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30/07/2021

**Subject:** Appeal FAC 865/2020 regarding licence CN86277

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued 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 CN86277 for the construction of 200m of forest road at Tullig, Co Kerry was issued by the Department of Agriculture, Food and the Marine (DAFM) on 02/12/2020.

#### **Hearing**

A hearing of appeal FAC 865/2020 was held by the FAC on 14<sup>th</sup> July 2021. In attendance at hearing:  
FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Iain Douglas, Mr. Derek Daly and Mr. Vincent Upton.

Secretary to the FAC: Ms. Marie Dobbyn.

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions received and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister for Agriculture, Food and the Marine regarding licence CN86277.

#### **Overview**

This project comprises 200 metres of forest road works, located in the townland of Tullig in Co Kerry. The predominant soil type underlining the project area is described as being predominantly podzols in nature. The slope is reported as being flat to moderate (<15%). The vegetation type within the project area comprises Sitka spruce with some wet grassland.

The site of the proposed road lies in a rural landscape in Tullig, County Kerry in the River Sub Basin Brick\_030. The River Sub BasinBrick\_030 has approximately 7% forest cover, which is lower than the national average of 11%. At 200m the project is considered by DAFM to be small in scale.

The proposal was referred to DAFM's archaeological service, who made the following comments, *"As the works that would arise from the application, should it be granted a licence, are not "at or in relation to" a designated Recorded Monument or Registered Historic Monument under Section 12(3) of the National Monuments (Amendment) Act 1994 and/or Section 5(8) of the National Monuments (Amendment) Act 1987 Act respectively; "at or in proximity to" a National Monument under Section 14 of the National Monuments Act 1930 (as amended); nor otherwise considered to have potential impacts on known or suspected archaeological sites, monuments or features, it has been determined that the application does not require a mandatory nor warrant a discretionary referral to National Monuments Service (NMS), DCHG for further advice. Consequently, for this Licence or the related Forest Road Scheme Approval, I have no specific archaeological recommendations other than normal adherence to the terms of the Forestry and Archaeology Guidelines"*

The site was subject to a field inspection by DAFM on 25.05.2020. The proposal does not lie within the boundaries of a European site and the DAFM recorded a screening for Appropriate Assessment and identified eight European sites within 15km. Each site was considered in turn alongside its qualifying interests and special conservation interests and a screening conclusion and reasons have been recorded. The DAFM also recorded a consideration of other plans and projects in-combination with the proposed road construction, dated the 26.11.2020. The DAFM considered the proposal across a range of criteria and recorded a decision that the proposal should not proceed to Environmental Impact Assessment (EIA). There was one referral to a prescribed body, Kerry Co Council on the 23.04.2020 and no response was received. Four submissions were received from members of the public and were recorded as being considered by the DAFM in making their decision. The Appellant submitted one of the submissions, which raised much the same issues and concerns that are detailed in the appeal. The licence was issued with conditions on 02.12.2020.

## **Appeal**

There is one appeal against the decision. The grounds contend that; *"The proposed haulage road is not a public road and Forestry Clover 1 Ltd do not have a right of way over this road. 100 meters of this road are in my domain as can be seen from the enclosed Land Registry sealed and certified copy folio and filed plan. This haulage road referred to in the application for the license is a private road, which is owned privately by me. The applicant Forestry Clover 1 Ltd, have no right or permission or license from me to enter or use my road."*

The grounds include submissions from the Appellant regarding the site notice and ownership of the private lane way and a letter from Kerry County Council in this regard, and maps.

In a response to the appeal, the DAFM submitted the dates and steps they followed in processing the application. They submit that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act and that they were satisfied that all criteria outlined in their standards and



procedures policy had been adhered to in making a decision on the application. They further stated that, in response, to submissions on the application that they had sought legal proof regarding access to the lands and that a document addressed to the Property Registration Authority was provided. This document was on the record provided to the FAC and included a statement from the previous landowner.

#### **FAC considerations**

The FAC held a hearing to consider the appeal on the 14.07.2021, the FAC had regard to the record of the decision, the grounds of appeal and any submissions received.

The FAC further considered the record of the decision. Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The proposal is for the construction of a forest road. The proposal is not within a European site and is not connected with or necessary to the management of such a site. The FAC consulted publicly available information from the NPWS and EPA and identified the same European sites within 15km. The FAC considered the range and type of plans and projects considered in combination with the proposal and found them acceptable. The FAC considered the reasons recorded for screening the proposal and the decision not to proceed to Appropriate Assessment and did not identify any serious or significant errors.

The FAC also considered the proposed development in the context of the Environmental Impact Assessment (EIA) Directive. The EU EIA Directive sets out, in Annex I, a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine through thresholds or on a case-by-case basis (or both) whether or not EIA is required. The Irish Forestry Regulations 2017 (S.I. 191 of 2017), in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 Hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. At 200m the proposal is significantly below the threshold for mandatory EIA, The DAFM did undertake a consideration of the proposal across a range of criteria including existing land use, cumulative effect and extent of the project, designated and non-designated habitats, archaeology, and landscape and concluded that it should not proceed to EIA. The FAC did not consider that there was any evidence before it that an error had been made in this regard.

The FAC considered the appellant's specific grounds of appeal. The Forest Service inspector stated in his declaration of fact that he was aware of the disputed right of way issue and had sought proof from the applicant that a right of way existed. In response, the applicant submitted documentation showing that they had purchased the forestry property in 2010. At that time, they sought and received a declaration from the previous owner that he and his family had enjoyed a right of way from the public road (the N69) to the property for a period in excess of 30 years. In the property registration document the

current owners of the forested property make a declaration, dated in 2019, that they, in turn, assert a right of way based on the historic right of way enjoyed by the previous owner and continued down through their ownership. Vodafone, through their predecessor Telecom, also enjoy a right of way along the same route, to service a telecommunications mast located on the edge of the forest property. The FAC also notes that the claim relates to a right of way outside of the licenced area.

On the other hand, the appellant has submitted land registry documents that do not record the applicant's asserted right of way. The FAC takes the view that it will be a matter for the courts to determine, should it come to litigation, whether or not the applicant's claim is sound. Notwithstanding, the FAC notes that the DAFM was furnished with credible evidence by the applicant to the effect that there was a right of way and the FAC takes the view that the Minister did not make a serious error by taking this evidence into account when deliberating whether to grant the licence application.

It is noted that the Appellant had requested notification of the decision and this appeared to have occurred on the date the decision was made. Regarding the site notice, it is noted in the record that an updated site notice is recorded as having been placed on the public road and photographic evidence to this effect were provided. The FAC is not satisfied that the Minister has erred in this regard.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and other submissions received. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without regard to fair procedures. The FAC is thus affirming the decision of the Minister regarding licence CN86277 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In affirming the decision, the FAC considered that the proposal would be in keeping with Good Forestry Practice and Government policy.

Yours sincerely

A black rectangular redaction box covering the signature of Donal Maguire.

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Donal Maguire on behalf of the forestry Appeals Committee