



An
Bord
Pleanála

Inspector's Report RL.17.RL.3604

Question	Whether the reinstatement of land by the importation of 94,683m ³ on non-waste/by product soil and stones is or is not development or is or is not exempted development.
Location	Basketstown, Summerhill, Co. Meath.
Planning Authority	Meath County Council.
Planning Authority Reg. Ref.	PA ref. TA/S5/1724.
Applicant(s)	Jacinta and Conor Murtagh.
Type of Application	Referral.
Planning Authority Decision	That the proposed development is development and is not exempted development.
Referrer	Jacinta and Conor Murtagh.
Date of Site Inspection	18 th October 2017
Inspector	Deirdre MacGabhann.

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1.0 Site Location and Description

- 1.1. The subject site lies c.7km to the south east of Trim town and c.3km north east of Summerhill village, County Meath. It is situated to the south of the L6209, a third class road that joins the R158, north of Summerhill.
- 1.2. The site lies c.700m to the south of the L6209. Access to it is from the local road via an existing entrance and haul road that previously served the Basketstown Landfill site (to the north east of the site) and which currently serves a leachate tank associated with the landfill site. Sightlines at the entrance to the site are >90m to the south west but limited to the north east, to c.50m, due to a bend in the public road.
- 1.3. The site itself is approximately square in shape. It comprises a flat, generally low lying site, in a wider agricultural landscape. The site is not visible from the public road due to its distance from it, its elevation and mature roadside vegetation. The Dangan River runs along the southern boundary of the site.

2.0 The Question

- 2.1. In May 2017 Rossmore Civils Ltd, acting on behalf of Jacinta and Conor Murtagh, sought a declaration from Meath County Council, under section 5 of the Planning and Development Act, 2000 (as amended) whether the reinstatement of 12.14ha of land by the importation of 94,683m³ of non-waste/by-product soil and stones consisting of 43,900m³ of top soil and 50,783m³ of subsoil, was or was not development or was or was not exempted development,
- 2.2. The Section 5 application form states:
 - The development is required to reinstate lands that were stripped of subsoil and topsoil to provide capping of the Basketstown Landfill by a contractor employed by Meath County Council,
 - Material will be sourced from greenfield development sites only, located in the Dublin area.
 - Full WAC analysis of the by-product material will be submitted to the EPA as part of the Article 27 notification system for the declaration of a by-product.

- The reinstatement works are required to make the land viable for agricultural use.

2.3. Accompanying the Section 5 application is an Environmental Report. It covers a wide range of environmental topics and in section 9, Roads and Traffic, indicates that the development will give rise to 100 HGV movements per day (20t truck, 50 in and 50 out) and 10 staff movements per day over a 5 day working week, over a 32-week period. In section 7.3 it states that the site was first reclaimed under the Department of Agriculture's Land Reclamation Scheme in 1982.

3.0 Planning Authority Determination

3.1. Decision

3.1.1. On the 19th June 2017 the planning authority decided that having regard to:

- Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended),
- Articles 6, 8, 8A, 8C, 8D and 9 of the Planning and Development Regulations, 2001(as amended), and
- Class 11 of Part 3, Schedule 2 of the Planning and Development Regulations, 2001 (as amended),

(a) Reclamation works consisting of re-contouring of land using clean inert soil on agricultural lands constitutes 'works' as defined by section 2(1) of the Planning and Development Act, 2000 (as amended),

(b) The infilling of soil constitutes development under section 3(1) of the Planning and Development Act, 2000 (as amended),

(c) Land reclamation works consisting of re-contouring of land using soil that is sourced from outside of the farm holding does not comply [with] the terms and conditions of the exemption provided under Article 8C of the Planning and Development Regulations 2001 (as amended),

(d) The proposed rate of importation of material could endanger public safety by reason of traffic hazard or obstruction of road users as per section 9(1)(a)(iii) of the planning and development regulations,

(e) The proposed rate of importation of material is in excess of 25,000 tonnes per annum would trigger the requirement for an Environmental Impact Statement. A planning application with an associated EIS would be required to authorise the development.

3.1.2. The report concludes that the proposed development is considered to be development and is not exempted development within the meaning of the Planning and Development Acts 2000 (as amended).

3.2. Planning Authority Reports

3.2.1. The Planning Report refers to the planning history of the site and to relevant legislation. It considers that the proposed development is considered to be development and not exempted development, for the reasons set out above.

3.2.2. A report by the planning authority's Road Design Office, recommends that the applicant be requested to submit a planning application, including a Traffic Impact Assessment plus overview of public roads on which HGVs will travel to and from the proposed site.

3.3. External Reports

- Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs – Stripping of topsoil from c.25 acres of lands in 2002 at Basketstown has created a diverse habitat of wet grassland and fen like habitat. The development will remove the diverse habitats of the site. The Environmental report accompanying the application did not outline the impacts on protected species now using the site for feeding, roosting and breeding. Require more information on timing of works and means to mitigate impacts on protected species.
- Inland Fisheries Ireland – No objections subject to no impacts on adjoining waters as per details submitted in Environmental Report (including measures set out in section 7.3.8 regarding hydrology).

4.0 Planning History

4.1. The following planning applications have been made or determined in the vicinity of the appeal site:

- PL17.247792 (PA ref TA/160678) – Planning permission was granted by the Board in July 2017, in respect of land immediately east of the appeal site, for (a) the importation of subsoil and topsoil for land reclamation, (b) the separate importation, recovery and recycling of concrete and brick materials for re-use in construction and engineering projects land, and (c) wheel wash, weigh bridge, mobile screening/crushing plant, aggregate storage bays, portable toilet, new entrance, access road and site development works. The permission was subject to 11 conditions, including limiting the permission to a period of 5 years, implementation of environmental and construction mitigation measures, submission of a traffic management plan and maintenance of a 10m buffer zone along the edge of the Dangan River.
- PL17.248174 (PA ref. TA/161396¹) – The Board also has before it a current appeal in respect of the continued use of previously permitted developments and a 10.9 ha extension of sand and gravel pit lying to the east of the subject site (see attachments).

4.2. In addition to the above:

- Land to the north and north east of the subject site has been used by Meath County Council as a landfill site. It was subject to a waste licence from the EPA, which was originally granted in 1999 (W0010-01) and replaced by licence no. W0010-02, granted in 2004, and
- At Foxtown, c.1.5km to the north of the subject site, a waste licence has been granted by the EPA in 2016 to Kiernan Sand and Gravel for the continued restoration of lands, previously used for extraction, with the importation of inert soils, stone and recovery of construction and demolition waste (W0262-01). (The site was also the subject of a Board decision under 17.QC.2113 –

¹ History files related to this application include PA ref. 01/35 and PL17.127397; PA ref. TA/802261 and PL17.231076 and PA ref. TA/150208 (extension of time of TA/802261).

modification of conditions imposed by the planning authority on the operation of the quarry at Foxtown).

5.0 Relevant Board Cases

5.1. 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, 2001, 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 Barn tick, 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 does not constitute exempted development, and 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.

6.0 The Development Plan

6.1. Meath County Development Plan 2013 – 2019

- 6.2. The subject site lies within the 'Central Lowlands' landscape character area and is considered to be of high value and moderate sensitivity. It is removed from any protected structures, architectural conservation areas or protected views. Whilst the site contains no features of cultural heritage, there is a recorded archaeological site to its north east (see attachments) which comprises a holy well (RMP ME043-044, see section 3.6 of Environmental Report).
- 6.3. The nearest Natura 2000 site lies substantially the north of the site, and comprises the River Boyne and Blackwater SAC (site code 002299) as it flows through Trim Town. (The Dangan River, which flows to the south of the site ultimately discharges to the sea near Drogheda, Co. Meath, >15km from the subject site). Landscape character type, archaeological heritage and European sites are all afforded protection through policies of the County Development Plan (see attachments).

7.0 The Referral

7.1. Referrer's Case

7.1.1. The referrer makes the following arguments:

- The subject site has always been zoned for 'agricultural' use in various County Development Plans. In their current state that lands cannot be used for any type of agricultural purpose due to the absence of any topsoil or usable subsoil.
- The soils on the site were removed by Meath County Council, in agreement with the landowner and contractor, to provide capping material for the adjoining Basketstown landfill site. The agreement provided for the replacement of soils on the subject to site to restore the field back to its original agricultural purpose. This has not happened and the contractor has now ceased trading.

- The proposed development either comprises part of the previously permitted development (i.e. final phase of original development) or, if the initial development is now considered to be not in accordance with proper planning and development, the current proposals are the logical legal mechanism to reverse the original illegal activity.
- The on-farm activity is not considered to be restructuring, re-contouring, a scheme of land drainage or the removal of hedgerows or clay banks. Rather it is the reinstatement of farm lands to their former arable state. The development does not constitute development, in accordance with section 3 of the Planning and Development Act 2000. The activity is purely for reinstatement purposes strictly for the preservation of the designated usage of lands in the area in accordance with the County Development Plan.
- In accordance with section 4, the development is exempt development. The proposal does not require planning permission as the activity is reinstatement to farm land not development for any acknowledged commercial use or objective. The development does not require the preparation or submission of an EIS.
- The materials to be used are usable sub-soil and arable top-soil, not waste materials. All necessary licences will be obtained for the transport of these materials.
- It is neither legal or constitutional that a farmer should be deprived of the opportunity to earn his livelihood from his lands, by the same public body that he originally entered into agreement with in respect of the lands.
- The landowners are entitled to the legitimate expectation that no public body acting also as a planning authority would make decisions that are contrary to proper planning and sustainable development or are contrary to the public benefit.

7.1.2. Attachments to the referral include a copy of a pre-planning consultation with the planning authority and an Environmental Report (May 2017).

8.0 Statutory Provisions

8.1. Planning and Development Act 2000 (as amended)

8.1.1. Section 2(1) 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'.

8.1.2. Section 3(1) 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'.*

8.1.3. 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 works constituting the reclamation of estuarine marsh land and of callows).

8.1.4. Section 4(2) enables the Minister, subject to certain provisos, make regulations which provide for any class of development to be exempted development. Section 4(4) states that any regulations under section 4(2) shall not apply if the development requires environmental impact assessment or appropriate assessment.

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

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

8.2.1. Under article 6(3), the Regulations state that subject to article 9, rural 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'.*

8.2.2. Class 11, of Part 3 of the Regulations refers to Land Reclamation and describes this as 'development consisting of the carryout out of drainage and/or reclamation of

wetlands' and column 2 limits such development to no more than 0.1ha (see attachments).

8.2.3. 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*'.

8.2.4. 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)).
- Comprise the excavation, alteration or demolition of any archaeological monument included in the Record of Monuments and Places, except with consent or under licence under the National Monuments Act (article 9(1)(a)(viiA)).
- It 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)).
- If the development is of a type to which Part 10 applies, environmental impact assessment (article 9(1)(c)).

8.3. **Waste Management**

8.3.1. The European Waste Framework Directive (2008/98/EC) sets down the basic requirements for handling waste in the EU. It defines the term 'waste' as '*any substance or object which the holder discards or intends or is required to discard*' (article 3(1)). Under article 2(1)(c), the Directive specifically excludes '*uncontaminated soil and other naturally occurring material excavated in the course of construction activities where it is certain that the material will be used for the purposes of construction in its natural state on the site from which it was excavated*'.

and I would infer from the above, that it includes naturally occurring material which is removed for a site from which it was excavated.

- 8.3.2. Nationally, the Waste Management Act, 1996 (as amended) defines waste as *‘any substance or object belonging to a category of waste specified in the First Schedule or for the time being included in the European Waste Catalogue which the holder discards or intends or is required to discard, and anything which is discarded or otherwise dealt with as if it were waste shall be presumed to be waste until the contrary is proved’*. The First Schedule of the Act is quite wide ranging and includes, under item 16, *‘Any materials, substances or products which are not otherwise specified in this Schedule’*.
- 8.3.3. The EPA in their Waste Classification document (EPA, 2015), pursuant to the requirements of the European Waste Framework Directive, list under waste category 17.05, soil, stones and dredging spoil, including under 17.05.04, soil and stones (see attachments).
- 8.3.4. Article 27 of the European Communities (Waste Directive) Regulations, 2011, referred to by the applicant, allows an ‘economic operator’ to decide under certain circumstances that a material is a by-product and not a waste. Decisions by economic operators under this article are required to be notified to the EPA and the Agency is entitled to decide that a notified by-product should in fact be considered as waste. Section 27(1) of the Regulations states that a substance, resulting from a production process, may be regarded as not being waste but as a by-product if the following conditions are met:
- (a) further use of the substance or object is certain;
 - (b) the substance or object can be used directly without any further processing other than normal industrial practice;
 - (c) the substance or object is produced as an integral part of a production process; and
 - (d) further use is lawful in that the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

9.0 Assessment

9.1. Context of the proposed development

- 9.1.1. The applicant for the referral states that the proposed development is required in order to remedy a situation where the planning authority and/or contractor has not reinstated the subject site. The applicant also states that the development either comprises part of the previously permitted development (i.e. final phase of original development) or, if the initial development is now considered to be not in accordance with proper planning and development, the current proposals are the logical legal mechanism to reverse the original illegal activity.
- 9.1.2. There is no information on file regarding the planning history of the adjoining Basketstown Landfill, for example in respect of site restoration, or capping. Notwithstanding this, any matters relating to a previous permission under the planning acts or in respect of legal agreements between the parties, are either matters for enforcement or for adjudication in the courts. They fall outside the scope of this referral, which may only deal with the merits of the referral which has been made to the Board.

9.2. Is or is not development

- 9.2.1. The proposed development comprises the importation of sub-soil and top-soil to an agricultural field, which has been stripped of soils. The effect of the development will be to raise the level of the field by a maximum depth of 2m (see Drawing no. 073/002, Sections). 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).

9.3. Is or is not exempted development

9.3.1. Section 4 of the Planning and Development Act 2000 (as amended) sets out certain categories of development which are exempted. Section 4(1)(l) provides that development consisting of the carrying out of any of the works referred to in the Land Reclamation Act 1949 (excluding the reclamation of estuarine marsh land or callows), is exempted development. Section 1 of the Land Reclamation Act, 1949, lists activities that constitute 'works' under the Act and these 'land reclamation'. However, the term land reclamation is not defined in the Act of 1949 but it 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.'

9.3.2. The Board has traditionally held that article 8C does not provide an exemption for the importation of soil from external sources to the farm holding. Further, the European Waste Framework Directive and the EPA's guidance on classification of waste, includes soil, stones and dredging spoil as a waste category. I would consider, therefore, that the proposed development, which comprises land reclamation under the Land Reclamation Act 1949, would not comprise exempted development as the works involve the importation of waste to the site, which is inconsistent with the guidance given in the Planning and Development Regulations on the meaning of the term land reclamation, for the purpose of exempted development. For these reasons, I would also not accept the applicant's arguments that the material to be imported to the site is a 'by-product'.

9.3.3. Article 6(3) of the Regulations refers to exempted development in rural areas, set out in column 1 of Part 3 of Schedule 2. This includes, in Class 11 'Land Reclamation', i.e. the carrying out of drainage and/or reclamation of wetlands, with the area affected to not exceed 0.1ha. However, the proposed development does not fall within this class as it does not consist of the carrying out of drainage and/or the reclamation of wetlands and exceeds 0.1ha in size. (In this regard I draw the Board's attention to the applicant's submission which states that the site was originally

drained under in 1982 and that the proposed development is not a scheme of land drainage).

- 9.3.4. Article 8 of the Regulations, provides that certain works specified in a drainage scheme shall be exempted development. Again, the proposed development does not form part of any drainage scheme and article 8 of the Regulations would also not apply. (Even if specified in such a scheme, the development would not be exempted, under article 8C, by virtue of it comprising infilling with waste material imported from outside of the landholding).

9.4. **Restrictions on exempted development**

- 9.4.1. Section 4(4) of the Planning and Development Act and Article 9 of the Regulations, sets out a number of circumstances in which development to which article 6 relates, shall not be exempted development. As the proposed development does not fall within a category of development set out in article 6, the provisions of article 9 do not apply.

- 9.4.2. Notwithstanding this, I would draw the Board's attention to the following:

Public Safety

- 9.4.3. Access to the subject site is proposed from the minor road to the north of the site, the L6209. The applicant's Environmental Report predicts 100 movements per day (in and out of the site) by HGVs over a 30-32 week period. It is anticipated that HGVs will primarily turn left on exiting the site, and travel on the L6209 to the R156 and then onto the R158 to join the N3 and M3 motorway.
- 9.4.4. The L6209 is a minor road with a small number of informal passing bays. Further, the proposed development takes place in an area where other HGV traffic already uses the local road network i.e. that generated by the existing quarry at Ballynamona and where further activity is likely to be generated by the recently approved land reclamation/construction waste recovery development to the north of the site. Within this context, there is a risk that the additional traffic generated by the proposed development, in conjunction with other developments, if not controlled e.g. by condition, would endanger public safety by reason of traffic hazard or obstruction of road users.

Environmental Impact Assessment

- 9.4.5. Part II of Schedule 5 of the Planning and Development Regulations 2001, as amended, sets out specific classes of development which require environmental impact assessment, in accordance with Part 10 of the Planning and Development Act, 2000 (as amended). This includes installations for the disposal of waste with an annual intake greater than 25,000 tonnes, not included in Part 1 of the Schedule. As discussed above, the proposed development comprises the importation of waste materials to the subject site in excess of 25,000 tonnes and the development would, therefore, require environmental impact assessment.

Cultural Heritage

- 9.4.6. The proposed development will have no impact on any known archaeological monument.

10.0 Recommendation

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

WHEREAS a question has arisen as to whether the reinstatement of land by the importation of 94,683m³ of non-waste/by-product soil and stones is or is not exempted development or is or is not exempted development at Basketstown, Summerhill, Co. Meath

AND WHEREAS Jacinta and Conor Murtagh requested a declaration on this question on the 17th July 2017:

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

- (a) Sections 2(1), 3(1) and 4(1)(l) of the Planning and Development Act, 2000, as amended,
- (b) Articles 6(3) and 8 of the Planning and Development Regulations, 2001, as amended,

- (c) European Waste Framework Directive, 2008/98/EC, as amended,
- (d) The submission on file by the applicant to the planning authority, and
- (e) The nature of the proposed development.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The importation of non-waste/ by-produce of soil and stones constitutes 'works', and 'development' as defined in Section 2(1) and Section 3(1), respectively, of the Planning and Development Act, 2000, as amended.
- (b) The soil and stones to be imported to the site constitute 'waste'.
- (c) The activity does not, therefore, come within the meaning of the term land reclamation, as set out in article 8 of the Planning and Development Regulations, 2001, as amended.
- (d) The activity does not, therefore, fall within the scope of section 4(1)(l) of the Planning and Development Act, 2000, as amended.
- (e) Notwithstanding the above, and for the avoidance of doubt, the activity does fall within the scope of section 4(4) of the Planning and Development act, 2000, as amended and would require environmental impact assessment.
- (f) The activity does not come within the scope of article 6 or 8 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 (4) of the 2000 Act, hereby decides that the said reinstatement of land by importation of 94,683m³ of non-waste/ by-product soil and stones is development and is not exempted development.

Deirdre MacGabhann
Senior Planning Inspector

23rd October 2017