



An
Bord
Pleanála

Inspector's Report 27.247380

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| Development | Change of use (removal of Section 47 condition of reg. ref. 11/4589) from residential use as a dwelling to use by all classes of person. |
| Location | Sleanaglogh, Ashford, Co. Wicklow |
| Planning Authority | Wicklow County Council |
| Planning Authority Reg. Ref. | 16/833 |
| Applicant(s) | Michelle Salley |
| Type of Application | Permission |
| Planning Authority Decision | Refuse permission |
| Type of Appeal | First Party |
| Appellant(s) | Michelle Salley |
| Observer(s) | None |
| Date of Site Inspection | 30 th December 2016 |
| Inspector | Michael Dillon |

1.0 Site Location and Description

The site, with a stated area of 0.362ha, is located approximately 6.0km due southwest of the village of Ashford in Co. Wicklow. Access is from a narrow country road (L-5093-19) on which the 80kph speed restriction applies. There is no public lighting and there are no public footpaths in the area. The site slopes gently downhill away from the road to the west. There is a two-storey house (stated to be 296sq.m) and detached garage structure on the site. The roadside boundary has been set back and a recessed entrance constructed. Sight distance at the entrance is good in either direction. There is a raised percolation area adjacent to the roadside – to the south of the site entrance. The site is surrounded by lands used for agriculture and forestry – separated from such land by timber post and rail fencing. A stream runs along the southern boundary of the site. The area is sparsely populated.

2.0 Proposed Development

Permission was sought on 25th July 2016, to effectively remove condition 4 of planning permission ref. 11/4589, which condition imposed a seven-year occupancy clause in accordance with Section 47 of the Planning and Development Act 2000.

3.0 Planning Authority Decision

By Order dated 8th September 2016, Wicklow County Council refused planning permission for one reason as follows-

“The Council’s settlement strategy is to encourage further growth of existing settlements and to restrict rural housing development to cases where there is a bona fide necessity to live in the rural area instead of existing settlements. It is noted that the dwelling may only have been occupied by the applicant for a maximum period of 2 years. The proposed change of use is unjustified and would set a highly undesirable precedent for the proliferation of non essential [sic] housing in rural areas, while undermining the provisions of the Planning Authority’s settlement strategy, the rural housing policy and the provisions of the Sustainable Rural

Housing Guidelines, 2005. The proposed change of use would therefore be contrary to the proper planning and sustainable development of the area.

4.0 Planning History

Ref. 11/4589: By Order dated 22nd December 2011, Wicklow County Council issued a Notification of decision to grant planning permission to Michelle Salley to construct a dwelling-house. [It is presumed that the full grant of planning permission issued sometime in early 2012 – there being no copy of the Final Grant of Planning Permission on the appeal file]. Condition 4 stated as follows-

- (a) The use of the proposed dwelling shall be restricted to the applicant or to other persons who comply with the provisions of Objective RH14 of the County Development Plan 2010-2016 and as the Planning Authority agrees to in writing. This requirement shall be embodied by a legal undertaking that shall be registered as a burden against the title of the land in the Land Registry or Registry of Deeds and shall be of seven years duration from the date of this registration. Evidence of this registration shall be submitted to the Planning Authority within twelve months of the commencement of development on the site.
- (b) The Planning Authority will consent to any sale of the completed dwelling by a lending institution in exercise of its powers as a Mortgager in possession of this property and likewise consent to any sale by any person deriving title from the lending institution.

REASON: To ensure that the development in this area of high amenity is appropriately restricted, in the interests of proper planning and sustainable development.

5.0 Policy Context

5.1. Development Plan

When the application was lodged, the relevant Plan was the Wicklow County Development Plan 2010-2016. The relevant document is now the Wicklow County Development Plan 2016-2022. This plan was adopted on 14th November 2016, and

came into effect four weeks later. A Draft Ministerial Direction in relation to certain aspects of the Plan was issued on the 7th day of December 2016 – relating to retail warehousing at Kilpedder and generation of electricity from wind. The adopted Plan is on the County Council website described as an ‘Interim’ Plan due to the Draft Ministerial Direction. The proposed development is not impacted by the Draft Ministerial Direction.

- The site is within an area designated the Northeast Mountain Lowlands – an Area of High Amenity located between the N11 Corridor and the Wicklow Mountains Area of Outstanding Natural Beauty.
- The site is well outside of the development boundary of the village of Ashford.
- Objective HD23 states- “Residential development will be considered in the open countryside only when it is for those with a definable social or economic need to live in the open countryside”. There are 16 categories of persons who might be considered for residential development in rural areas.

5.2. Sustainable Rural Housing – Guidelines for Planning Authorities (April 2005)

These Guidelines indicate that the site is located within an “Area Under Strong Urban Influence” – arising from proximity to Dublin and the N11. The Guidelines refer to “Persons who are an intrinsic part of the rural community” and to the desirability of occupancy clauses for areas such as this one.

6.0 The Appeal

6.1. Grounds of Appeal

The appeal from Hughes Planning & Development Consultants, agent on behalf of the applicant, Michelle Salley, received by the Board on 5th October 2016, can be summarised in bullet point format as follows-

- The appeal relates to the removal of condition no. 4 of permission ref. 11/4589.

- The removal of this condition would be in accordance with the Draft County Development Plan 2016 and with the Sustainable Rural Housing Guidelines 2005.
- Both of the occupants of this house work in Dublin and commute on a daily basis. The commute is too difficult – particularly with small children to be cared for.
- The site is a rural area – well removed from an area which is under pressure from residential development. An occupancy condition is not warranted.
- Permission was granted for the house on this site on grounds of proven need to reside in a rural area.
- The removal of condition 4 would allow the applicant and her spouse to sell the house and move to Dublin.
- If the Board considers that it cannot remove the condition entirely, then it is requested to lessen the number of years for which the Section 47 agreement applies.
- Wicklow County Council has already accepted that there can be exceptional circumstances which would warrant removal of an occupancy condition. [The appellant goes on to quote a number of cases, which I do not propose to summarise, as each case should be dealt with on its merits].
- The site is located in an ‘Area of Special Amenity’, as set down in the County Development Plan 2010-2016.
- The Guidelines refer to occupancy clauses only being appropriate in rural areas close to main cities and larger towns which are under considerable pressure for development. This is not the case in this instance.
- The applicant’s husband works in emergency services and is expected to be available on-call. This proves difficult residing so far from his place of work as he currently does.
- There are few houses in this area – and the area is not under pressure for residential development.

- There is no public transport in this area. If the applicants resided in Dublin, they could use public transport to get to work.
- The removal of condition 4 would not create a precedent, as the applicant and her spouse have exceptional needs.
- Construction commenced on this house in 2012, and the family moved in in 2014. Subsequent to the grant of permission, the applicant's circumstances changed – engagement, marriage, birth of two children and a third child expected.
- The sale of the house is difficult because of its rural location and restriction to those who are indigenous or who have a genuine need to reside in a rural area.

6.2. Planning Authority Response

None received.

7.0 Assessment

- 7.1. Before proceeding with an assessment of the information on the appeal file submitted to the Board, it must be questioned whether the proposal before the Board for adjudication comprises “development”. Section 3(1) defines “development” to mean – ‘the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land’. This application has been phrased in the terms of a change of use to the house on the site, from one which only the applicant or others who comply with the provisions of Objective RH14 of the Wicklow County Development Plan 2010-2016, and as the planning authority agrees to in writing, can occupy the house; to a situation whereby the house could be occupied by any class of persons. The Fifth Schedule to the Act allows for conditions to be imposed on the granting of permission to develop land, without compensation. No. 33 states- ‘Any condition restricting the occupation of any structure included in a development until the completion of other works included in the development or until any other specified condition is complied with or until the planning authority consents to such occupation’. Section 47 allows a planning

authority to enter into an agreement with any person restricting the use of lands. I would be concerned that the proposal before the Board may not constitute “development” at all, in that the change of use proposed is not in effect a material change of use that would have any impact on any other aspect of the proper planning and sustainable development of the area – whether this house is occupied by the applicant/others who comply with the provisions of Objective RH14, or other types of individuals. The applicant has entered into a Section 47 agreement with the Council, and this agreement stands. If the Board comes to the conclusion that the proposal before the Board does not constitute “development”, then it falls that the appeal must be dismissed. Should the Board decide that the appeal is a valid one, then what follows is of relevance to the consideration of such an appeal.

- 7.2. The history file relevant to this case has been forwarded from Wicklow County Council – ref. 11/4589. There is a considerable amount of correspondence relating to compliance with conditions – payment of development contributions, creation of the site entrance and effluent disposal (up to and including September 2016). These matters are not strictly relevant to the substance of this appeal. The compliance correspondence, however, also relates to compliance with condition 4, which is of relevance to this appeal.
- 7.3. The applicant states that construction on this house commenced in 2012, and that the house was occupied in 2014 – the precise dates are not given. A Commencement Notice was received by Wicklow County Council on 20th April 2012 – indicating that it was proposed to commence works on 7th May 2012. An e-mail from the applicant to Wicklow County Council on 28th November 2013, indicates that financial constraints have resulted in “a complete stop with the development”. The e-mail further indicated that “It is now my intention to re commence [sic] with payments and work with the council to address the matters outlined”. A letter on file from Augustus Cullen, Solicitors (dated 2nd December 2013), to Michelle Salley, states- “We confirm that your Section 47 Agreement is pending registration in the Land Registry under Dealing Number **D2013LR093818C**”. Land Registry documentation on file indicates that on 1st November 2013, “The covenant specified in Instrument no. D2013LR093918C made between Michelle Salley, her heirs, executors and assigns as specified therein on the one part and the County Council of the County of Wicklow of the other part” was registered as a burden on Folio 36678F (map

included). A copy of the Indenture signed by the applicant and Wicklow County Council (dated 27th day of September 2013) referring to restriction on use of the lands (as required by condition no. 4 of permission ref. 11/4589) is included. Rather confusingly, the Indenture refers to a period of seven years (as was provided for in the wording of condition no. 4) but then goes on to restate condition no. 4 (mistakenly referred to now as condition no. 2) and also referring to a period of ten years. These discrepancies do not appear to have been noted by the parties to the appeal. Notwithstanding these discrepancies, I would be satisfied that the period referred to is (or should be) seven years – whatever the legality of the Indenture/Covenant/Instrument ultimately signed by the parties.

7.4. I note that condition no. 4 requires the occupancy condition to be registered as a burden against the title of the land and “shall be of seven years duration from the date of the registration”. The burden was registered on the Folio on 1st November 2013, even though the house was not completed at that time, and was not occupied until sometime in 2014. Whilst referred to as an occupancy clause for seven years, the wording of the condition would appear to refer to the “date of registration”. By reference to this date, the burden on the title would appear to apply until 31st October 2020. The applicant wishes to have the condition removed to facilitate the sale of the house, so that the occupants can move to Dublin. In the event that the Board is not minded to remove the condition, it is requested that the length of time be reduced (no specific reduction has been suggested). I would consider that either the condition should be removed or it should remain, there is no argument put forward for justifying a shorter number of years. The Council argues that removal of the condition would set an undesirable precedent, whereas the applicant argues that such conditions have been removed by the Council in other instances. I would not agree with the Council that the removal of the condition would set an undesirable precedent, as each case must be dealt with on its merits. I would similarly not agree with the applicant where it is stated that the Council has set a precedent by granting permission or the removal of similar-type conditions elsewhere in the county – again, as each case must be dealt with on its merits.

7.5. The applicant is a native of this area – the site being transferred to her from her father (Denis Salley) who farms 190 acres in this area. The applicant’s three sisters have obtained permissions to construct houses on the family landholding. The

applicant worked in Dublin at the time application was made to construct this house – ref. 11/4589, whilst residing at Sleanaglogh. The applicant’s place of work does not appear to have changed since that time. At the time of making the planning application, the applicant owned an apartment in Dublin which was rented out. What appears to have changed since the making of the planning application is that the applicant has married and now has young children. Her spouse also works in Dublin in “emergency services” – just what type or where is nowhere specified. The applicant’s need to live in this area at the time of granting planning permission was a significant consideration in the decision of Wicklow County Council to grant planning permission. The removal of condition no. 4, for any but the most exceptional of reasons, would seriously undermine the settlement strategy policies of the Council. I would consider that the applicant has not put forward exceptional reasons for the removal of this condition.

- 7.6. The Sustainable Rural Housing Guidelines identify this area as an “Area Under Strong Urban Influence”. Within such areas – housing for “persons who are an intrinsic part of the rural community” should be considered favourably. Where permission has been granted for such persons, the Guidelines consider it appropriate to attach an occupancy condition. Wicklow County Council attached such an occupancy condition (no. 4). The applicant claims that the Guidelines do not require such an occupancy condition, as the site is in a rural area which is not under pressure for residential development. Whilst this area is sparsely populated, it is nonetheless located within an Area of High Amenity (as defined in the current development plan for the area), and is also within an “Area Under Strong Urban Influence” – as set out in the Guidelines. The position of this site *vis a vis* the Guidelines has not changed since planning permission was granted ref. 11/4589 – the Guidelines having been adopted in 2005. The Wicklow County Development Plan 2016-2022 has not significantly changed in relation to rural housing policy – where new development is to be directed into settlements, but for 16 types of exception for persons/sites as set out at Objective HD23.
- 7.7. I would consider that the applicant has not put forward a convincing case for the removal of condition no. 4. I would note that this condition was not the subject of a first party appeal to the Board at the time planning permission was granted by Wicklow County Council. The applicant was satisfied to accept such a condition as

part of the grant of planning permission. I do not see that circumstances have altered to such a degree which would warrant the removal of condition no. 4 from this planning permission.

- 7.8. An application of this nature – change of use – will not have an impact on any European site.

8.0 Recommendation

I recommend that permission be refused for the Reasons and Considerations set out below.

9.0 Reasons and Considerations

1. The removal of condition 4 of permission ref. 11/4589 would undermine the provisions of the Planning Authority's settlement strategy, as set out at Section 4 (and Objective HD23 in particular) of the current Development Plan for the area, and would also be contrary to the 'Sustainable Rural Housing – Guidelines for Planning Authorities', issued by the Department of Environment, Heritage and Local Government in April 2005, wherein the site is located within an "Area Under Strong Urban Influence". The proposed change of use would, therefore, be contrary to the proper planning and sustainable development of the area.

Michael Dillon
Planning Inspector

4th January 2017