



22nd October 2020

Subject: Appeal FAC462/2019 regarding refusal of licence application CN84557

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence application refused by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence CN84557 for afforestation of 4.24 ha at Corlea, Co. Donegal was refused by the Department of Agriculture, Food and the Marine (DAFM) on 26th November 2019.

Hearing

An oral hearing of appeal FAC462/2020 was held by the FAC on 7th October 2020.

FAC Members in attendance: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Ms. Bernadette Murphy, Mr. Vincent Upton

DAFM Representatives: Mr. Martin Regan (District Inspector), Mr. Janet Farrell (HEO)

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence CN84557.

The licence application pertained to the planting of 4.24 ha with 625 metres of stock fencing at Corlea, Co. Donegal. Planting of 85% Sitka spruce and 15% broadleaves was proposed with fertilisation with 250kg/ha of granulated rock phosphate and herbicide weed control in years 0-3. The application states that the soil type of the site is mineral, peat and that the land is enclosed and in agricultural use with a grass, grass rush vegetation type. The site is described as exposed, moderately exposed and at an elevation of 80 to 90 metres. The application includes the following note *"site has undergone a complete transformation due to draining, fertilising, liming, manuring and the vegetation type is now grass rush. All weedy overgrown areas of the site have been mulched to ground level. Inspector site visit is advised and photographic evidence of new site vegetation and nutrient improvement will be attached to this*

application also". There are eleven photos of land and vegetation on the file provided by the DAFM in addition to the application maps.

The application was refused and the following reasons were provided

- Environmental Considerations
- Incapable of producing commercial crop YC>14
- Land Unplantable
- High Water Table
- Outside scope of Scheme

A first party appeal against the decision was submitted to the FAC. The grounds contend that the land has been significantly improved and that this was highlighted in the application. They suggest that a site visit was recommended and that this did not occur and that a preconceived opinion was formed on the application. It is submitted that a review was requested and undertaken by a more senior Inspector and that, following this review, two additional reasons were provided in relation to the refusal and that this was unfair. In relation to environmental considerations, it is suggested that the proposal would be carried out in adherence with all environmental guidelines including setbacks and planting native broadleaves and that there is no EPA marked watercourse on the site and that it is not within a referral zone. It is also submitted that the land has been applied for as eligible area under the BPS and that cattle have been grazing the land. It is contended that the land does not have a high water table and that it drains north to south with drainage in place and that mound drains would be put in place during the planting. It is suggested that the lands are highly suited for afforestation and the DAFM scheme and is capable of producing a productive crop. It is suggested that a Coillte owned forest is growing successfully adjacent to the proposed land. In relation to the review by a more senior Inspector and the reference to the Land Types for Afforestation document, the grounds suggest that the lands have been improved recently but also qualified for BPS prior to this.

A statement from the DAFM was provided. In addition to the reasons provided on the original refusal letter to the Application the following reason was provided

Desk review carried out by the District Inspector's supervisor who reviewed the file (05/11/2019) and discussed with the District Inspector on the phone (06/11/2019). Previously refused under CN82270 - land improved prior to submission of this application (as per Registered Forester's comments). Land Types for Afforestation (October 2017), Section 1 Note on reclaimed land (page 2) states 'Land reclaimed since 1st January 2011 will be assigned its pre-January 2011 land type classification. This more accurately represents the underlying soil qualities and parameters and/or level of agricultural activity foregone on the site. Therefore the land classification of the previous application, CN82270, still applies and as such the application must be refused. Emailed the District Inspector and spoke to Registered Forester on the phone.

The statement suggests that the decision was issued in accordance with the DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act. The District Inspector states that they desk reviewed the application and based on the decision given for CN82270, for the same area, recommended refusal and

confirmed that there was no request for further information. The statement contends that the decision on CN82270 was that the land was incorrectly classified and was unsuitable for commercial afforestation because of low fertility, high water table, very difficult to drain and swampy in places.

During the oral hearing the DAFM outlined the application and refusal and reasons provided. They contended that a site visit was undertaken in relation to a previous afforestation application on the same lands, while no details of this application were provided to the FAC by either party. They suggested that on inspection the lands were comprised of deep peat soil and vegetation indicating a low level of fertility and productivity, such as deer grass and heather. In particular they contended that areas of the land were swampy with sphagnum moss present indicating waterlogging and very poor drainage. They suggested that the forest adjoining the site had been planted with lodgepole pine which is associated with deep peats and low productivity sites but they did not consider the productivity of the adjoining site to be directly relevant to the application. They referred to the Land Types for Afforestation document and how vegetation type surveys had been employed in decision making for a number of years and that scheme circulars had been issued in this regard and that this procedure requires improvements undertaken since 2011 to be discounted as, it is suggested, that previous vegetation is more indicative of site productivity. The District Inspector indicated that they did not have environmental concerns regarding this site and that the decision was primarily in relation to productivity. The DAFM submitted that the decision related to both consent for afforestation and access to the afforestation scheme but that if only consent was applied for that the procedure may have varied. DAFM confirmed that no further assessment had been undertaken of the proposal.

The Appellant outlined their grounds of appeal during the oral hearing. They described the improvements that they had undertaken on the land and provided a summary regarding the management of the lands. They contended that the site is agricultural land, and has been for a considerable time, and suitable for afforestation. They questioned the description of the soil and vegetation type of the land provided by the DAFM. They submitted that correspondence had been undertaken with Coillte regarding the adjoining lands and that these lands were yielding a yield class of 18 and had been replanted with Sitka spruce and broadleaves.

The FAC was established under Article 14A of the Agricultural Appeals Act 2001, as amended with a primary function as follows

(2) The function of the Forestry Appeals Committee shall be to hear and determine appeals specified in subsection (4).

"(4) (a) Where a person is dissatisfied by a decision made by the Minister under an enactment or statutory instrument specified in Schedule (2) (referred to in this section and sections 14B and 14D as a 'decision') he or she may, within a period of 28 days beginning on the date of the decision, appeal to the Forestry Appeals Committee against the decision.

Schedule 2 currently includes

Section 7 of the Forestry Act excluding grants arising under the schemes mentioned in Schedule 1. The Forestry Regulations 2017 (S.I. No. 191 of 2017) insofar as they relate to a licence for afforestation, felling of trees, forest road construction or aerial fertilisation of forests

Subsequently the FAC has no role in relation to access to funding schemes and can only address the issue of consent for afforestation, while recognising that the Appellant had made an application for consent and funding. In this regard, the FAC does not consider that it was appropriate for the DAFM to provide the reason "outside scope of scheme" as a reason for refusing an afforestation consent in itself. Furthermore, while the Land Types for Afforestation¹ document and procedure may be used for consent it is suggested that this is undertaken on "a case-by-case basis" (page 1). The FAC considers that where a case by case decision is being made regarding consent that reasons should be provided to the applicant regarding why this procedure was adopted in this case. Page 2 of this document states

Note on reclaimed land

Land reclaimed since 1st January 2011 will be assigned its pre-January 2011 land type classification. This more accurately represents the underlying soil qualities and parameters and / or the level of agricultural activity foregone on the site.

Page 3 suggests the following amongst classes of land that are considered suitable, subject to achieving an R+N score above 6

Cultivated and fertilised fields used for tillage, crops and pasture grazing, and land reclaimed for grazing prior to the 1st January 2011.

The former paragraph was referred to during the oral hearing and it was suggested that the vegetation type from a previous inspection was employed in deciding the decision under appeal. It is evident from historical maps of this area that the land has been enclosed for a considerable time with some six inch maps classifying this land as rough pasture with furze. More recent photographs suggest that scrub has started to grow on the lands in recent years. The Appellant indicated that scrub had started to grow on the lands but that this was cleared and that liming and the cleaning of drains had been undertaken. As noted the FAC considers that where a case by case consideration is being undertaken that the DAFM should provide reasons for procedures being undertaken in particular cases. In this case, there is no convincing evidence before the FAC that land reclamation, as opposed to land management, was being undertaken post-2011 and historic maps indicate that this land has been managed for a considerable time.

The site description provided by the District Inspector, including vegetation type, drainage regime and, in particular, soil type and depth of peat, would suggest that the lands that may not be sufficiently productive from the perspective of good forestry practice. However, no detailed information regarding

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<https://www.agriculture.gov.ie/media/migration/forestry/grantandpremiumschemes/schemecirculars/2018/LandTypesForAfforestationOct17030118.pdf>

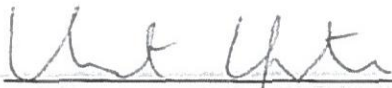
soil type, vegetation, soil fertility or an R+N score were provided to the FAC by either party. The FAC considers that regard should be given to forests adjoining the proposal lands unless there are clear reasons for discounting such a comparison as they should provide an indication of local productivity levels where site conditions are similar.

While "Environmental Considerations" were also included as a reason for refusal, no further details of this issue were provided and the District Inspector indicated that this was added following a review of the original decision and that they did not have any particular concerns in this regard. The FAC considers that the reasons provided for refusal should be clear and interpretable particularly where added following a review of the original documented decision.

The FAC is satisfied that a series of errors were made in the making of the decision related to whether and how grant aid rules and procedures for this decision were employed without providing reasons to the Applicant in this case, as previously described. For this reason, the FAC has decided to set aside the decision and remit it to the Minister. As noted the FAC has no remit regarding grant aid and can only consider decisions regarding consent or licensing.

Before making its decision, the FAC considered all of the information submitted with the application, the processing of the application by the DAFM, the grounds of appeal and any submissions received.

Yours sincerely,



Vincent Upton On Behalf of the Forestry Appeals Committee

