



Question

Whether the spreading of clean topsoil and subsoil, on the lands for agricultural use is development and is exempted development.

Location

Oldcourt Lane, Oldcourt Ballycullen, Dublin 24.

Declaration

Planning Authority

South Dublin County Council

Planning Authority Reg. Ref.

ED17/0033.

Applicant for Declaration

Michael Wheelan.

Planning Authority Decision

Is development and is not exempted development.

Referral

Referred by

Michael Whelan.

Owner/ Occupier

Michael Whelan

Date of Site Inspection

18th January 2018.

Inspector

Bríd Maxwell.

1.0 Site Location and Description

1.1. The referral site comprises agricultural land located on elevated ground on the foothills of the Dublin Mountains south of Oldcourt Lane, in Ballycullen, Dublin 24. The lands rising in a southerly direction comprise marginal farmlands on with a shallow topsoil layer overlying shaley rocky material. Access to the land is via an access road, apparently of recent construction, from Oldcourt Lane, a cul de sac to the east which also serves as access to a telecommunications mast site located to east. Adjacent lands are predominantly in agricultural use with Old Court Lane Industrial units located to the east and Oldcourt Alotments to the north east. Bohernabreena graveyard is located to the west. I noted on the date of my site visit significant fly tipping of various types of household rubbish on Oldcourt Lane adjacent to the entrance to the lands and along various sections of this laneway. On the date of my site visit I noted that the site has been subject to importation of soil and subsoil partially spread and partially stockpiled on the site.

2.0 The Question

2.1. The question referred is whether works comprising the spreading of clean topsoil and subsoil on the lands for agricultural use is development and is exempted development. The information provided with the referral indicate that the works comprise the importation of 7000 cubic metres of soil and subsoil from the Dodder Brook Housing development site to the north. It is envisaged that a 200-400mm layer of subsoil will be deposited and 200-300mm later of topsoil.

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1 The Planning Authority declared that the proposed development of Land Reclamation works at Old Court Lane using uncontaminated by product excess material from an adjoining site at Dodderbrook, Oldcourt, Reg Ref SD17A/0180 at Old Court Lane, Tallaght, Dublin 24 is not considered to be

exempted development under the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended) and therefore does require planning permission.

3.2. Planning Authority Reports

3.2.1. Planning Reports

3.2.1.1 Deficiencies in the level of detail provided with the application are noted. The site does not comprise wetlands therefore the exemption under Class 11 of Part 2 of Schedule 2 of the regulations does not apply.

4.0 Planning History

4.1 No planning history on the referral site.

Adjacent sites

- **SD14A/0180** Permission for development of 130 houses, 8 apartments car parking, open spaces and associated site development and infrastructural works, South of Oldcourt Road, Oldcourt Firhouse.
- **SD17A/0227** Permission granted 1/9/2017 for retention of an 18m slimline lattice telecommunications structure, carrying antennae associated equipment cabins within an enclosed compound.

5.0 Policy Context

5.1. Development Plan

5.1.1 The South Dublin County Development Plan 2016-2022 refers. The site is on lands zoned Objective RU being “*To protect and improve rural amenity and to provide for the development of agriculture.*”

5.2. Natural Heritage Designations

5.2.1 Natura 2000 sites within 15km include:

- Glenasmole Valley SAC (001209) c1.8km to the southwest
- Wicklow Mountains SAC 002122 3.7km to southeast
- Wicklow Mountains SPA 004040 4.2km to southeast.

6.0 The Referral

6.1. Referrer's Case

6.1.1 The Referral is submitted by Fenton Associates Town Planners and Architects on behalf of the landowner Michael Wheelan. Grounds of referral are summarised as follows:

- The spreading of clean topsoil and subsoil for the purposes of agricultural use is not development or works under the Act and in any case is exempted development under Section 4(a) of the Planning and Development Act 2000 and Section 8(c) of the Planning and Development (Amendment) No 2 Regulations 2011 as amended under SI No 454. Section 4(l) of the Planning and Development Act is not relevant.
- Spreading of clean topsoil is exempt under Section 4(a) of the Planning and Development Act 2000 which is development for the use of land for agricultural purposes.
- It is accepted that the Class 11 of Part 3 of Schedule 2 does not apply. The relevant section is Section 8(c) of the Planning and Development (Amendment)(No 2) Regulations 2011 as amended under SI No 454 being "land reclamation works consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding shall be exempted development."
- Area of proposed soil distribution comprises 2.6 hectares currently devoid of vegetation due to lack of soil within an overall holding of 6.1 hectares.

Proposed infill is necessary in accordance with the carrying out of normal farming practices.

- A farmer is not prohibited from acquiring uncontaminated soil for the purposes of land reclamation works which constitutes normal filling of lands as per standard agricultural practices.
- The product to be spread is not waste and is considered a by-product under Article 27 Notification submitted to the EPA by adjoining developer Capami Ltd from whom Mr Whelan acquired the soil.¹
- Request the Board to declare that the spreading of soil and re-contouring of lands is not development and is exempted development under the Planning and Development Act 2000 and Planning and Development (Amendment)(No 2) Regulations 2011 as the process is required as part of normal agricultural development purposes.
- Report from Teagasc adviser outlines that the increased depth of soil will facilitate an increased depth of workable soil a deeper and more favourable top soil and provide opportunity to level areas which are presently rough and uneven.

6.2. Planning Authority Response

6.2.1 The Planning Authority chose not to comment on the referral.

7.0 Statutory Provisions

7.1 Planning and Development Act, 2000.

Sections 2 and 3 define “works” and “development” as per the 1963 Act.

S.2(1) Defines among other things “agriculture” – includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including

¹ <http://web.epa.ie/Article27Register/>

any creature kept for the production of food, wool, skins, or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds and “agricultural” shall be construed accordingly.

S 2(1) Defines “works” - *includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.....”*

S.3(1) “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(1) of the 2000 Act states that certain developments shall be “exempted development” for the purposes of the Act including (a) development consisting of the use of any land for the purposes of agriculture and development consisting of the use for that purpose of any building occupied together with land so used;
(l) development consisting of the carrying out of works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced

I note that the “works” in the Land Reclamation Act 1949 refers to the following:—

- (a) field drainage;
- (b) land reclamation;
- (c) the construction and improvement of watercourses;
- (d) the removal of unnecessary fences;
- (e) the construction of new fences and the improvement of existing ones;
- (f) improvement of hill grazing;
- (g) reclamation of estuarine marsh land and of callows;
- (h) any operations ancillary to the foregoing.

7.2.3 Section 4(2) of the Act makes provision for the Minister (for Environment) to

make regulations to provide for any class of development being exempted development.

Schedule 2, Part 3, Exempted Development – Rural.

Land Reclamation

Class 11

Development consisting of the carrying out of drainage and / or reclamation of wetlands (column1) subject to the following restrictions (set out in column 2)

1. The area to be affected shall not exceed 0.1ha.
2. Where development has been carried out within a farm holding under this class the total area of any such development taken together with the area of any previous such development within the farm holding shall not exceed the limits set out in 1 above.

7.2 Environmental (Miscellaneous Provisions) Act 2011.

S.17(1)(b) amends section 4 of the Planning and Development Act 2000 (as amended) by the provision that notwithstanding exemptions under subsection (1)(a), (i), (ia) or (1) or regulations made under subsection (2) development shall not be exempted development if Environmental Impact Assessment or Appropriate Assessment of the development is required. The Planning and Development Regulations 2001, are made under section 4(amongst others) of the Planning and Development Act 2000.

7.3 Planning and Development Regulations 2001 (as amended)

A.6(3) Subject to article 9.... Development of a class specified in column 1 of Part 23 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.

A.8A Initial afforestation shall be exempted development.

A.8B Works consisting of field drainage for agriculture, other than drainage of wetlands, shall be exempted development.

- A8C Land reclamation works (other than reclamation of wetlands) consisting of the re-contouring of land, including infilling of soil (but not waste material) within a farm holding shall be exempted development.
- A8D Works consisting of the removal for the purposes of agriculture of field boundaries consisting of stone walls or wire or post fences shall be exempted development.
- A.9(a) Development to which article 6 relates shall not be exempted development for the purpose of the Act-
- (a) if the carrying out of such development would'
 - (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 4metres in width.
 - (iii) endanger public safety by reason of traffic hazard or obstruction of road users,
 - (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 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.

7.5 European Communities (Waste Directive) Regulations 2011. SI 126 of 2011.

Article 27 of the European Communities (Waste Directive) Regulations, 2011, allows an “economic operator” to decide, under certain circumstances, that a

material is a **by-product** and not a **waste**. Article 27 was introduced into Irish law to implement article 5 of the 2008 Waste Framework Directive (2008/98).

8.0 Relevant Board Cases

8.1. The following cases 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)(I) 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.

RL3540

The Board decided in the question of the recovery of surplus excavated inert soil and the importing of that soil for infilling low lying area at Dunancory, Virginia, Co. Cavan:

- The importation of soil for the purpose of infilling a low lying area of land constitutes 'works' and alteration of that land, and therefore 'development' as defined in Section 2 and Section 3, respectively, of the Planning and Development Act, 2000, as amended;
- The development does not come within the scope of the exemption set out under section 4(1)(I) of the Planning and Development Act 2000, as amended by the Environment (Miscellaneous Provisions) Act 2011;
- The development does not come within the scope of the exemption set out in Article 8C of the Planning and Development Regulations, 2001, in respect of Land Reclamation, because it is proposed to import material from outside the landholding in order to carry out the development, and furthermore the material proposed to be imported is a waste material (noting that the recovery of excavated inert soil, for the purpose of the improvement or development of land, is identified as a waste activity in the Waste Management (Facility Permit and Registration) Regulations 2007 (as amended));

(d) The development does not come within the scope of Class 11 of Part 3 of Schedule 2 to the of the Planning and Development Regulations, 2001, as amended, (Land Reclamation - infilling of wetlands) because of non-compliance with the conditions and limitations no. 1 of that Class, as the area in question exceeds the 0.1 hectares.

The Board therefore decided that the recovery of surplus excavated inert soil and the importing of that soil for infilling low lying area is development and is not exempted development.

9.0 Assessment

9.1. Is or is not development

9.1.1. The development as set out within the grounds of referral comprises the importation of inert soil (7,000 cubic metres) to an existing agricultural field, with the effect of recontouring the land, improving waterholding capacity and providing for a more productive grass sward. Details provided indicate that the proposal will involve depositing a maximum of 400mm of subsoil and 300mm of topsoil on the land. 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).

9.2. Is or is not exempted development

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

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). I note that the application site does not comprise wetlands and therefore it is acknowledged by all parties to the referral Class 11 Part 3 of Schedule II of the Regulations does not apply.

9.2.2 As regards Article 8C, of the Planning and Development Regulations, 2001 (as amended) this provides an exemption for "Land reclamation works consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding shall be exempted development." I note that the material was subject to Article 27 Notification to the EPA by Capami Ltd

under Article 27(2)(a) of the European Communities (Waste Directive) Regulations 2011 (SI 126) of 2011 and appears on the EPA register (Notification Number Art 27-0637)². On this basis the material which comprises inert soil can be considered not to comprise a waste material. (which would differentiate the current referral case from previous referrals RL2987, RL3116 and RL3540 though not RL3034). 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 (RL3034 and RL3116 and RL3540 RL2897). The development as set out in the referral involves the importation of 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.

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

9.2.3 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.

9.2.4 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' and 'improvement of hill grazing'. 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.'

9.2.5 I may be inferred from the above that the re-contouring of land by way of infilling with soil constitutes land reclamation works. However, as stated

² <http://web.epa.ie/Article27Refister/>

above, the proposed development comprises the importation of a material to the landholding.

9.2.6 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 material to a site would not benefit of the exempted development provisions set out in Section 4(1)(l) of the Planning and Development Act, 2000 (as amended).

9.3 Restrictions on exempted development

9.3.1 I note that in the event that the Board were to adopt an alternative view it is appropriate to consider the relevant restrictions on exempted development. 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.

9.3.2 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 or 2 of Schedule 5 of the Regulations. The proposal as set out involves the importation of 7,000 cubic metres of soil. The proposal 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.

9.3.3 With regard to appropriate assessment, the application site lies c.1.8km north east of the nearest Natura 2000 site, the Glenasmole Valley SAC and SPA,

and 3.7km and 4.2km north west of the Wicklow Mountains SAC and Wicklow Mountains SPA respectively and the site is not hydrologically connected to these sites. There are no streams immediately adjacent to the infill area however there is a stream adjacent to the access road a short distance to the east of the site, a tributary of the Oldcourt Stream which in turn is a tributary of the River Dodder. The main environmental risk arising relates to potential for pollution to stream which could be carried downstream. Given the distance involved from the downstream Natura 2000 sites, the risk of pollution is extremely limited. Having regard to the nature, scale and location of the proposed development from the Natura 2000 sites, I conclude that there is no potential for significant effects either from the proposed development, or in combination with other plans or projects.

10 Recommendation

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 spreading of clean topsoil and subsoil on lands for agricultural use is or is not development or is or is not exempted development at Oldcourt Lane, Oldcourt Ballycullen Dublin 24.

AND WHEREAS Michael Wheelan requested a declaration on this question on the 9th August 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 of the Regulations, as amended,
- (e) The submission on file by the applicant to the planning authority,
- (f) The location of the development relative to downstream Natura 2000 sites.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The importation and spreading of soil for the purpose of recontouring land constitutes 'works', and 'development' as defined in Section 2 and Section 3, respectively, of the Planning and Development Act, 2000, as amended.
- (b) 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.
- (c) Having regard to the nature of the proposed development, which entails the importation of material to the site, 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.
- (d) '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, by imported 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.

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 spreading of clean topsoil and subsoil on lands for agricultural use and the importing of that soil for recontouring of land is development and is not exempted development.

Brid Maxwell
Planning Inspector
24th January 2018