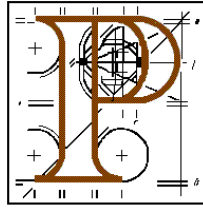

An Bord Pleanála



Ref.: **PL10.HM0001**

Development: Application to amend the Board's Decision the subject of the approval for the Kilkenny Central Access Scheme (Case reference number 10.HA0014)

Planning Application:

Planning Authority: Kilkenny County Council

Applicant: Kilkenny County Council

Type of Application: S.146A

Inspector: Conor McGrath

1.0 Introduction

This case relates to a request from Kilkenny County Council to the Board under Section 146A of the Planning and Development Act 2000, as amended, seeking an amendment to the previous Board approval under ref. 10.HA0014 in respect of the Kilkenny Central Access Scheme. The Board decide to approve the development in that case in December 2011 subject to four conditions.

The amendments the subject of the application relate to the in-river construction methodology to be pursued in the construction of a new bridge over the River Nore as part of the scheme. Works in respect of the river crossing commenced in 2014 and are expected to be complete in 2015.

2.0 Section 146A.

Section 146A. of the 2000 Act, as amended, provides as follows:

(1) Subject to subsection (2)—

- (a) a planning authority or the Board, as may be appropriate, may amend a planning permission granted by it, or
- (b) the Board may amend any decision made by it in performance of a function under or transferred by this Act or under any other enactment,

for the purposes of—

- (i) correcting any clerical error therein,
 - (ii) facilitating the doing of any thing pursuant to the permission or decision where the doing of that thing may reasonably be regarded as having been contemplated by a particular provision of the permission or decision or the terms of the permission or decision taken as a whole but which was not expressly provided for in the permission or decision, or
 - (iii) otherwise facilitating the operation of the permission or decision.
- (2) A planning authority or the Board shall not exercise the powers under subsection (1) if to do so would, in its opinion, result in a material alteration of the terms of the development, the subject of the permission or decision concerned.
- (3) A planning authority or the Board, before it decides whether to exercise the powers under subsection (1) in a particular case, may invite submissions in relation to the matter to be made to it by any person who made submissions or observations to the planning authority or the Board in relation to the permission or other matter concerned, and shall have regard to any submissions made to it on foot of that invitation.
- (4) In this section ‘term’ includes a condition.

3.0 Permitted Development

3.1 An application in respect of the Kilkenny Central Access Scheme was originally lodged with the Board in 2008, under ABP ref. 10.HA0014. The Board subsequently issued a request for further information seeking revisions to the overall scheme. As part of the response to this request a revised design for the bridge over the River Nore was submitted to the Board in January 2011. The River Nore is designated as an SAC and a revised EIS and NIS accompanied the further information response. The Board subsequently approved the development, without further revision in December 2011, subject to four conditions.

3.2 Revised 2011 EIS

Section 4.2 of the Revised EIS describes the revised bridge as a five span structure supported on abutments on the eastern and western river banks, and on four pairs of concrete pillars over a total length of 118m. The bridge supports a 7m wide single-carriageway road, 1.5m cyclelanes in both directions and 3m cantilevered footpaths on each side, with an overall width of 16m.

The supporting concrete pillars are located at 25m centres. The central pair of columns are located within the River Nore, with the outer pair located on the eastern and western banks respectively. The pillars are approx. 1m in diameter, each pair supported on a single-base, a 12m x 3m concrete pile cap, which is to be constructed on piles which themselves were to be driven into the gravels underlying the riverbed. Works to construct the concrete pile caps required localised excavation of the riverbed to depths of between 1.2 and 1.5m. In-situ concrete construction was to be contained by either pre-cast or sheetpile formwork.

Page 59, section 7.3.4 notes that

“temporary works required for construction using in-situ concrete within the River Nore will be installed and secured to ensure that any water likely to be contaminated by fresh concrete can be controlled if necessary to prevent pollution of the River Nore. To achieve this, it is proposed to construct a localised containment structure, to be removed on completion within which any excavation works and the pouring of concrete will take place.

To minimise the risk of suspended solids and other impacts, construction of temporary access causeways in the river will not be allowed. In-stream works will be carried out using long-reach excavators or temporary suspended access platforms on piles driven into the riverbed, all of which will be removed on completion.” (emphasis added)

The environmental commitments and mitigation measures are summarised in Chapter 14 of the EIS and include item 4.6 as follows:

“To minimise the risk of suspended solids and other impacts, construction of temporary access causeways in the river will not be allowed. In-stream works will be carried out using long-reach excavators or temporary suspended access platforms on piles driven into the riverbed, all of which will be removed on completion. Other temporary works in-stream will include the construction of a localised containment structure, to be removed on completion, within which any excavation would take place, thereby facilitating the control and collection if necessary of water displaced or impacted by the construction works.”

3.3 The Revised 2011 Natura Impact Statement

The works area comprises part of the River Barrow and River Nore SAC (002162). As part of the 2011 further information response, a revised NIS was submitted to the Board. The project description on page 6 of this document, states that “it is proposed to construct the bridge support piers on concrete pile caps which will themselves be supported on piles driven into the underlying gravels.”

Section 3.3.3, page 30 states that

“To minimise the risk of suspended solids and other impacts, construction of temporary access causeways in the river will not be allowed and the works will be carried out using long-reach excavators or temporary suspended access platforms on piles driven into the riverbed, all of which will be removed on completion.”

Specific construction mitigation measures identified in Section 3.3.4 on page 32, include:

5. It is proposed to construct a localised containment structure, to be removed on completion, within which any excavation works and the pouring of concrete would take place, thereby facilitating the control and collection if necessary of water displaced or impacted by the works to ensure no release of uncured concrete to the River Nore.”

4.0 The Amendment Sought

4.1 The applicants state that the purpose of this application under S.146A is request the Board to amend planning approval 10.HA0014, to confirm that the proposed in-river construction methodologies as described are as set out in the approved EIS and facilitate the operation and implementation of the Board approval in this instance.

Condition no. 1 of the Board approval dated December 2011 states the following:

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1. The development shall be carried out and completed in accordance with the modified plans and particulars for the Central Access Scheme for the City of Kilkenny, including the revised design for the bridge, submitted to An Bord Pleanála on the 31st day of January, 2011, and the mitigation measures (encompassing the environmental commitments) set out in the revised environmental impact statement (January 2011) also submitted on the same date, except as may otherwise be required in order to comply with the following conditions.

Kilkenny County Council suggest the following wording for the amendment under S.146A, which would appear to constitute an amended wording for Condition no. 1 of An Bord Pleanála approval 10.HA0014:

“Kilkenny County Council shall undertake the development, the subject of An Bord Pleanála ref. 10.HA0014, in accordance with the modified plans and particulars for the Central Access Scheme for the City of Kilkenny (as submitted to An Bord Pleanála on the 31st day of January 2011) in accordance with the mitigation measures (encompassing environmental commitments) set out in the revised Environmental Impact Statement (January 2011) and in accordance with the submissions to An Bord Pleanála dated 15th December 2014 except as may otherwise be required in order to comply with Conditions 2 – 4 of An Bord Pleanála approval 10.HA0014.”

4.2 Construction Methodology

The submission to the Board of 17/12/2014 provides details of the nature of the amendment sought. The design of the bridge approved in December 2011 remains the same and the amendment relates only to the nature of construction works. The 2011 further information response anticipated in-river construction works and the revised EIS, NIS and the Memorandum of Understanding with Inland Fisheries Ireland made specific provision in this regard. In this regard in particular, it is noted that the time constraints relating to in-river works, were identified as specific mitigation measures, which are being adhered to in this case.

Under HA0014, in-stream works were to be carried out using long-reach excavators or temporary suspended access platforms on piles driven into the riverbed. These suspended access platforms were required to facilitate the driving of piles for the bridge support foundations. Localised containment structures were to be constructed within which in-river excavation works and the pouring of concrete for the concrete pile cap would take place, in order to protect water quality. The nature and extent of these containment structures was not clearly defined in the EIS / NIS. Other identified mitigation measures included a prohibition of the installation of *temporary access causeways*, however, this phrase is not defined.

Correspondence on the current file advises that subsequent geotechnical investigations determined that rotary bored piles were the appropriate form of construction rather than driven piles as described in the EIS and NIS. Temporary suspended access platforms are not required for rotary bored piles which are installed from within the containment structure rather than from such platforms.

The change to a bored pile form of construction appears to have given rise to a need to create a work platform within the containment structure to support piling rig and associated plant and equipment, accessed directly from the riverbank. It is not clear whether this necessitated an increase in the extent of the containment structure; however, it has required the importation and placement of stone fill in the river to create the platform.

It is stated that works in this regard were undertaken in July – Sept. 2014 to facilitate piling on the western side of the river. Works are to recommence in June 2015 to complete those works and to commence work on the eastern piles and support columns. It is indicated that these works have achieved compliance with the environmental commitments of the 2011 EIS, as evidenced by satisfactory monitoring results, however, the results of such monitoring have not been provided.

With regard to the containment structure, it is indicated that the works carried out in 2014 involved the importation and placement of stone fill in the river, subsequent to which perimeter sheet piles were installed to create the containment structure. In respect of works to recommence in 2015, it is indicated that the sheet pile containment structure will be installed first, within which stone fill will be placed using a long-reach excavator from the riverbank.

The approved 2011 EIS and NIS made no reference to the importation and deposit of stone in the river for the creation of a working platform and there was no assessment of the potential adverse impacts of this aspect of the development on the SAC. It is an identified mitigation measure, however, that no “temporary access causeway” be provided.

The submission to the Board lacks any drawings outlining the nature and extent of works approved under HA0014 or of the modifications set out in this application, including the extent of the localised containment areas. It is also unclear what was intended by the reference to temporary access causeway. I note that the common dictionary definition of a causeway is a raised road, track or path, especially across a wet or low area.

5.0 Assessment

5.1 S.146A

S.146A provides for the making of an amendment to a permission or a decision for three reasons. Section 146(1)(i) provides for the correction of a clerical error, which does not arise in this instance. Subsection (1)(ii) refers to an amendment in order to

facilitate the doing of something which had been contemplated as part of a permission or decision, but which was not expressly provided for in the permission or decision. This would appear to provide a means to address unintended internal conflicts or inconsistencies within a permission or decision, in order to facilitate the implementation of the decision or permission. Subsection (1)(iii) would appear to be broader in scope and provides for amendments otherwise facilitating the operation of the permission or decision.

All of these provisions are subject to the requirement that the Board is satisfied that the amendment would not result in a material alteration to the terms of the development. I note that having regard to the wording of the section, there is no obligation on the Board to amend a decision or planning permission following a request in this regard. It does not appear to provide for the revisiting or alteration of the EIA or AA process or procedures.

The particular wording of the section presents challenges to its understanding and applicability. I note in the first instance that unlike S.146B, there is no express provision under S.146A for an application to be made to a planning authority or the Board to amend a permission or decision. Nor is there any provision for further details or information to be sought from the parties in such a case. There is provision for the Board to invite submissions from any party who made submissions or observations on the original application, however.

5.2 Applicability of Section 146A

146(1)(ii): It must be considered whether the construction methodology the subject of this request could be reasonably regarded as having been contemplated by the approval under HA0014, or any provision or term thereof.

In this case the amended construction methodology does not arise as a consequence of any condition of the approval, nor did any condition provide for the finalised construction methodology to be agreed. The methodology identified and assessed under HA0014 was specific in its reference to driven piles and the means of access thereto, and did not identify the potential for alternative forms of construction. In this context, I note that the introduction of a large volume of stone material into the SAC to provide a working platform for the piling operations was not assessed under HA0014 and would not have been contemplated in the approval. I note the specific provisions of the revised EIS and NIS in this regard and, in particular, the prohibition on temporary access causeways in respect of in-river construction. I conclude that there is no basis on which to reasonably consider that these works, in particular the placement of large volumes of stone in the river, would have been contemplated.

146(1)(iii) The modified construction methodology, including the importation and placement of a large volume of stone in the river may be considered necessary to

facilitate the operation of the permission and therefore comply with s.146(1)(iii). It must be determined, however, whether the modification would result in a material alteration to the terms of the approval under S.146(2).

5.3 Section 146(2) Material Alteration

The Board shall not amend a planning permission or decision if to do so would, in its opinion, result in a material alteration of the terms of the development, the subject of the permission or decision concerned.

The amendment sought relates to the construction methodology to be implemented and the installation of temporary structures to facilitate same. Kilkenny County Council have indicated that the environmental standards set out in the EIS have been achieved in works to date. In this regard, and notwithstanding the lack of evidence or detail submitted in this regard, consideration could be given to an amendment whereby the final construction methodology could be subject to the written agreement of IFI and NPWS.

Particular caution is advised in this case, however, having regard to the location of the subject works within a Natura 2000 site. The works themselves do not comprise a project but rather an amendment to a previously approved project under HA0014, which was subject to Stage I screening and Stage II appropriate assessment.

The introduction of large volumes of fill into the river and the possibility that the containment area has been increased in extent in order to facilitate the revised works methodology and access by large items of plant, are matters which have the potential to impact on the European site, and which were not assessed under HA0014.

Section 146A deals with amendments to orders, not variations to developments. It does not appear to provide for the revisiting or alteration of the EIA or AA process or procedures. In this regard, notwithstanding comments from the applicants with regard to the environmental standards achieved to date, in the absence of an assessment of these works, it is considered that the amendment sought would materially alter the terms of the development the subject of the approval.

The Habitats Directive provides that approval may not be given for a project until it has been ascertained beyond reasonable scientific doubt that it would not adversely affect the integrity of a European site, in the light of the site's conservation objectives. Section 146A does not provide for an appropriate assessment of the impacts of a development and an amendment can only be made where the amendments have already been subject to such an assessment. In this case, I do not consider that such an assessment was carried out.

It is the case that works in accordance with the amendment now sought have already been carried out at the site and that further works in this regard are to be completed this year. There is some difference in the procedures already carried out

and those to be implemented later this year. I note that the wording suggested by Kilkenny County Council refers to the submission to the Board dated 15th December 2014, which post-dates works already carried out. An amendment in the manner sought could be argued to retrospectively authorise works already carried out, which may raise particular legislative difficulties in this location.

6.0 CONCLUSIONS:

The amendment request relates to a revised construction methodology for a new approved bridge over the River Nore. The methodology outlined in the application under HA0014, including the revised EIS and NIS, and subsequently approved by the Board was clear. It is not considered that the revisions the subject of this application could have been contemplated in that decision. The revised works, which occur within an SAC, were not assessed as part of the EIA or AA processes. It is therefore considered that the amendment sought would constitute a material alteration to the terms of the development the subject of the approval and that the Board would therefore be precluded from making the amendment under S.146(2) of the Act. Having regard to the nature of the issues involved, I do not consider that it is necessary to invite submissions or observations in relation to the matter from persons who had made submissions or observations in relation to the application, the subject of this amendment.

7.0 RECOMMENDATION:

That the request for an amendment be refused as follows.

DEVELOPMENT CONCERNED: A Local Authority Road Development project described as the Central Access Scheme for the City of Kilkenny, Co. Kilkenny.

WHEREAS the Board made a decision to approve, subject to conditions, the abovementioned development by order dated 12th of December 2012, under An Bord Pleanála Reference Number: 10.HA0014.

AND WHEREAS the Board received a request on the 17th December 2014 from Kilkenny County Council under section 146A of the Planning and Development Act, 2000, as amended, to amend that decision order to confirm that the construction methodologies described in that submission were contemplated by the provisions of the EIS and facilitate the operation of the approval.

AND WHEREAS the Board considered that the amendment of the Approval as set out in the submission by Kilkenny County Council would result in a material alteration of the terms of the development, the subject of the approval,

AND WHEREAS the Board considered that it was precluded from making the amendment in accordance with Section 146(2),

AND WHEREAS having regard to the nature of the issue involved, the Board decided not to invite submissions or observations in relation to the matter from persons who had made submissions or observations in relation to the application, the subject of this amendment,

NOW THEREFORE in accordance with section 146A(2) of the Planning and Development Act, 2000, as amended, the Board refuses to make the amendment sought for the reasons and considerations set out below,

REASONS AND CONSIDERATIONS

Having regard to:

- (a) the terms of the development approved under An Bord Pleanála reference number 10.HA0014,
- (b) the specific provisions of the Environmental Impact Statement and the Natura Impact Statement submitted in respect of An Bord Pleanála reference number 10.HA0014 on 31st January 2011.
- (c) the need for the protection of the sensitive aquatic ecology and fisheries in the River Nore, which comprises part of the River Nore and River Barrow SAC, and the absence of any adequate and appropriate assessment of the works methodology the subject of this request carried out as part of the approval under An Bord Pleanála reference number 10.HA0014.
- (d) The Board has concluded that the amendments in question, including in particular the placement of large volumes of stone within the river, have the potential to affect a European site, and the environment generally, over and above the development already described and assessed by the appropriate assessment and environmental impact assessment that was carried out by the Board when the original approval was granted.

it is considered therefore that the alteration to the terms of the condition, as proposed, would constitute a material alteration and the Board is therefore precluded

from making the amendment to the decision under Section 146(2) of the of the Planning and Development Act, 2000, as amended.

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 was required to have regard. Such matters included the submissions and observations received by it in accordance with statutory provisions.

Conor McGrath

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