



An
Bord
Pleanála

Inspector's Report ABP301924-18

Development	Retain a Sea Defence Wall and associated site works.
Location	Flaggy Shore, Newquay, County Clare.
Planning Authority	Clare County Council.
Planning Authority Reg. Ref.	P18/64.
Applicant	Michael Harty.
Type of Application	Retention of Planning Permission.
Planning Authority Decision	Refuse.
Type of Appeal	First Party -v- Refusal.
Appellant	Michael Harty.
Observers	(i) Brendan Conway, (ii) Department of Agriculture, Food and the Marine.
Date of Site Inspection	19 th September, 2018.
Inspector	Paul Caprani.

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1.0 Introduction

ABP301924-18 relates to a first party appeal against the decision of Clare County Council to issue notification to refuse planning permission to retain a Sea Defence Wall and associated works at Newquay, County Clare. Clare County Council in its single reason for refusal, considered that the development to be retained by reason of its nature and scale would constitute a visually intrusive element which would be out of character with the coastal location and would therefore seriously injure the visual and residential amenities of the area and would set an undesirable precedent for other such protection works along this coastline.

2.0 Site Location and Description

- 2.1. The appeal site is located at the Flaggy Shore along the north coast of County Clare, west of Kinvara. The small settlement of Newquay is located approximately 1 mile to the east of the subject site. The area to which the current proposal relates is located on the coastal side of a narrow rural roadway which runs along the southern coastline of Galway Bay and to the north of the N67 National Secondary Route. There are a number of dwellinghouses located along the southern side of the local road facing northwards onto the Bay. The strip of land which forms the subject site comprises of a narrow section of coastline between the roadway and the high water mark of the sea. The coastline at this location forms part of the Galway Bay Complex SAC and the Inner Galway Bay SPA.
- 2.2. The subject site is approximately 115 metres in length and approximately 2 metres in width. It rises to a height of approximately 0.5 metres and runs parallel to the existing public road to the south. The existing large stones and boulders which form part of the rocky shoreline have been consolidated into a sea defence wall using concrete to form a sea defence wall along this section of coastline. Information submitted with the application indicates that no reinstatement material from the sea defence wall was sourced from the shoreline in the vicinity of the site and that all reinstatement stone was sourced from a local quarry in Kinvara approximately 12 kilometres to the east.

2.3. Photos of the works undertaken as part of the sea defence wall are depicted in photographs attached.

3.0 Proposed Development

Retention of planning permission is sought for the works undertaken to create the 0.5 metre high and 2 metre wide sea defence wall.

4.0 Planning Authority's Decision

4.1. Decision

4.1.1. Clare County Council issued notification to refuse planning permission for a single reason which is set out in full below.

The subject site is located along the Flaggy Shore, within an area designated as "heritage landscape" where it is the objective of the development plan as outlined in Objective CDP 13.5, that proposals must demonstrate that every effort has been made to reduce the visual impact from site selection through to details of siting and design. It is considered that the development to be retained, by reason of its nature and scale, would constitute a visually intrusive element which would be out of character with its coastal location along Flaggy Shore. Furthermore, it is considered that the subject works, if permitted would result in an ad hoc development of coastal protection measures, and may give rise to erosion of adjoining properties or impact on the dynamics of the coastline at this location. The proposed development would, therefore, seriously injure the visual and residential amenities of the area, would set an undesirable precedent for other such protection works along the coastline and would therefore be contrary to the proper planning and orderly development of the area.

4.2. Documentation Submitted with the Planning Application

4.2.1. The application submitted to the Planning Authority was accompanied by public site notices, planning application form and a letter from Clare County Council which consents to the inclusion of the said lands in the planning application (please see letter submitted with planning application dated 15th November, 2017).

4.2.2. Covering Letter: Also submitted was a covering letter by the applicant which states that in December, 2013 the applicant's house was flooded due to a high tide which caused extensive damage to the dwelling. It was stated to the front of the house, Clare County Council had sea defences which were totally destroyed. The applicant contacted Clare County Council and requested that they replace the sea defences in question. Clare County Council indicated that their employees were too busy with other problems and had no funds to pay for the required works. The applicant therefore decided to fix the problem on the basis that concern was expressed that the house would be lost in the next big storm. The applicant felt that he was legally entitled to employ all reasonable undertakings to protect the property in question. It is stated that the house has not been flooded since this sea defence wall was constructed, notwithstanding the fact that there has been flooding in the local area subsequent to building a wall.

4.2.3. Planning Report: This report sets out the site description and the proposed development and also notes that the site is located within two Natura 2000 sites (the Galway Bay Complex SAC; Site Code 000268, and the Inner Galway Bay SPA; Site Code 004031). The report also sets out the planning history associated with the site (see section below) and outlines the planning policy as it relates to the site. The report makes specific reference to the policies and provisions contained in the (at the time of preparation) Draft National Planning Framework 2017 and the Clare County Development Plan 2017 – 2023.

In conclusion the planning report states that the applicant wishes to regularise the planning status of the flood defence works. The applicant was unaware that he required planning permission to carry out such remedial works which sought to replace the existing defence wall.

An Appropriate Assessment Screening Report notes the site's location within two Natura 2000 sites and details of the qualifying interests associated with the Natura 2000 sites and other Natura 2000 sites within a 15 kilometre radius are set out in the report. However, the report concludes that the proposed development will have no individual or cumulative impacts on any of the European sites having regard to the Conservation Objectives associated with the European sites in question. On this basis it is concluded that there is no requirement for a stage 2 appropriate assessment.

Also submitted is a Flood Risk Assessment. It sets out the project details and the site characteristics as well as background information associated with flood risk. It notes that no strategic flood risk assessment is available for the location of the study area. The report notes that the primary source of flood risk at this study site is the inundation from extreme tidal water levels, including waves. There was a record of flooding in the study area, most notably the flood events which occurred in January, 2014. The study concludes that the site is at risk of flooding and damage in a 1 in 10 year, 1 in 200 year and 1 in 1,000 year storm event. In the absence of the defence structure, the subject site would be at an increased risk of localised flooding and damage. The existing coastal defence structure is localised to the area to the north of the adjacent dwelling. This structure will have a negligible impact on flooding elsewhere.

4.3. Observations

4.3.1. A number of observations were submitted objecting to the proposed development. Among the issues raised in the observations were as follows:

- The applicant has not sufficient legal interest to carry out the works in question.
- The sea defence wall for which retention of permission is sought did not replace an existing sea defence wall but was constructed on a grassy bank famous for its early spring gentians, protected Burren flowers.
- The unauthorised development involved the pouring of many tonnes of concrete and imported stones which is incompatible with the natural beauty of this part of the Wild Atlantic Way.
- The proposed development is inappropriate for the Flaggy Shore as a designated natural heritage landscape.
- The unauthorised wall will have the impact of redirecting any potential flood waters to the public road and neighbouring properties.
- A submission from An Taisce notes that the Board issued a decision to grant leave to appeal for substitute consent. However, the applicant failed to apply for substitute consent within the statutory 12-week period as required by law.

(See planning history below). It is argued that the manner in which retention is being sought, raises serious procedural concerns. It also states that it does not appear that the written consent of the landowner has been submitted as part of the current application.

- A separate observation argues that the applicant is required to obtain requisite statutory licence under the Foreshore Acts for the construction of the wall and therefore Clare County Council has no authority to grant retention for the wall.
- It is argued that the proposal constitutes a dominant visually incongruous structure which has adverse impacts on the visual amenity of the area.
- The proposed structure therefore contravenes a number of objectives in the Clare County Development Plan.
- An observation from the Department of Culture, Heritage and the Gaeltacht notes that the development application lies within designated European sites. The qualifying interests in respect of the Galway Bay Complex Special Area of Conservation (Site Code: 00268) includes the qualifying interests “perineal vegetation of stony banks” and “reefs” which occur in proximity to the development site. It is noted that there is the potential for an adverse impact on the integrity of the European site from hard sea defence structures through interference with natural habitat formation and shifting. The County Council is advised to satisfy itself that the development will not give rise to significant adverse impacts on the Annex 1 coastline habitats and Clare County Council are advised to send for any additional information furnished in respect of the development to the Department before Clare County Council make any final decision on the application.

4.4. Planning Authority Assessment

- 4.4.1. A report from the Environmental Assessment Officer expresses some concerns in relation to the flood risk assessment submitted with the planning application. It suggests that the coastal defence for which retention of planning permission is sought, does not constitute a “like for like replacement” for the previous coastal defence on site. There is no evidence provided to indicate that such a coastal

defence existed prior to the current development. The flood risk assessment provides no scientific analysis as to what level of protection the coastal defence affords the applicant's property. The flood risk assessment provides very limited analysis of the provision of a flow path for overtopping water. It does not provide any analysis in terms of wave energy deflection or the displacement of flood levels elsewhere.

- 4.4.2. With regard to the screening for appropriate assessment, report the Environmental Assessment Officer's notes that the only qualifying interest in close proximity to the subject site associated with the Galway Bay Complex SAC is habitat type 1160 – "large shallow inlets and bays". It is stated that there is no evidence of disturbance, pollution, damage, alteration or fragmentation of this habitat as a result of the works. The otter is also a qualifying interest of this SAC and while no direct effect is anticipated on the species through the construction of the coastal defence wall, the area directly in front of the defence is also being identified as an otter commuting route. However, the proposed works will not impinge on any potential otter routes. It is concluded therefore that there is no potential for significant effects on the integrity of any European sites or their conservation objectives. The Environmental Assessment Officer therefore agrees with the findings of the report.

4.5. **Unsolicited Additional Information Received by Planning Authority.**

- 4.5.1. This unsolicited further information was submitted in response to concerns raised in the observations submitted particularly in relation to the impact of the proposal on the landscape and visual character of the area. The submission argues that the proposal would not have a significant adverse impact on the landscape. The subject development can only be seen from a very limited and localised area outside the immediate application site. Due to the height and the position of the development, views of the wider area have not been interrupted as a result of the works undertaken. The magnitude of change resulting from the construction of the flood defence wall is deemed to be negligible.
- 4.5.2. A separate report on file (see pouch to the front of file) from Steve Lahiffe from Clare County Council notes that the Council have just completed a Coastal Erosion and Flood Risk Management Study for the Flaggy Shore and Aughinish Island. This report identifies the risks and proposals for coastal defence measures. It identifies a

combination of high tides and overtopping as the cause of flooding in the general area including the subject location. It identifies the applicant's property as vulnerable. A number of measures were examined to mitigate the incidents of flooding. These measures have been appraised on their viability and performance. However, it is concluded that the proposed measures were subject to economic appraisal and no justification for the works on an economic basis was found. The 'benefit-to-cost ratio' was found to be below the unity threshold using the maximum figures available for damage to property and infrastructure as a result of a flooding event. It is highly unlikely that Clare County Council or the Office of Public Works will allocate any public funding to a coastal protection scheme at this location.

4.5.3. The report goes on to state that the officer has inspected the current revetment on site and it is smaller than that required for Clare County Council's design standards. Particularly on the eastern side, it states that the current structure has been tested on a number of occasions and has performed relatively well. It is clear that it offers a good level of protection to the dwellinghouse particularly on the western side. There is no evidence of increased erosion on the eastern side of as a result of the introduction of this hard structure. The design has incorporated a pathway for flood water to return to the foreshore following overtopping. It is quite clear that the dwellinghouse is under threat from flooding in a storm event. Due to the site's location within Natura 2000 sites, the environmental aspects of this development will have to be carefully examined. If granted the applicant should be conditioned to repair the current revetment.

4.5.4. The planner's report notes that the Board required the applicant to apply for substitute consent. However, the applicant has sought to regularise the subject development by the submission of a retention application under Section 34 of the Act. Under Section 34(12) a Planning Authority shall refuse to consider an application to retain an unauthorised development where the development would have required, inter alia, an appropriate assessment. Notwithstanding this the Planning Authority have examined the AA Screening Report as submitted with the application and concur with the findings that there is no potential for significant effects on the integrity of any European site. It would appear therefore, notwithstanding the previous application and direction by the Board regarding

substitute consent, the application on the basis of the current information available can be processed and assessed by the Planning Authority.

- 4.5.5. The planner's report goes on to detail all the representations on file.
- 4.5.6. In respect of flood risk, the planner's report makes reference to the report by the coastal engineer and notes that the coastal engineer considers that, while the rock size appears to be adequate, the eastern side of the revetment shows signs of damage particularly in relation to underpinning. Therefore, the adequacy of the defence wall is called into question and its potential deconstruction may lead to further harm. It is noted that the defence is only in place less than four years and is already showing signs of damage.
- 4.5.7. The planner's report also states that the defence wall is located beyond the high water mark and therefore the application is not made on the foreshore.
- 4.5.8. The planner's report notes that the site is located in a heritage landscape where Objective 13.5 applies. It is stated that while the wall is at low level, it does appear to be somewhat out of place with the heritage landscape and detracts from same. The proposal would set a precedent for other similar individual defences along the Flaggy Shore and would alter the nature and visual amenity of the area. For this reason, it is recommended that planning permission be refused for the proposed development.

5.0 Planning History

- 5.1. One relevant history file is attached. Under LS03.LS0020 an application on behalf of the applicant for leave to apply for substitute consent pursuant of Section 177(c) of the Planning and Development Act 2000 was sought for the works in question. The Board in its decision dated 5th January, 2016 decided that (a) an appropriate assessment is required and that (b) exceptional circumstances exist whereby it would be appropriate to permit the opportunity for the regularisation of the development by permitting an application for substitute consent. The Board also required notice to the applicant advising him of this decision and also directed that:
 - (a) The application must be made within 12 weeks of the giving of the notice or such longer period as the Board may on request consider it appropriate.

- (b) That the application for substitute consent shall be in respect of the construction of the subject sea defence wall (rather than the replacement or reinstatement of the sea defence wall).
- (c) The application must include a remedial Natura Impact Statement which shall assess the impact of the subject development on coastal processes, and assess the potential for increased deposition and/or erosion along the coastline as a result of the proposed development.

- 5.2. The Board also concurred with the Senior Planning Inspector in his report that it would be necessary for the applicant to provide evidence of his legal interest in the site on which the subject development took place of if he has no legal interest written evidence of consent to the making of the application for substitute consent by person or persons who have such legal interest.
- 5.3. No such application for substitute consent was submitted for the works undertaken within the 12-week period.

6.0 Grounds of Appeal

- 6.1. The appeal of Clare County Council to issue notification to refuse planning permission was the subject of a first party appeal on behalf of the applicant submitted by McCarthy Keville O'Sullivan Limited. Details of all the documentation submitted with the original application are also appended to the grounds of appeal.
- 6.2. By way of background, the grounds of appeal point out that prior to the construction of the current structure, the shore at this location was afforded protection from both large boulders and sea defence wall which were destroyed by numerous severe storm surges during the winter of 2013/2014. It is noted that the Planning Authority's own coastal engineer recognises the protection afforded by the wall and notes that the dwelling is under threat from future storm events. The current works were carried out following a number of requests for urgent remedial action to Clare County Council. The applicant was unaware that these works required planning permission until an enforcement notice was issued from Clare County Council under UD14-013.

- 6.3. The applicant then sought leave for substitute consent from An Bord Pleanála which was granted by the Board. However, the applicant was unable to submit the application for substitute consent within the 12-week period as stipulated.
- 6.4. Clare County Council have confirmed that “there is no potential for significant effects on the integrity of any European sites or their conservation objectives”. The application and accompanying screening report was reviewed by the Council’s ecological and environmental expert who has built up considerable expertise in the assessment of the impact of coastal flooding defences on designated sites as a result of the considerable number of coastal storm surges and weather events that Clare County Council has to cope with. The submission goes on to outline the:
- site location and description,
 - the proposal,
 - the planning history as it relates to the site and
 - the policy context as it relates to the site.
 - Reference is also made to the Flaggy Shore coastal protection report. It notes that residents along the Flaggy Shore Road are within the flood extent area and are vulnerable to flood hazard. However, it concluded that the coastal protection measures required would not be economically feasible and would not reach the required threshold to have them deemed acceptable for the investment of funds.
- 6.5. Section 7 of the grounds of appeal specifically relate to the local authority assessment and in particular, the Planning Authority’s conclusions that:
- The development is located above the high-water mark and therefore has not been carried out within the foreshore area.
 - The conclusions of the environmental assessment officer that the proposal would not have any significant effects on Natura 2000 sites either directly or indirectly.
 - The coastal engineer’s report which found that the existing structure was found to be constructed in line with the requirements of the Council for such

structures and that the wall in question would benefit the applicant's home in terms of increased protection from flood risk.

- 6.6. Section 8 specifically sets out the grounds of appeal. It notes that the reason for refusal primarily relates to the visual impact arising from the proposal. In relation to the visual impact reference is made to Objective 13.5 of the Clare County Development Plan which requires all proposed developments in heritage landscape must demonstrate that every effort has been made to reduce the visual impact. It is argued that the height and extent of the wall has been minimised so as not to obscure views to or from the shore. The defence wall has been finished using locally sourced materials and have been completed to a comparable and better standard than similar sea defences which have been constructed along the Flaggy Shore. The subject development can only be seen from a very limited and localised area. Accordingly, the magnitude of change and visual effects are low. The wall in question has been largely assimilated into the landscape. While the subject wall has been resulted in a change in the landscape, the introduction of the new feature does not equate to visual harm. Were the roadway and dwellinghouse destroyed in future storms, it is argued that this would have a greater adverse visual impact.
- 6.7. In relation to the issue of flood risk, a flood risk addendum report was submitted with the grounds of appeal. It concludes that there will be negligible impact on flood storage volumes in the area due to the scale of the subject structure relevant to the surrounding shoreline and Galway Bay. It states that the existing coastal defence structure provides a level of localised protection to the adjacent dwellinghouse, the adjacent public road and the public water services located within the road verge. In the absence of this defence structure, the study site would be at increased risk of localised flooding and damage. The structure would have a negligible, if any, impact on flooding and erosion elsewhere.
- 6.8. With regard to the precedent for other such protection works along the coastline, it is argued that all applications must be decided solely upon the merits. It is argued that to refuse planning permission on the grounds of establishing precedent is contrary to Section 34(2)(a) of the Planning and Development Act 2000 which restricted the factors which the Planning Authority can take into account when determining a planning application. Furthermore, the Council's own coastal planning report has

clearly shown that the applicant's property is in extreme danger from coastal flooding.

- 6.9. In conclusion it is argued that the applicant has made a significant investment to provide the sea defence wall which does not impact on the amenity of the area and secures and protects the public roadway from being washed away. If anything, it is argued therefore that the proposal represents a favourable precedent. On the above basis it is recommended that An Bord Pleanála overturn the decision of the Planning Authority and grant planning permission for the proposed development.

7.0 **Appeal Responses**

- 7.1. The Planning Authority submitted the following response to the grounds of appeal.

The Planning Authority is satisfied that the development would not have required a submission of an EIA. The environmental assessment officer concludes that there is no potential for significant effects on the integrity of any European sites or their associated conservation objectives. Therefore, notwithstanding the previous application and direction from the Board, the application on the basis of the current information available, can be processed and assessed by the Planning Authority.

- 7.2. The Planning Authority did not consider the proposal is a 'like for like' proposal. The original wall in place consisted of a small low wall, running along the boundary of the shoreline that can be viewed on Google Maps. The Planning Authority are also of the opinion that the site is not located on the foreshore and is 3.6 metres away from the high-water mark. Furthermore, Clare County Council consent to the inclusion of the said lands in the current planning application. It does however remain unclear as to the applicant's legal interest at this location.

- 7.3. Reference is made to the draft report on coastal erosion and flood risk management for the Flaggy Shore and Aughinish Island. The report has identified this section of the coastline is vulnerable to flooding and there is no objection to the proposal in principle. The coastal engineer has also highlighted that, while the rock size appears adequate, the eastern side of the revetment shows signs of damage particularly in relation to underpinning. It is stated that the development would lead to a precedent for further such developments along the Flaggy Shore which would lead to the

erosion of the visual amenity of the area and would be contrary to Section 7.9.3 of the development plan which relates to raised defences.

- 7.4. While it is noted that the Planning Authority is satisfied that the wall does not lead to significant effects on any European site whether directly or indirectly, it is cognisant of the fact that An Bord Pleanála granted leave to appeal for substitute consent for the identical development whereby the substitute consent application was not applied for by the applicant and the timeframe for same has now expired. In conclusion, it is considered that the proposal constitutes a visually intrusive element and is out of character with the coastal and sensitive location of the Flaggy Shore and would therefore seriously injure the visual and residential amenities of the area and would set an undesirable precedent for other such protection works along the coastline.

8.0 Observations

8.1. Observation by Brendan Conway

- 8.1.1. It is stated that Mr. Conway is a permanent resident at the Flaggy Shore, Newquay, County Clare.
- 8.1.2. It is argued that it is a fundamental requirement of planning law that the applicant must have a requisite legal interest in the land on which he wishes to build. It is argued that he neither owns, nor has the consent of the owner, to build the sea defence structure. It is noted that the planning inspector's report in respect of LS0020 highlights this point. It is also maintained that the lands in question is not part of the local road and therefore is not in the charge of Clare County Council as suggested in the documentation submitted.
- 8.1.3. It is also argued that the works in question are located on the foreshore as defined in legislation. The definition of the foreshore for planning law purposes is set out in the Planning and Development Act 2000 and not the Foreshore Act 1933. It is suggested that planning permission must be obtained in addition to and not in substitution for the provisions of the Foreshore Act. The grounds of appeal suggest that the Coastal Engineer's Report is largely positive towards the structure in terms of its contribution to protect against flooding. However, this is at odds with the planner's report which concludes that the proposal would be contrary to Volume 10(c) of the Clare County

Development Plan which argues against the provision of ad hoc raised structures as sea defences.

- 8.1.4. It is also stated that prior to the works being carried out, there was no reinforced concrete structure anywhere near the appellant's house. The previous structure was no more than a boundary wall where the road margin met the shoreline. It is suggested the purpose of this wall was not as a flood defence but as a boundary wall to support the road margin and prevent it from falling into the shoreline below.
- 8.1.5. It is argued that the structure continues to be a grossly ugly blot on the landscape and is therefore contrary to the visual amenities of the area.
- 8.1.6. Furthermore, the structural integrity of the wall has not been tested in terms of severe storm surges. Any reference therefore to the structure offering a good level of protection to the dwellinghouse is deemed to be premature. It is also stated in the observation that the flood defence wall would not be the type of flood relief abatement measure that would be implemented by the Council or the OPW having regard to the ad hoc nature of the structure.
- 8.1.7. It is also suggested in the grounds of appeal that the Planning Authority cannot consider the issue of precedent in determining the application. This is firmly rejected in the observation and the Planning Authority are entitled to take such issues into consideration when determining the application.

8.2. Observation of the Department of Agriculture, Food and the Marine

- 8.2.1. The submission states that the Department has no observation to make in connection with the application.

9.0 Development Plan Provision

- 9.1. The site is governed by the policies and provisions contained in the Clare County Council Development Plan 2017 – 2023. Volume 10(c) of the development plan specifically relates to Strategic Flood Risk Assessment.
- 9.2. Section 7.9.3 of Volume 10 of the development plan specifically relates to raised defences in response to flood risk. It states that construction of raised defences (i.e. flood walls and embankments) traditionally has been the response to flood risk. However, this is not the preferred option on an ad hoc basis, where defences to

protect the development are not part of a strategically led flood relief scheme. Where a defence scheme is proposed as a means of providing flood defence, the impact of the scheme on the flood risk up and downstream must be assessed and appropriate compensatory storage must be provided.

- 9.3. The subject site is located within a heritage landscape, as is the entire west coast of County Clare.
- 9.4. CPD13.5 states that it is an objective of the development plan to require that all proposed developments in heritage landscape demonstrate that every effort has been made to reduce the visual impact. This must be demonstrated for all aspects of the proposal, from site selection through to details of siting and design. All other relevant provisions of the development plan must be complied with. All proposed developments in these areas will be required to demonstrate
- That sites have been selected to avoid visually prominent locations.
 - Site layouts avail of existing topography and vegetation to minimise visibility from scenic routes, walking trails, public amenities and roads.
 - That the design for buildings and structures minimise the height and visual impact through careful choice of forms, finishes and colour. Any site works should seek to reduce the visual impact of the development.

10.0 Planning Assessment

10.1. Introduction

I have read the entire contents of the file, including all the documentation submitted with the planning application, I have visited the site and its surroundings and have had particular regard to the planning history and specifically the application for leave for substitute consent made under Reg. Ref. LS03.LS0020. I consider the critical issues in determining the current application and appeal before the Board are as follows:

- Planning History and Appropriate Assessment Requirements
- Impact on Heritage Landscape
- Ad Hoc Development of Coastal Protection Measures

- Legal Title
- Foreshore Licence Requirements

10.2. Planning History and Appropriate Assessment Requirements

- 10.2.1. I consider the planning history associated with the subject site to be critically important in determining the current application and appeal. The applicant was granted leave to appeal for substitute consent in respect of the development to be retained on the basis that any application for substitute consent be accompanied by a remedial Natura Impact Statement. The Board also determined that exceptional circumstances exist to permit the regularisation of the development by way of substitute consent.
- 10.2.2. In its decision the Board also determined that the application must be made within 12 weeks (i.e. on or before the 29th March, 2016). No such application for substitute consent was submitted. Furthermore, no reason was proffered on behalf of the applicant as to why the application for substitute consent was not submitted within the required timeline other than merely stating that the applicant was “unable to meet the deadline”.
- 10.2.3. The Board Directive in the case of LS03.LS0020 is clear and unambiguous in my view. The Board Direction required that the application for substitute consent be in respect of the construction of a subject sea defence wall (rather than the replacement of reinstatement of the sea defence wall) and require that the application for substitute consent shall include a “remedial Natura Impact Statement which, inter alia, shall assess the impact of the subject development on coastal processes and assess the potential for increased deposition and/or erosion along the coastline as a result of the subject development”.
- 10.2.4. I note that the applicant submitted an ecological impact assessment and an NIS with the original application that sought leave to apply for substitute consent. This application specifically related to the alleged reinstatement works (as opposed to the construction of a sea defence wall). Furthermore, it did not deal with the issues of potential impact on coastal processes.
- 10.2.5. In relation to the AA screening report submitted with the current application which seeks retention of planning permission, I note that the evaluation under Section 6 of

this report assesses the proposed development in the context of the replacement or reinstatement of the sea defence wall as opposed to the construction of the subject sea defence wall as required in the Board Direction. Table 6.1 sets out the likely impacts of the project on European sites. It states in relation to size and scale “*the works were small scale in nature and reinstate an existing wall*”. In relation to landtake it notes that “*although the works carried out were inside the Galway Bay Complex SAC and the Inner Galway Bay SPA, the development replaced a previously existing flood defence wall*”. In relation to distance from the European site or key features of the site reference is again made to “*however the works included the reinstatement of the previously existing sea defence wall*”. In relation to excavation requirements reference is again made to “*however these works included the reinstatement of a previously existing sea defence wall and were small scale in size*”.

- 10.2.6. The AA screening assessment therefore appears to be predicated upon an assessment of the potential impact on the reinstatement of a sea defence wall as opposed to the construction of a new sea defence wall notwithstanding the fact that the latter was explicitly required under the Board Direction.
- 10.2.7. It also appears that the AA screening report did not meet the Board’s requirements with regard to evaluating the impact of the subject development on coastal processes and in particular assess the potential for increased deposition or erosion along the coastline as a result of the proposed development. There is no comprehensive assessment of these issues in the AA screening report submitted.
- 10.2.8. The AA screening report submitted with the current application for retention does not in my view address the specific issues raised in the Board’s direction regarding the application for leave to apply for substitute consent.
- 10.2.9. While the applicant has not complied with the Board’s requirement to apply for planning permission for substitute consent, I can find nothing under the Planning and Development Acts which specifically preclude the applicant to apply for retention of planning permission for the works undertaken notwithstanding the Board’s direction in relation to the application for leave for substitute consent. Furthermore, I can find no reference in the legislation which precludes the applicant to submit along with the

application for retention of planning permission an AA screening report which concludes that a Stage 2 Appropriate Assessment is not required.

- 10.2.10. However, it is obvious that such a conclusion directly contradicts the opinion expressed in the Board's decision and direction in respect of LS03.LS0020. It does raise some curious procedural issues under the legislation whereby an applicant can apply for leave for substitute consent, and having obtained leave to appeal, can then decide not to submit an application for substitute consent in accordance with the requirements of the Board Direction. But instead at some future date, the applicant can submit an application for retention of planning permission under the requirements of Section 34 of the Act on the premise that the works are not likely to have a significant effect on Natura 2000 sites and therefore conclude that there is no requirement an NIS or rNIS despite the Board coming to a different conclusion.
- 10.2.11. Another important consideration in my opinion which has not been adequately dealt with in the AA screening reports relates to the presence of "perennial vegetation of stony banks" (1,220) and "reefs" (1,170) both of which constitute qualifying interests associated with the Galway Bay Complex SAC. These qualifying interests are in close proximity to the shoreline adjacent to the subject site. In fact it is possible that the shoreline along the Flaggy Shore in parts may constitute a habitat which equates to perennial vegetation of stony banks. It is clear from the submission from the NPWS (9/3/2018) contained on file that there is "potential for impact on the integrity of the European site from hard sea defence structures, through interference with natural habitat formation and shifting".
- 10.2.12. The above statement from the NPWS appears to be in direct conflict with the conclusions set out in the AA screening report. It is important to stress in relation to AA screening, that where likely significant effects cannot be ruled out, a Stage 2 Appropriate Assessment is required. In this instance there is, in the opinion of the NPWS, a potential for an impact on the integrity of the qualifying interests of a European site and for this reason in my opinion a Stage 2 appropriate assessment and a remedial NIS should have been undertaken in accordance with the Board's decision under LS03.LS0020.
- 10.2.13. In conclusion therefore and notwithstanding the conclusions contained in the AA screening report and the conclusions reached by Clare County Council that a Stage

2 Appropriate Assessment is not required, I would disagree with such a conclusion. I consider that the AA screening report submitted failed to properly evaluate the development's impact on coastal processes as required in the Board's decision to grant leave for substitute consent. I consider that there is a reasonable scientific doubt in relation to the potential impacts which could occur on the qualifying interests and conservation objectives associated with the Inner Galway Bay SAC. The applicant in my view is required to submit a remedial NIS in accordance with the Board's decision to grant leave to appeal for substitute consent. As this was a requirement of the Board's previous decision and the applicant has failed to comply in this regard, in such circumstances the Board is in my view, precluded from granting retention of planning permission for the sea defence wall.

10.3. Impact on Heritage Landscape

10.3.1. For the purposes of completing the assessment I propose to briefly evaluate other issues raised on file, including Clare County Council's reasons for refusal. I would generally agree with the arguments set out in the grounds of appeal that the works undertaken as part of the sea defence wall will not significantly or materially impact on the designated heritage landscape area. I acknowledge that Objective 13.5 of the County Development Plan requires that all proposed development in heritage landscapes demonstrate that every effort has been made to reduce the visual impact. The proposed coastal defence works which have been undertaken are not markedly different from the environment that already exists along the shoreline at this location from a visual perspective. While the works undertaken are in excess of 100 metres in length they are a mere 0.5 metres in height and incorporate the same type of boulders and rocks which are ubiquitous along this section of shoreline. The use of poured concrete to consolidate the sea defence is only readily apparent on close visual inspection and is not readily discernible for a pedestrian walking along the roadway. I therefore do not consider it appropriate to refuse planning permission on the grounds that the works undertaken constitute a visually intrusive element which is out of character with the area as suggested in the Planning Authority's reason for refusal.

10.4. Ad Hoc Development of Coastal Protection Measures

10.4.1. The second aspect of Clare County Council's reason to refuse planning permission suggests that the works result in ad hoc development of coastal protection measures. I would generally agree with this assertion having particular regard to the Council's policy set out in Volume 10 of the Clare County Development Plan in relation to raised coastal defences. The policy clearly states that "the construction of raised defences is not the preferred option on an ad hoc basis where such defences to protect the development are not part of a strategically led flood relief scheme". Notwithstanding the comments on file from Clare County Council Coastal Engineer which suggests that the proposal offers a good level of protection to the dwellinghouse, there can be no doubt that the proposal represents the provision of a sea defence system on an ad hoc basis which merely seeks to protect the applicant's dwellinghouse. While of course it is laudable and appropriate that the applicant would seek to protect its house from floods, it would be necessary to ensure in my opinion, that any such works undertaken do not exacerbate or accentuate the potential for flooding elsewhere. In this regard the proposal does not form part of a strategically led flood relief scheme. The coastal engineer's report also notes that the works undertaken are "smaller than required in our design standards". It also notes that some remedial works are required to be carried out particularly in relation to the eastern side of the defence wall.

10.5. Legal Title

10.5.1. There appears to be some ambiguity regarding legal title. It is clear that the lands which were the subject of the works carried out are not under the ownership of the applicant. There is however a letter contained on file (dated 15th November, 2017) and submitted with the application, prepared by Clare County Council which states that the section of land where the works have been undertaken forms part of the public road which is in the charge of Clare County Council and that Clare County Council "hereby consent to the inclusion of the said lands in your planning application". Based on the information contained in this letter, I can only conclude that the owners of the land in question have permitted an application to be made in respect of the said lands and as such the applicant has demonstrated sufficient legal interest on which to make the application.

10.6. Foreshore Licence

10.6.1. The historic 25 inch ordnance survey map which demarcates the limit and extent of the high water mark would appear to indicate that the subject site is indeed located within the foreshore area. The foreshore as defined under Section 224 of the Planning and Development Act includes “lands between the line of the high water of ordinary or medium tides and land within the functional area of the Planning Authority concerned that adjoins the first mentioned land”. Section 225 of the Act states that permission shall be required under Part 3 of the Act on the Foreshore where it would adjoin the functional area of the Planning Authority or any reclaimed land adjoining such functional area. In accordance with the provisions of Section 225 therefore the applicant would be required to obtain planning permission for the works undertaken. Whether or not the applicant would require a licence to develop on the foreshore under the Foreshore Acts of 1933 to 1998 would be the subject of a separate application and would not in my view preclude the Board from granting retention of planning permission for the works undertaken.

11.0 EIA Screening Determination

I note the provisions of Class 10(k) of Part 2 of Schedule 5 of the Planning and Development Regulations which relates to:

“Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, moles, jetties or other sea defence works, where the length of the coastline on which the works would take place would exceed 1 kilometre, but excluding the maintenance and reconstruction of such works are works required for emergency purposes”.

The development undertaken therefore would fall within a class of development for which EIA may be required. However, at 115 metres in length and 0.5 metres in height, I consider that the works undertaken are significantly below the threshold of 1 kilometre and have regard to the limited scale of the proposed development it is reasonable to conclude that the development is not of sufficient size and scale to warrant an the production of an environmental impact assessment.

Furthermore, I note that the Board appear to have reached the same conclusion when adjudicating upon the application for leave to appeal for substitute consent under Section 177C(2)(b) of the Planning and Development Acts 2000 to 2014.

12.0 Conclusion and Recommendation

Arising from my assessment above I consider that the Board should refuse retention of planning permission for the reasons and considerations set out below.

13.0 Reasons and Considerations

On the basis of the information provided with the application and appeal and in the absence of a remedial Natura Impact Statement which was required to accompany any application for substitute consent, the Board cannot be satisfied that the proposed development individually or in combination with other plans and projects would not be likely to have a significant effect on European Site No. 000268 or any other European site, in view of the site's conservation objectives. In such circumstances the Board is precluded from granting retention of planning permission for the development in question.

Paul Caprani,
Senior Planning Inspector.

22nd November, 2018.