

An
Bord
Pleanála

Inspector's Report ABP-316012-23

Question

Whether the importation and on site works with soil and subsoil is or is not development or is or is not exempted development.

Location

Painestown, Kill, Co. Kildare

Declaration

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

ED0989

Applicant for Declaration

Tom Kelliher, Pat O'Reilly and others.

Planning Authority Decision

Is not exempted development

Referral

Referred by

Tom Kelliher, Pat O'Reilly and others.

Owner/ Occupier

Vincent Talbot.

Observer(s)

None.

Date of Site Inspection

7th March 2024.

Inspector

Susan McHugh

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2. The parking of an industrial vehicle bearing a large arm (or a type which can be used to distribute/move soil and/or subsoil) on this land and parking of commercial trucks on site,
3. The use of this property for non-agricultural external storage,
4. The erection of a circa 3.0metre tall timber fence on the land,
5. The sorting of soil and subsoil, the placing the sorted matter into bags and the transportation of these bags off the site,
6. The use of large barrel-vaulted structure which has been erected on the referral site for sorting, bagging and dispatch of soil and subsoil.

is or is not development or is or is not exempted development.

2.3. In October 2022 the agent Adams Law LLP clarified that the question was 'whether or not any and /or all of the following structures or activities comprise development and/or exempted development....' which included one further item 'the parking of commercial trucks on the site'.

2.4. The Referral was accompanied by a Planning Report prepared by Farry Town Planning Ltd.

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1. On the 1st March 2023 the planning authority decided having regard to:

- Sections 2, 3, 4, and 5 of the Planning and Development Act 2000 (as amended),
 - Articles 6 and 9 of the Planning and Development Regulations 2001 (as amended),
 - The nature and extent of the development and development permitted on the site,
1. The importation and deposit of soil and/or subsoil from off-site into a number of heaps on the land in itself is not development, however, is not part of a permitted development on site and is Not Exempted Development,

3. Owner to clarify the use of any machinery on site, details of the amount of any soil or subsoil removed or imported to the subject site, and nature of importation if any.
4. Owner to clarify the nature of a timber fence erected on site and clarify which permission if any this fence was permitted under. From a review of the planning history of the site it would not appear that a timber fence of the height constructed was permitted as part of a previous development.

Two separate responses to the Further Information request were lodged by the land owner of the site 8/11/2022 and the third party Referrer 02/02/2023 in this case.

The 2nd Planning Report dated 28/02/2023 concluded that the proposed development is considered to be development and not exempted development, for the reasons set out above.

3.2.2. Other Technical Reports

- None.

4.0 Planning History

Concurrent Planning Appeal

PA Reg.Ref.23/650 ABP-318245-23: Permission **granted** 18/09/2023 for the sub-division of existing site for the construction of a single storey detached bungalow, single storey domestic garage, shared use of existing and permitted entrance to adjacent house, secondary effluent treatment system and all associated site works to Tammy Talbot. Third Party appeal against grant of permission, decision pending.

Referral Site

PA Reg.Ref.21/818: Permission **granted** 29/07/2021 to amend site boundaries and location of secondary effluent treatment system on previously approved permission (File Ref. 20/790) and all associated site works to Rose Talbot.

- 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.

ABP Ref. RL3034 – In May 2013 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).

ABP Ref. RL3116 – In January 2014 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 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.

ABP Ref. RL3479 – in May 2018 the Board decided that the importation of inert soil for the purposes of site restoration, and restoration works using imported inert soil, in respect of a quarry at Powerstown, County Carlow, is development and is not exempted development.

- The works the subject of this referral are development within the meaning of Sections 2 and 3 of the Planning and Development Act 2000, as amended,
- the subject works involves the importation and deposition on land of inert soil (whether or not it is deemed to comprise a waste or a by-product) and therefore, pursuant to section 3(2)(b)(iii), the use of the land has materially changed and this constitutes development,
- the permission granted under An Bord Pleanála appeal reference number PL 01.129838 has expired and the conditions of that permission were not complied with to the satisfaction of the planning authority, and
- the works are not directly connected with or necessary to the management of a European Site in accordance with article 6(3) of the Habitats Directive. It has not been established, to the satisfaction of the Board, that there is not a hydrological relationship between the site and the River Barrow and River Nore Special Area of Conservation (Site Code: 002162) and, therefore, it cannot be established, beyond reasonable scientific doubt, that the subject works would not have significant effects on this European Site and, in the absence of a Natura impact statement, that the subject works would not have

satisfied is not 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.

5.0 Policy Context

5.1. Development Plan

The operative development plan is the Kildare County Council Development Plan 2023-2029, which took effect on 28th January 2023.

Chapter 2 - Core Strategy and Settlement Strategy

- The site is located in a rural area outside the defined town boundary of Kill and within the Multi-Modal Transport Corridor as indicated on the Core Strategy Map.

Chapter 9 - Our Rural Economy

- Section 9.4 refers to Agriculture.
- Section 9.9 refers to Mineral Resources and Extractive Industry.

Chapter 13 – Landscape, Recreation and Amenity

- The site is situated within the Northern Lowlands Landscape Character Area, as indicated on the Landscape Character Areas map. The Northern Lowlands are classified as Class 1 Low Sensitivity area. They are described as *'Areas with the capacity to generally accommodate a wide range of uses without significant adverse effects on the appearance or character of the area.'*

5.2. Natural Heritage Designations

None of relevance in the vicinity. The Grand Canal proposed Natural Heritage Area is located approx. 1.2km to the north west.

letter acknowledging receipt of the application to the owner would have been welcomed.

- The planning history of the site is outlined, including that of a previous landowner and party to the referral.
- The Barrel-vaulted structure was permitted under permission 14/415. The floor plan on the drawings submitted were 36.5m x15.86m giving a floor area of 564sqm. The as-constructed agricultural building is in substantial compliance with its permission. There are cattle and horses present and the landowner has a herd no.
- There are two permissions (20/790 and 21/1221) active on site benefitting from commencement notices. Any use of machinery is associated with the above including the organisation of the lands to include much needed maintenance of culverts/fields.
 - Any soil excavated is currently stored in piles and fenced off. When the current owner purchased the lands, there was serious maintenance required due to neglect. The current owner has his own machinery for his commercial business, (a separate entity) and these machines are being used on-site.
- The timber fence is more than the 2m in height (exempt development) and does not benefit from a valid permission. A submission to the PA for the retention of same has been made, and a further information request has been issued. Submit that if a reply is made to the PA now then any decision will have an impact on this Section 5 Referral and vice versa.
- Expresses concern with unauthorised personnel entering onto his lands.

6.4. Further Responses

None sought.

- (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. Planning and Development Regulations, 2001

7.2.1. Article 6(1)

'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'.

7.2.2. Article 8

Relates to exemptions for field drainage.

- Article 8B relates to field drainage for agriculture, other than reclamation of wetlands.
- Article 8C relates to land reclamation works, other than reclamation of wetlands, consisting of recontouring of land, including infilling of soil (but not waste material), within a farm holding shall be exempted development.

Schedule 2, Part 3, Exempted Development – Rural

Land Reclamation

7.2.3. Class 11 refers to 'development consisting of the carrying out of drainage and/or reclamation of wetlands' (column 1) 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.

(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

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

8.0 Assessment

8.1. Introduction

- 8.1.1. It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the development in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.
- 8.1.2. The Board is advised that the Section 5 Referral is assessed in the context of the current Kildare County Development Plan 2023-2029 which took effect on 28/01/2023.
- 8.1.3. The Section 5 Referral was lodged in September 2022 with the PA by a Third Party. The PA sought further information on 03/11/2022 and received responses from both the landowner on 11/11/2022 and the Third Party on 07/02/2023.
- 8.1.4. The PA issued its determination on the Section 5 referral on the 01/03/2023, the same day the Third-Party appeal was lodged with the Board. The third-party appeal is made therefore on the basis that a Section 5 Referral determination was not issued by the PA.
- 8.1.5. The main parties to this referral are therefore as follows;
- Tom Kelliher, Pat O'Reilly and others (Referrer)
 - Kildare County Council
 - Vincent Talbot (Landowner)

- 8.2.3. 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',
- 8.2.4. The Referrers case is that part of the referral site is being used for industrial purposes, comprising the importation of soil and subsoil in bulk quantities and the packaging of this material in smaller loads, for final dispatch to end-users, off site. I note however that the volume of material is not specified. It is submitted that this operation is taking place both within a building whose permitted purpose is as a 'hay shed' and on open land beside this structure, is a non-agricultural activity and that the carrying out of this business represents a material change in the use of this land.
- 8.2.5. The owner's case is that the use of the machinery is associated with permitted and live developments under (20/790 and 21/1221) and the organisation of the lands to include much needed maintenance of culverts/fields. The owner also refers to the current owner (although not named) who has his own machinery for his commercial business, (a separate entity) and these machines are being used on-site.
- 8.2.6. I would consider that the importation of 'bulk quantities' of soils and /or subsoil and use of the shed and activities on site for sorting, bagging of soil and/or subsoil and transportation off site would comprise both 'works' and 'development', as defined in the Planning and Development Act, 2000 (as amended).
- 8.2.7. I can confirm from my site inspection, that soil and materials are not currently being stored on the site subject of the referral, but I can confirm that large quantities of soil and materials were visible on the larger landholding notably to the north of the site.
- 8.2.8. I am satisfied that on the day of my site inspection that the existing use of the shed and yard area surrounding the shed did not indicate any uses such as parking of commercial vehicles (apart from a tractor and a small truck) or activities (apart from a number of storage bags) which would result in non-agricultural uses. However, were there to be commercial non-agricultural related vehicles parked either inside the shed or outside on the adjoining lands associated with the importation and transport of large quantities of soil and or subsoil off site, I would concur with the referrer and the PA that this would indeed constitute development unrelated to the agricultural use.

8.3.4. The referrers case is that soil and/or subsoil is being imported onto the site. I also note that contrary to the owners assertion of maintenance works to culverts/fields I did not see any evidence of excavation works on site. Consequently, as material 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)

8.3.5. 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.

8.3.6. 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 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 recontouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development'.

8.3.7. I would infer from the above that the importation of soil and/or subsoil (a waste material) to the landholding does not constitute land reclamation works.

8.3.8. 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, 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).

8.3.9. I also note that under CLASS 4 of Part 3, of Schedule 2 which refers to.

serviced area and the separation distance to the nearest European site, no Appropriate Assessment issues arise, and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

9.0 Recommendation

9.1. 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 importation of and deposit of soil and /or subsoil,
- the use of the shed and activities on site for sorting, bagging of soil and/or subsoil and transportation off site,
- the parking of commercial vehicles and
- erection of a 3m high timber fence

is or is not development or is or is not exempted development:

AND WHEREAS Tom Kelliher, Pat O'Reilly and others requested a declaration on this question from Kildare Council and the Council issued a declaration on the 1st day of March, 2023 stating that the matter was development and was not exempted development:

AND WHEREAS Tom Kelliher, Pat O'Reilly and others referred this declaration for review to An Bord Pleanála on the 1st day of March, 2023:


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

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.

- (d) The erection of a 3m high fence is in excess of the limitation under CLASS 4 of Part 3, of Schedule 2.

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 importation and deposit of soil along with sorting, bagging of soil and/or subsoil and transportation off site, parking of commercial vehicles and erection of a 3m high fence is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.



Susan McHugh
Senior Planning Inspector

29th March 2024