



An  
Bord  
Pleanála

## Inspector's Report PL08.248071

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<b>Development</b>	Retention permission to retain existing house and integrated granny flat and fit new waste water treatment system and all associated works.
<b>Location</b>	Ballybrack, Waterville, Co. Kerry.
<b>Planning Authority</b>	Kerry County Council
<b>Planning Authority Reg. Ref.</b>	KY161181.
<b>Applicant(s)</b>	Derek Noble.
<b>Type of Application</b>	Permission.
<b>Planning Authority Decision</b>	Grant Permission.
<b>Type of Appeal</b>	First Party
<b>Appellant(s)</b>	Derek Noble.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	2 <sup>nd</sup> June 2017
<b>Inspector</b>	Fiona Fair.

## 1.0 Site Location and Description

- 1.1. The appeal site (0.64 ha) is located at Ballybrack, Waterville County Kerry. The site is located approx. 1 Km south east of Waterville and just east of the N70 Ring of Kerry.
- 1.2. The site hosts a detached split level dwelling house, with an integrated 'granny flat' at ground level. Access is via a narrow roughly surfaced private cul de sac laneway east off a public local minor roadway.
- 1.3. The appeal site is located on the southern bank of Lough Currane. It has extensive views east over the lake and there is direct access to the lake from the front lawn of the dwelling. The rear / western part of the site is quite overgrown and is at a lower ground level to the eastern portion of the site. A detached garage is located behind a low wall
- 1.4. There are a number of one off dwellings in the immediate surrounding area.

## 2.0 Proposed Development

- 2.1. The proposal comprises:

Permission to:

- Fit new waste water treatment system

Retention permission to

- Retain existing house and integrated 'granny flat' in its current use.

## 3.0 Planning Authority Decision

### 3.1. Decision

Permission and Retention Planning permission granted subject to four number conditions:

Schedule 2(a) states:

Retention Permission retain existing house and integrated 'Granny Flat' in its current use. Granted subject to two conditions:

Condition 1 standard condition.

Condition 2. (a) 'The use of the proposed dwelling shall be as a primary permanent all year round private residence' (b) 'The proposed dwelling shall not be used as a holiday home or second home'.

Schedule 2(b) Permission to fit new waste water treatment system:

Condition 3 standard condition

Condition 4 (i) The existing septic tank shall be de-sludged and decommissioned. (ii) The existing house and integrated 'granny flat' shall be provided with a proprietary waste water treatment unit. (summarised)

### **3.2. Planning Authority Reports**

#### **3.2.1. Planning Reports**

The Planners Report considers having regard to the nature, extent and location of the proposed development and the planning history on site that subject to condition the proposed development would not be visually obtrusive, would not seriously injure the amenities of the area or be otherwise contrary to the proper planning and sustainable development of the area.

#### **3.2.2. Other Technical Reports:**

Site Assessment Unit, Environment Department: Report recommends conditions be attached to any grant of planning permission.

Biodiversity Officer: No objection, it is stated that installation of a WWTP is likely to improve water quality.

### **3.3. Prescribed Bodies**

The file was referred by Kerry County Council to DAU Dept. of Arts, Heritage, Regional, Rural and Gaeltacht Affairs, An Comhairle Ealaoin, An Taisce, An Taisce and Failte Ireland, no response was forthcoming / on file.

### **3.4. Third Party Observations**

None.

## 4.0 Planning History

**Reg. Ref. 98/3144** Outline Planning Permission Refused (2000) to erect a dwelling house fully serviced by a septic tank

**Reg. Ref. 98/3143** Planning permission sought by Derek Noble to retain garage workshop and to erect two self-catering apartment extensions.

Inspectors Note: Under this application it was established that the existing house contained a separate living unit / accommodation at sub ground floor level at the rear / lake elevation for which no record of planning permission was in place.

Schedule 'A' Granting of retention of dwelling house and storage shed.

Schedule 'B' Granting of wastewater treatment unit to serve existing dwelling house as replacement for existing septic tank

Schedule 'C' Refusal of extension to existing dwelling house for use as two separate dwelling units.

Six conditions one refusal - Schedule A States:

Condition 1 (i) 'This grant of permission shall relate to the retention of existing structures, namely dwelling house and storage shed, within the original site boundaries, per Planning Reg. Ref. No. 838, i.e. the combined site area of Planning Reg. Ref. No. 3143/98 and Planning Reg. Ref. No. 3144/98.'

(ii) 'The retention of the existing developments within revised site boundaries is hereby refused by reason of constituting an undesirable density of development and of setting a very undesirable precedent for other such relevant development in the vicinity which is subject to the control of any permitted development for the protection of the landscape which is designated Prime and also Secondary Special Amenity in the CDP...

Condition 3 (i) 'The existing dwelling house, subject of retention, comprising two separate dwelling units shall be used solely for private family residential use of the applicant / owner or by an immediate member of his family'.

(ii) 'The use of either one of the existing two dwelling units for purposes of rented accommodation or other commercial or non-family use shall not be permitted by reason of contravening Section 15.3.1 (d) Development Control Objectives of the CDP which requires an individual septic tank/effluent disposal unit to serve one dwelling house only.'

(iii) 'The retention of the existing dwelling house, comprising two dwelling units, within the original permitted site boundaries, shall remain as one integral unit under one ownership and neither properties shall be disposed of as a separate entity'.

Schedule C States:

The site is located on the southern shoreline of Lough Currane in an area designated in the County Development Plan as Prime Special Amenity; the proposed development of extension to dwelling house (in two separate dwelling units) for use as two additional separate dwelling units to be served by one single effluent disposal unit within one site area, by itself or by the precedent which the grant of permission for it would set for other relevant development would:

- (i) Seriously injure the high scenic quality, natural beauty and visual amenities of the area by reason of mass, scale and density...contravene the policies of the CDP...
- (ii) Seriously injure the residential amenities and depreciate the value of property in the vicinity and would contravene the CDP...
- (iii) Would be prejudicial to public health...
- (iv) Endanger public safety by reason of a traffic hazard...

## 5.0 Policy Context

### 5.1.1. Sustainable Rural Housing Guidelines for Planning Authorities

The guidelines refer to criteria from managing rural housing requirements while achieving sustainable development. Among the policy aims identified for sustainable rural housing are

- Ensuring that the needs of rural communities are identified in the Development Plan process and that policies are put in place to ensure that the type and scale of residential and other development in rural areas at appropriate location necessary to sustain rural communities is accommodated.
- Expanding on the rural policy framework set out in the National Spatial Strategy, the Guidelines provide that the people who are part of the rural community should be facilitated in the planning system in all rural areas, including those under strong urban based pressures. The principles set out in the Guidelines also require that new houses in rural areas be sited and designed to integrate well with the physical surroundings and be generally compatible with:

- The protection of water quality and the arrangements made for on-site wastewater disposal facilities.
- The provision of a safe means of access in relation to road and public safety.
- The conservation of sensitive sites such as natural habitats, the environs of protected structures and other aspects of heritage.

#### 5.1.2. Development Plan

The site is governed by the policies and provisions contained in the Kerry County Development Plan 2015-2021. The site is located in an area zoned 'Rural Prime Special Amenity Area' which is detailed in section 3.3.2.3 of the Plan. The following sections of the Development Plan are of relevance:

Chapter 12 Zoning and Landscape

Objective ZL-1 Protect the landscape of the County as a major economic asset and an invaluable amenity which contributes to people's lives.

Section 12.3.1 Rural (a) states that 'Rural Prime Special Amenity Areas' are those landscapes which are very sensitive and have little or no capacity to accommodate development.

Section 10.2 Environmental Designations

Objective NE-11, Objective NE-12 and Objective NE-13

## 5.2. **Natural Heritage Designations**

The site is zoned 'Rural Prime Special Amenity Area' and located abutting Killarney National Park, McGillucuddy Reeks & Caragh River Catchment SAC.

## 6.0 **The Appeal**

### 6.1. **Grounds of Appeal**

This is an appeal against Condition 2. (a) and (b) of schedule (2a) of the planning authority's decision to grant planning permission Reg. Ref. KY161181, only.

#### **Background and Planning History**

- Planning permission was granted to Mr. Martin Lee-Bapty from England in 1964. The house was constructed in 1966 in compliance with planning and enjoyed as a holiday home without conditions on use.
- In 1971 the applicant's family purchased the property
- In 1973 extra accommodation was developed below the existing dwelling, intended as a sheltered garden space beneath ground floor, within the footprint of the dwelling.
- In 1998 application for a fishing lodge accommodation was refused planning permission on lands.
- Restrictive occupancy condition was put on the property in 1999.
- In 2003 the area was zoned special amenity area.

- On October 4<sup>th</sup> 2016 the p.a. in response to 1998 condition, conceded 1998 restriction could not apply in perpetuity and advised retention application be applied for, to rectify the issue.
- As well as applying for retention to rectify planning in its current use, applicant also applied for new wastewater treatment system replacing an existing unit
- An application was made to retain the building in its current use i.e. 'free-held holiday home and family residence'
- The p.a. has now, despite communication, included a new occupancy condition in perpetuity on the in-compliance 50-year-old pre-occupancy clause dwelling.
- All dwellings serviced by access roads to Nobles dwelling were granted planning permission over the years with no restrictive occupancy conditions attached.
- The Condition may have been applied in error as it describes the dwelling as a 'proposed dwelling'
- Occupancy condition imposed retrospectively is onerous and unusual, more applicable to new dwellings.
- The property to which the condition applies is a 50-year-old house, built as, purchased as and that continues to be used as both a holiday residence and free-held family home.
- The imposed 1998 and 2017 clauses have caused distress and costs.
- **Appeal accompanied with** letter from planning authority of Kerry County Council, dated 4<sup>th</sup> October 2016, in respect of Condition number 3 (1) of Reg. Ref. 98/3143. The letter sets out the p.a. accepts that such as condition cannot apply in perpetuity and suggests that 'the owner of the property should submit a planning application for retention permission to retain the development in its current use.'

## 6.2. Planning Authority Response

Response received it is summarised as follows:



- GIS map indicating the file reference numbers of all developments (planning applications) adjoining the subject appeal site since 1991

## 7.0 **Assessment**

The main issues in this appeal are those raised in the grounds of appeal and I am satisfied that no other substantive issues arise. The issue of appropriate assessment also needs to be addressed. The issues can be dealt with under the following headings:

- **Appeal against Condition**
- **Appropriate Assessment**

### 7.1. **Appeal against Condition**

I highlight that the subject appeal is a first party appeal, solely, against the attachment of a condition. This is an appeal against Condition 2. (a) and (b) of schedule (2a), only. Given the foregoing and having regard to section 139 (1) of the Planning and Development Act, 2000, as amended, I consider that a 'de novo' consideration of the development is not warranted in this instance.

In my judgement the principle factors for consideration in this appeal relate to evaluation of Condition no. 2 (a) and (b) of Schedule 2 of the planning authority's draft decision to grant planning permission Reg. Ref. KY161181 which states:

'Schedule 2a Retention permission retain existing house and integrated 'Granny Flat' in its current use'.

2(a) 'The use of the proposed dwelling shall be as a primary permanent all year round private residence'

2(b) 'The proposed dwelling shall not be used as a holiday home or second home'.

There is a long and protracted planning history associated with the appeal site, see section 4.0 of this report above.

On foot of Reg. Ref. 98/3143 it was established that the existing house contained a separate living unit / accommodation at sub ground floor level at the rear / lake elevation for which no record of planning permission was in place, at that time. Having considered the planning history, it is my understanding that permission was granted for retention of the dwelling house subject to strict condition. Condition 3 (i) of Reg. Ref. 98/3143 restricts the use of the dwelling, comprising two separate dwelling units solely for private family residential use of the applicant / owner or by an immediate member of his family. Condition 3 (ii) restricts the use and sets out that neither of the two residential units contained within the dwelling house could be used for purposes of rented accommodation or other commercial or non-family use. Condition 3 (iii) requires that the dwelling house remain as one integral unit under one ownership and neither property shall be disposed of as a separate entity.

Regard is had to the correspondence between the applicant's agent and the planning authority dated 4<sup>th</sup> October 2016 and which has been submitted with the appeal and was submitted with the planning application documentation to the planning authority. This correspondence relates to Condition 3 (i) of Reg. Ref. 98/3143. It is clear from this letter that the planning authority accepts that such a restriction cannot apply in perpetuity and it is advised that the 'owner of the property should submit a planning application for retention permission to retain the development in its current use'. The Board should note that it was pointed out that the advice was subject to due process.

The description of the development as per the public notices, in the subject appeal states; 'planning permission to fit new waste water treatment system and retain existing house and integrated 'granny flat' in its current use.' I am of the opinion that the applicant is ambiguous in terms of the current use of the property. The advice given by the planning authority is clear. Nowhere in the documentation submitted to the planning authority or in the appeal documentation is it proven or even demonstrated that the use of the integrated unit is as a 'granny flat'.

It is argued, that the house was constructed in 1966 in compliance with planning and enjoyed as a holiday home without conditions on use and that the applicant's family purchased the property in 1971. It is argued that the property to which the condition applies is a 50 year old house, built as, purchased as and that continues to be used as both a holiday residence and free-held family home.

However, they themselves have acknowledged that in 1973 extra accommodation was developed below the existing dwelling, it is submitted 'intended as a sheltered garden space beneath ground floor, within the footprint of the dwelling'. This is now a separate living unit and therefore I consider the conditions 3 (i) (ii) and (iii) attached by the planning authority in respect of 3143/98 were pertinent and reasonable. In particular, given Development Control Objectives of the County Development Plan, at that time and currently which required an individual septic tank / effluent disposal unit to serve one dwelling house only. In the subject appeal case, permission is sought for a new waste water treatment system to serve the development. I note, the technical reports of the Environment Department and Biodiversity Officer do not raise any concerns and I agree that installation of a new WWTP at a revised location distant from the lake is likely to improve water quality. The existing treatment system located to the front of the dwelling proximate to the lake shore (approx. 25m) is to be decommissioned and the revised WWTP location is to the rear west of the appeal site in excess of 100m from the lake shoreline.

I agree that the wording of condition 2(a) and 2(b) of Reg. Ref. KY161181 is confusing as it refers to 'proposed dwelling'. This appears to be an error rather than a misunderstanding of the nature of the application.

I have some sympathy for the first party that the dwelling as originally constructed and purchased by their family had no restriction on occupancy (used it is claimed as a holiday home). Cognisance being had to the letter of advice from the planning authority and to the long established use on the site / the length of time the dwelling and integrated residential unit has been in existence, dating back to 1973 in excess of 40 years.

Condition 2(a) and (b) relate solely to the use of the dwelling and integrated unit / 'granny flat' and not to ownership. Cognisance being had to the planning history, in particular the original unrestricted grant of permission for the host dwelling and the long established use I am of the opinion that subject to the dwelling house and integrated residential unit remaining as one integral unit under one ownership and neither property being disposed of as a separate entity that Condition 2(a) and (b) should reasonably be omitted.

## 7.2. **Appropriate Assessment**

The appeal site is located within 15 Km of the following Natura Sites:

- Iveragh Peninsula SPA
- Deenish Island and Scaffiff Island SPA
- Ballinskelligs Bay and Inny Estuary SAC
- Valentia Harbour Portmagee Channel SAC
- Kenmare River SAC

The appeal site directly abuts:

- Killarney National Park, McGillycuddy Reeks and Caragh River catchment SAC

Overall I consider it is reasonable to conclude on the basis of the information available that the proposal individually or in combination with other plans or projects, would not adversely affect the integrity of a Natura 2000 site having regard to the nature and scale of the proposed development and separation distances involved to adjoining Natura 2000 sites. It is also 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.

## 8.0 Recommendation

I recommend that the planning authority be directed under section 139 (1) of the Planning and Development Act, 2000, as amended, to omit Condition 2 (a) and 2(b).

## 9.0 Reasons and Considerations

### Having regard to-

- (a) The Planning History associated with the subject appeal site.
- (b) The letter of correspondence from the planning authority to the applicant's agent, dated 4<sup>th</sup> October 2016.
- (c) The long established use of the house and integrated residential unit / 'granny flat'.
- (d) Condition 3 (iii) of Reg. Ref. 98/3143 which remains relevant.
- (e) The installation of a new Waste Water Treatment Plant located further from the Lake than the existing on site treatment system.

The Board considered that Condition 2 (a) and 2 (b) should be omitted.

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Fiona Fair  
Planning Inspector

06.06. 2017