



An
Bord
Pleanála

Inspector's Report RL03.RL3611

Question

Whether Groundworks, including the importation and deposition of fill material, creation of a hardstanding area and raising of the land area is or is not development or is or is not exempted development.

Location

Tulla Road Ennis C. o Clare

Planning Authority

Clare County Council.

Referrer

Clare County Council.

Owner Occupier

Crossfield Property Company Limited

Date of Site Inspection

8th November, 2017.

Inspector

Paul Caprani.

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Decision Quashed

1.0 Introduction

A question has arisen pursuant of Section 5 of the Planning and Development Act as to whether or not groundworks including the importation and deposition of fill material and the raising of the ground level in order to create a hardstanding area constitutes development and if it constitutes development, whether or not it constitutes exempted development. The lands in question are located approximately 1.5 kilometres north-east of Ennis Town. The question was referred to the Board by Clare County Council on foot of complaints received by the Planning Authority in respect of the activities undertaken.

2.0 Site Location and Description

- 2.1. The lands to which the referral relates are located in the north-eastern environs of Ennis Town Centre on the southern side of the Tulla Road. The lands occupy an area of approximately 1.5 hectares. They are currently undeveloped and filled with hardcore material. The north-eastern portion of the lands front onto the Tulla Road and extend back from the road to occupy an area to the rear of a petrol station and a number of commercial units which fronts onto the Tulla Road. The suburban estate of Castle Rock is located on lands to the west and south of the subject site. A large area of public open space associated with this estate is located adjacent to the south-eastern boundary of the site. The documentation submitted demarcates the subject site into two separate parcels (A and B). Area A comprises of a rectangular piece of land c.0.6 hectares in size fronting onto the Tulla Road. Parcel B occupies an area to the rear of the petrol station and is bounded to the west by the River Fergus which forms part of the Lower Shannon SAC. The subject site extends to the bank of the River Fergus but the area where the infill has taken place has not extended to the river. It appears from maps on file that a drainage channel to the east of the River Fergus traversed the centre of Area B in a north/south direction prior to the infilling of the site with hardcore. This drainage channel which comprises of an elongated depression is still apparent on lands to the south of the site adjacent

to the existing residential estate. It appears from maps submitted that this drainage channel previously extended across the site to the rear of the existing petrol station.

3.0 The Nature of the Declaration

- 3.1.1. The declaration was made by Clare County Council. It outlines the planning history associated with the site and states that the only planning history relates to an enforcement file open in respect of the subject importation and fill of hardcore on site. The submission goes on to set out the zoning provisions as they relate to the site and its surroundings. It notes that the site is designated as a flood risk zone and that the Lower Shannon SAC bounds the site to the immediate west and south-west.
- 3.1.2. The submission goes on to state that on foot of a number of complaints, the Planning Authority opened an enforcement file and concluded that the work carried out constituted development which is exempted development by reason of Article 8 of the Planning and Development Regulations 2001 (as amended). Notwithstanding this, further complaints were received and therefore a declaration is now sought from the Board. The Planning Authority submission states that Area A is located outside the flood relief works area. However, the Planning Authority understands that an access route through these lands were agreed between the landowner and the OPW.
- 3.1.3. It is stated that previously, before the current activities were undertaken, the site was overgrown with mounds of material deposited throughout the site. The site was cleared, levelled and additional hardcore material was imported and deposited within the site. The drain that previously ran through the site has been replaced by a 1,050 millimetre diameter pipeline. Clare County Council understands the works carried out were part of, and ancillary to, the River Fergus (Lower Ennis) Certified Drainage Scheme on behalf of the OPW. The Planning Authority notes that the Board ruled that in the case of RL03 3202, that works associated with the flood relief scheme constituted development which was exempted development.
- 3.1.4. A further submission from Clare County Council was received in response to a letter issued by the Board on 10th August, 2017. The further submission from Clare County Council states the following:
- There were no previous planning applications on site.

- Details of the warning letter to the landowner in respect of the activities carried out on site is attached.
- The letter states that Crossfield Property Company are the registered owners of the site.
- Finally, that the Planning Authority are seeking a declaration in respect of the activities undertaken from the Board under the provisions of Section 5 of the Act.

4.0 Submission from the Owner/Occupier of the Lands

- 4.1.1. The lands in question are part of the River Fergus (Lower Ennis) Certified Drainage Scheme. The lands were also used as a compound for Clare County Council/Ennis Town Council Drainage Project and some further filling took place at that time.
- 4.1.2. Site clearance works commenced in February 2013, and it is stated that the bulk of the drainage relief works were completed by August, 2014 and were fully completed by October of that year. Prior to this the site accommodated scrubland which was below the level of the road and while the lands were of some ecological value, the overall value is not deemed to be significant.
- 4.1.3. The whole area of the site was filled with imported material. Details of the timeline were set out under which the works were undertaken. The lands were also used as a temporary compound to carry out a water supply upgrade scheme in the area.
- 4.1.4. The owner was notified by the OPW of its intention to enter the lands in question and to carry out works under Section 9 of the Arterial Drainage Act 1945. It is stated that the activities in question constitute works which are exempted development under Article 8 of the Planning and Development Regulations 2001 and Section 4(1)(g) of the Planning and Development Act 2000. It is concluded that the works are exempted development under the provisions of the Planning and Development Act 2000.
- 4.1.5. A number of appendices are attached.
 - Appendix 1 contains a letter sent to the appellant from JB Barry and Partners that a Certified Drainage Scheme has been confirmed by Ministerial Order which results in powers conferred upon the commissioners of the OPW to enter

property to construct, execute and complete works specified under the Certified Drainage Scheme.

- Appendix 2 contains details of the works undertaken on site to date.
- Appendix 3 and 4 contain photos of the various stages of works undertaken on site.
- Appendix 5 contains extracts of the habitats survey of the Ennis and Environs Development Plan.
- Appendix 6 contains details of the use of the site as a compound for a local authority water supply scheme.

4.2. Further Submission by Clare County Council

- 4.2.1. This submission states that the details on behalf of the owner/occupier indicate that some of the works as carried out were ancillary to the flood relief works and therefore fall within the exemption as per Article 8 of the Regulations. It appears that other works were carried out as part of the watermain upgrading works where part of the site was used as a compound. It is unclear whether these works constituted development as per Section 4(1) (g) of the Act.

5.0 Planning History

One relevant history file is attached. Under RL03.RL3202 a declaration was sought from the Board from the residents of Woodstock Hill and Woodstock View as to whether or not the removal of fill material from lands for the use in the construction of embankments as part of the Ennis South Flood Relief Scheme constitutes development and if it constitutes development whether or not the works constituted exempted development. The Board issued a declaration that the construction of embankments as part of the Ennis South Flood Relief Scheme which is incidental to the works being carried out pursuant to the approval under Appeal Ref. No. 03.JP0013 together with the exemptions under Article 8 of the Planning and Development Act which are not bound by the restrictions on exemptions specified under Article 9 of the said Regulations that the works in question constitute development which is exempted development.

6.0 Relevant Legislation

6.1. Planning and Development Act 2000 as amended.

6.1.1. Section 2 of the Act includes the following definitions:

“Works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal or in relation to a protected structure includes any operation involved in the application or removal of plaster, paint, wallpaper, tiles or any other material to or from the surfaces of the interior to the exterior of the structure.

6.1.2. Section 3(1) of the Planning and Development Regulations 2000, as amended, states the follow:

“Development” in this Act means except where the context other 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.

6.1.3. Section 4 of the Act states the following shall be exempted development for the purposes of this Act.

4(1)(g) ‘development consisting of the carrying out by any local authority or statutory undertaking of any works for the purposes of inspecting, repairing, renewing, altering or removing of any sewers, mains, pipes, cables, overhead wires or other apparatus including the excavation of any street or other land for that purpose’.

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

6.2.1. Article 8 of the Regulations state the following:

Works specified in a drainage scheme confirmed by the Minister of Finance with the Part 2 of the Arterial Drainage Act 1945 (No. 3 of 1945) or the Arterial Drainage (Amendment) Act 1995 (No. 14 of 1995), carried out by or behalf of or in partnership with the commissioners with such additions, omissions, variations, deviations or other works incidental thereto as may be found necessary by the commissioners or their agent or partner in the course of the works shall be exempted development.

Article 6 states that 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.

6.2.2. In relation to *Temporary Structures and Uses*, Class 16 refers to *the erection, construction or placing on land on, in, over or under which or on land adjoining which development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or exempted development, of structures, works, plant or machinery needed temporarily in connection with that development during the period of which it is being carried out.*

6.2.3. The conditions and limitations as they apply to Class 16 are as follows:

Such structures, works, plant or machinery shall be removed at the expiration of the period and the land shall be reinstated save to such an extent as may be authorised or required by a permission under the Act.

7.0 **Assessment**

7.1. The first issue the Board must determine is whether or not the importation and deposition of hardcore constitutes “works” and if so whether or not the activities undertaken constitute development. The activities undertaken on site involved the importation of fill material which was deposited and levelled on the subject site which resulted in an increase of ground levels. These works were carried out in accordance with requirements under the Arterial Drainage Act of 1945. Works are defined under the Act as the ‘operation of construction, excavation, demolition, extension, alteration, repair or renewal’. I think it could be reasonably argued in this instance that the deposition and levelling of imported hardcore onto the subject site which resulted in a change in ground levels constitutes an alteration to the subject site and would therefore constitute works under the definition of the Act. If the Board agree that the activities undertaken on site constitute works, it logically follows that development has taken place in accordance with the definition set out under Section 3(1) of the Act which specifically refers to the carrying out of ‘Works’.

7.2. The next question which arises is whether or not the development constitutes development that is exempted development in accordance with the planning legislation. It is apparent from the documentation submitted with the

owner/occupier's submission that the certified drainage scheme was confirmed by Ministerial Order (see correspondence from JB Barry and Partners, Consulting Engineers in Appendix 1 of submission).

- 7.3. I cannot conclusively state that the works undertaken were strictly and fully in accordance with the drawings submitted. However, I do note that the Planning Authority do not express any concerns in this regard and furthermore the submission on behalf of the owner states that as part of the Certified Drainage Scheme, a large portion of the site was required to be filled with imported material. There is nothing to the contrary which suggests that any works undertaken were not in connection with the Certified Drainage Scheme and as such the works undertaken would appear to be exempted by virtue of Article 8 of the Planning and Development Regulations 2001 (as amended).
- 7.4. The Planning Authority raise some concern that some of the importation of fill and levelling of the grounds did not fall within the area designated for the flood relief scheme. These essentially relate to the land referred as Area "A" in the information contained on file. However, Article 8 does specifically state that works connected with the Arterial Drainage Act and "*or other works incidental thereto as may be found necessary by the commissioners or their agent or partners in the course of the works, shall be exempted development*". Area "A" as indicated in the drawing was used to create an access to the flood relief works and were also likely to be used as a temporary compound area associated with the works to be undertaken. Therefore, it can be reasonably argued in my view that the infilling and levelling of Area "A" constituted works that were incidental and ancillary to the main works carried out as part of the drainage scheme and as such also constituted exempted development under the Act.
- 7.5. As in the case of RL3202 (see attached) I note that exemption from obtaining planning permission for drainage works under Article 8 of the Regulations are independent for many restrictions and exemptions under Article 9 of the said Regulations. The restrictions on exemption under Article 9 solely relate to development to which Article 6 relates. As such the fact that the works are located adjacent to a European site would not trigger any de-exemption under the provisions of Article 9(viib) (or any other restrictions under Article 9 for that matter). As such, de-exemption only relates to development under Article 6 and not under Article 8.

- 7.6. The Planning Authority in its letter dated October 18th noted that part of the site was used as a compound associated with the watermain upgrading works. The submission goes on to state that it is unclear if these particular works constituted exempted development as per Section 4(1)(g) of the Planning and Development Act. Section 4(1)(g) exempts development from requiring planning permission where it involves *“the carrying out by any local authority or statutory undertaker of any works for the purposes of inspecting, repairing, renewing, altering or removing any sewers, mains, pipes, cables, overhead wires or other apparatus including the excavation of any street or other land for that purpose”*.
- 7.7. The use of the site at a temporary compound for the purposes of upgrading water supply in the area would in my view fall within the definition of works under Section 4(1)(g) and as such would constitute exempted development.
- 7.8. Furthermore, I consider that a strong case could be made for exempting the use of the site as a temporary compound under Article 6, Schedule 2, Part 1, Class 16 of the Planning and Development Regulations 2001, which exempts the following from requiring planning permission.
- “The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant of a permission under the Act or is exempted development, of structures works, plant or machinery needed temporarily in connection with that development during the period in which it is being carried out. It appears that any such works complied with the limitations set out under Class 16 in that such structures, works, plant or machinery was removed at the expiration of the period”*.
- 7.9. Arising from my assessment above therefore I consider that the activities undertaken on site which included the importation and levelling of hardcore for the purposes of implementing a Certified Drainage Scheme constitutes development which is exempted development primarily by reason of the provisions of Article 8 of the Planning and Development Regulations 2001, but also by virtue of the provisions of Section 4(1)(g) of the Principal Act (as amended) and Class 16 of Schedule 2, Part 1 of the Planning and Development Regulations, 2001 (as amended). I therefore recommend that the Board issue a draft order as follows:

WHEREAS a question has arisen as to whether or not groundworks including the importation and deposition of fill material and the creation of a hardstanding area and the raising of ground levels is or is not development or is or is not exempted development:

AND WHEREAS Clare County Council requested a declaration on the same question in accordance with Section 5(4) of the Planning and Development Act, 2000 (as amended)

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, as amended, and
- (b) Articles 6, 8 and 9 of the Planning and Development Regulations 2001, as amended

AND WHEREAS An Bord Pleanála concluded that

- (a) the groundworks undertaken including the importation and deposition of fill, the creation of a hardstanding area and the raising of ground levels were works carried out as part of the River Fergus Lower (Ennis) Certified Drainage Scheme under the Arterial Drainage Act of 1945, and
- (b) the exemptions under Article 8 of the Planning and Development Regulations 2001 (as amended),
- (c) furthermore, the use of the lands in question as a temporary compound associated with improvements in the water supply network fall within works which are exempted under the provisions of Section 4.(1)(g) of the Planning and Development Act 2000 (as amended) and Class 16 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended).
- (d) the Board noted that exemptions under Article 8 of the Planning and Development Regulations 2001 (as amended), are independent from the exempted provisions identified under Article 6 of the said Regulations and

therefore are not bound by the restrictions on exemptions specified under Article 9 of the said Regulations.

NOW THEREFORE An Bord Pleanála in exercise of the powers conferred on it by Section 5(3)(a) of the 2000 Act (as amended) hereby decides that the groundworks undertaken including the importation and deposition of fill material to create a hardstanding area and the raising of ground levels is development that is exempted development.

MATTERS CONSIDERED

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it is required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

Paul Caprani,
Senior Planning Inspector.

19th December, 2017.