referred to in the Land Reclamation Act, 1949), if appropriate assessment of the development is required.
- 10.3.7. The Government's guidelines on appropriate assessment refers to, and supports, the European Commission's four stage approach to appropriate assessment. Stage 1 deals with screening for appropriate assessment i.e. whether or not it is determined that an appropriate assessment is subsequently carried out. Stage 2 deals with appropriate assessment i.e. whether the plan or project, alone or in combination with other projects or plans, will have adverse effects on the integrity of a Natura 2000 site.
- 10.3.8. Section 4(4) of the Planning and Development Act, 2000, as amended, does not distinguish between the process of appropriate assessment (i.e. the four stages referred to in the Government's guidance document) or the technical appropriate assessment that follows a Stage 1 Screening Report. In view of this, and the precautionary approach the government's guidelines advocate in dealing with issues

of appropriate assessment, I would consider that the proposed development, by virtue of potential pathways connecting the appeal site to downstream Natura 2000 sites, properly requires a Stage 1 screening report, and therefore triggers a requirement for the process appropriate assessment. Consequently, the proposed development would therefore not comprise exempted development, by reason of Section 4(4) of the Planning and Development Act, 2000 (as amended).

11.0 Recommendation

11.1. 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 recovery of surplus excavated inert soil and the importing of that soil for infilling low lying area is or is not development or is or is not exempted development at Dunancory, Virginia, Co. Cavan:

AND WHEREAS Cavan County Council requested a declaration on this question on the 24th January 2017:

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) Section 4(1)(l) and 4(4) of the Planning and Development Act, 2000, as amended,
- (c) Articles 5, 6 and 8 of the Planning and Development Regulations, 2001, as amended and Class 11 of Part 3 of Schedule 2 of the Regulations, as amended,
- (d) The restrictions on exempted development under article 9(1)(a)(iii) and article 9(1)(a)viiB) of the Regulations, as amended,
- (e) Waste Management (Facility Permit and Registration) Regulations

2007 (as amended by SI No. 86 of 2008).

- (f) The submission on file by the applicant to the planning authority,
- (a) The location of the development relative to downstream Natura 2000 sites and potential pathways to these sites from the application site, by virtue of on-site and nearby watercourses.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The importation of soil for the purpose of infilling a low lying area constitutes 'works', and 'development' as defined in Section 2 and Section 3, respectively, of the Planning and Development Act, 2000, as amended.
- (b) The recovery of excavated inert soil, for the purpose of the improvement or development of land, is identified in the Waste Management (Facility Permit and Registration) Regulations 2007 (as amended) as a waste activity that requires a certificate of waste registration from the planning authority.
- (c) The deposition of a significant quantity of inert soil, in close proximity to on-site water and nearby courses which are directly connected to the River Blackwater SAC and SPA, site codes 002299 and 004232, may cause environmental pollution of these streams, by way of siltation, and it cannot be excluded, therefore, that the development would be likely to have a significant effect on the integrity of a European site. An appropriate assessment would, therefore, be required.
- (d) Having regard to the size of the application site, the inadequate sightlines available at the entrance to the site and the requirement for appropriate assessment, the proposed works do not comply with the provisions set out within article 6(3) and Class 11, Part 3 of Schedule 2 (Land Reclamation) of the Planning and Development Regulations, 2001, as amended. The proposed works do not, therefore, comprise exempted development.

- (e) Having regard to the nature of the proposed development, which entails the importation of waste material to the site, which may in part comprise wetlands, the development would not benefit from the provisions of Article 8C of the Planning and Development Regulations, 2001, in respect of Land Reclamation, and would not, therefore, comprise exempted development.
- (f) '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, which may in part comprise wetland, by imported 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.
- (g) Having regard to the requirement for appropriate assessment, the works in question come within the scope of section 4(4)(a) of the Planning and Development Act, 2000, as amended, and therefore, do not constitute exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the said recovery of surplus excavated inert soil and the importing of that soil for infilling low lying area is development and is not exempted development.

Deirdre MacGabhann
Planning Inspector

22nd May 2017