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MCCANN FITZGERALD

OUR REF	YOUR REF	DATE
BNMS\42577618.2	ABP-310546-21	17 August 2021

BY EMAIL - bord@pleanala.ie AND appeals@pleanala.ie
An Bord Pleanála
64 Marlborough Street
Dublin D01 V902

Our client - Sarah Corcoran, The Downs, Mullingar, County Westmeath By Email

Response to your notice given under section 129 of the Planning and Development Act, 2000 (as amended) (the "2000 Act") about whether peat extraction at Baltrasna Bog is development, or is exempted development

Dear Colleagues

Your letter dated 21 July 2021 to Sarah Corcoran of The Downs, Mullingar, County Westmeath has been passed to us. We make this response on her behalf. We calculate the last date for response is today, 17 August 2021.

It appears from the attachments to your letter that on or about 2 June 2021, Mr Tony Lowes made a request on behalf of Friends of the Irish Environment to Westmeath County Council (the "Council") under section 5 of the 2000 Act. The request was given the Council Ref. No. S5-8-21. The request is brief: it describes the proposed development to which the request relates as "Industrial Extraction of Peat Name + Address of Owner Daniel Joseph Leonard Blueball, Tullamore, County Offaly". The form is accompanied by an aerial photograph on which is marked lands labelled "Baltrasna Bog Extraction Area", together with a photograph labelled "Baltrasna Bog". No other information or context is provided.

It is not clear from your letter, but appears from your website that the Council did not decide whether the described development is development, or is exempted development. Instead, it appears that on or about 17 June 2021, the Council referred the matter to the Board. The referral has been given the Board Ref. No. ABP-310546-21.

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Consultants: Catherine Austin, Seán Barton, Ambrose Loughlin, Eleanor MacDonagh (fCA), Lonan McDowell, Anna Moran, Peter Osborne, Tony Spratt (ACA).

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In these circumstances, it is almost impossible for our client to offer any meaningful response to your letter.

The request for declaration first made by Mr Lowes, and then referred to the Board by the Council, appears, from the documentation now shared with our client, wholly incomplete and does not contain any of the information necessary for the Board to properly answer a question under section 5.

Under section 127 of the 2000 Act, the referral must state in full the grounds of referral, and the reasons, considerations and arguments on which they are based.

Here, no information at all has been provided about:

- (A) the date of first commencement of peat extraction;
- (B) what change in use or works if any, have been, or are proposed to be, carried out;
- (C) whether there are any material planning impacts arising from the use of the lands;
- (D) what has changed from that commenced before 1 October 1964;
- (E) the area of lands, if any, now extracted;
- (F) whether any such extraction is likely to have significant effects on the environment; or,
- (G) whether the same is likely to have significant effects on any European site.

Absent that information, we do not believe the Board can make any proper or lawful decision under section 5 of the 2000 Act. For this reason alone, we invite the Board to dismiss the referral, under section 127 of the 2000 Act, for being incomplete and/or under section 138 of the 2000 Act, by reason of the nature of the question which is raised by the referral.

We expressly rely on the decision of the High Court in *Heatons v. Offaly County Council* [2013] IEHC 261, where the court ruled that a referral was invalid for precisely these reasons. The reference in that case was so general and entirely silent about the reasons, considerations and arguments. That same is true here. It immediately places our client and any other interested person at a disadvantage dealing with such a "laconic and uninformative" reference.

We do acknowledge that the Board can cure a defective referral, even where the documentation submitted in support of a reference is "deplorable". That is what happened in *O'Reilly Bros. (Wicklow) v. An Bord Pleanála* [2006] IEHC 363. However, for the Board to cure a defective referral, it must at least be possible to discover reasons, considerations and arguments from the bundle of documentation submitted. That was possible in *O'Reilly*, but not here, given the lack of information provided.

These issues are particularly sensitive, given the special weight attached to a decision of the Board under section 5 of the 2000 Act, in enforcement proceedings. See, for example, *Killross Properties Ltd. v. Electricity Supply Board* [2016] 1 IR 541.

We are surprised that Friends of the Irish Environment has not provided the Board with more detail, given their understanding of the complexity of the issues involved, as demonstrated in cases in

which they were involved in the recent past, like *Bulrush Horticulture Ltd v. An Bord Pleanála & ors; Westland Horticulture Ltd & ors v. An Bord Pleanála & ors* [2018] IEHC 58 and *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment & ors* [2019] IEHC 685.

They would be wrong to assume that these judgments answer all of the important questions of law and fact relevant to Baltrasna Bog. They would be wrong to assume that all peat extraction now requires planning permission.

The Baltrasna Bog was first drained and cut for peat extraction long before the Local Government (Planning and Development) Act 1963 (the "1963 Act") came into force. As far back as 1910, the Irish Land Commission acknowledged the use of the land for turbary. Indeed, our client can attest to that activity for at least 64 years, given the time she, and her father before her, have been in possession. This use of the land for turbary was long established, even before turbary was defined as exempted development under section 4 of the 1963 Act, within the definition of "agriculture".

Does the referral mean to question the drains cut or other works carried out before the 1963 Act, and 2000 Act, applied?

It is sometimes misunderstood how the continuation of extraction, under a pre-1963 authorisation (as labelled by the Department of Environment, when offering guidance under section 261A of the 2000 Act), is regulated under the 2000 Act. The protection for development commenced before the 1963 Act is preserved within the definitions of "unauthorised use" and "unauthorised works", both matters on which the Board cannot offer a view under section 5. We must reserve our client's rights in relation to same. Without prejudice to our position that the referral should be dismissed, the question of what is or is not allowed to continue from before 1 October 1964 cannot and should not be answered.

No effort whatsoever has been made to identify the exemptions under previous legislation, within the 1963 Act and regulations made thereunder, or the transitional provisions that allow continued reliance on those exemptions.

No effort whatsoever has been made to identify material planning impacts from peat extraction on these lands. Our client does not believe there are any.

No effort whatsoever has been made to identify likely significant effects on any European site. Again, our client does not believe there are any.

No meaningful effort has been made to address the 30 hectare threshold, relevant to environmental impact assessment, under paragraph 2(a) of Part 2 of Schedule 5 to the Planning and Development Regulations 2001 (as amended). The aerial photograph includes a label to suggest there is an extraction area of 37 hectares. As a matter of fact, that is wrong. The area for extraction has been carefully maintained below 30 hectares, with all other lands under forestry, rehabilitation or other growth.

No effort whatsoever has been made to identify likely significant effects on the environment, relevant to sub-threshold development. Again, our client does not believe there are any.

There is no evidence before the Board that issues related to environmental impact assessment and/or appropriate assessment are engaged in this matter, so the debate in cases like *Bulrush Horticulture Ltd v. An Bord Pleanála & ors; Westland Horticulture Ltd & ors v. An Bord Pleanála & ors* [2018] IEHC 58 is wholly irrelevant. For completeness, we do not make the case that the Baltrasna

Bog is a "pipeline project", so excused, by that reason only, from this debate. We make the case that, absent the relevant information that persuaded the court and the Board in those two cases, the Board cannot be expected to make any decision.

For all of the foregoing reasons, we must invite the Board to dismiss the referral, under section 127 of the 2000 Act, for being incomplete and/or under section 138 of the 2000 Act, by reason of the nature of the question which is raised by the referral.

If the Board is minded to cure the referral and/or allow the Council or Friends of the Irish Environment to provide all of the missing information, which we suggest it should not, we respectfully reserve our client's rights and invite an opportunity, in the interests of natural justice, to review the same and make further submissions, as appropriate, to the Board.

We hope this is helpful.

Yours sincerely

(sent by email, so bears no signature)

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