



An
Bord
Pleanála

Inspector's Report ABP303045-18.

Development	Retention of agricultural development comprising a detached building 127.8 square metres, which extends to a height of 8.53 metres.
Location	Inis Oírr, Co Galway.
Planning Authority	Galway County Council.
Applicant(s)	Stiofán Seoighe
Type of Application	Application under Section 177E of the Planning and Development Act 2000-2011 for Substitute Consent.
Observer(s)	Department of Culture Heritage & the Gaeltacht
Date of Site Inspection	21 st March 2019
Inspector	Bríd Maxwell.

1.0 Introduction

1.1 This is an application for substitute consent under Section 177E of the Planning and Development Acts 2000-2011 as amended. It follows a decision by An Bord Pleanála, dated 13th September 2018, to grant the applicants leave to apply for substitute consent – ABP Ref LS0031, file attached. The Board's decision under LS0031 directed that the application for substitute consent be accompanied by a remedial Natural Impact Statement (rNIS).

2.0 Site Location and Description

- 2.1. The site is located at Formina Village on the Island of Inis Oírr in County Galway. The site forms part of an agricultural landholding (undefined) and is located within an elevated, open and exposed rural landscape characterised by limestone pavements and dry-stone walls. The site is occupied by an agricultural structure of 127.8 sq.m with a ridge height of 8.53m. The structure has a smooth plaster wall finish and grey rib sheet roof panels including 3 clear lights to both roof planes. A roller shutter door is provided to the western elevation. Internally a stair provides access to partial loft area. On the date of my site visit I noted use of the structure for parking of tractor and storage of agricultural machinery and goods. The site is set back circa 150m from the public roadway and accessed via a narrow access laneway.
- 2.2. The site is located within the Inisheer Island SAC (Site Code 001275).

3.0 The Development

- 2.1 The development subject of the application involves retention of the detached building of 127.8 sq.m, which extends to a height of 8.53m. The structure is positioned on a site of 0.319 hectares and is used by the first party, a farmer, for agricultural activities, specifically as a dry goods store.
- 2.2 The application as submitted includes the following documentation.

- A Remedial Natura Impact Statement rNIS dated October 2017 compiled by Flynn Furney.
- Cover Letter by O Flynn Architects.

4.0 Planning History

07LS 0031 Application for Leave to Apply for Substitute Consent under section 177C(2). By Order dated 13th September 2018, The Board decided to grant leave to apply for substitute consent under section 177D of the Planning and development Act 2000, as amended. From the Board order I note the following:

“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 any submissions and observations received by it in accordance with statutory provisions.

Reasons and Considerations

Having regard to section 177D of the Planning and Development Act, 2000, as amended, and to the conclusions reached by the Board in its determination of the referral under reference number 07RL3496, with respect to the development on the site, the Board is satisfied that an Appropriate Assessment would be required in respect of the development concerned. Furthermore, the Board examined whether or not exceptional circumstances exist such that it would be appropriate to permit the regularisation of the development by permitting leave to make an application for substitute consent.

In this regard, the Board –

Considered that the regularisation of the development would not circumvent the purpose and objectives of the Habitats Directive,

Considered that the applicant could reasonably have had a belief that the development was not unauthorised,

Considered that the ability to carry out an Appropriate Assessment and for the public to participate in such assessments has not been substantially impaired, and

Considered the limited nature of the actual or likely significant effects on the integrity of a European site.

Taking all of the above into consideration, it is considered that exceptional circumstances do exist such that it would be appropriate to permit the opportunity for

the regularisation of the development by permitting an application for substitute consent.”

EN16/030. County’s Enforcement Section issued a warning letter 17 February 2016 in relation to the unauthorised construction of a new building. Enforcement proceedings were initiated on 25th April 2016.

ED16/25 Section 5 declaration request. Galway City Council issued declaration 29th June 2016 stating that the works are not exempted development.

RL 3496 Referral to An Bord Pleanála. The Board Concluded that development would have required an Appropriate assessment and was development and not exempted development.

5.0 Legislative Context.

5.1 Under Section 177K(2) of the Planning and Development Act 2000, as amended, a decision of an application or substitute consent shall be made after consideration of the proper planning and sustainable development of the area, regard being had to

- (a) The provisions of the development plan or any local area plan for the area;
- (b) The provisions of any special amenity area order relating to the area;
- (c) The remedial environmental impact statement, or remedial Natura impact statement, or both of those statements, as the case may, submitted with the application;
- (d) The significant effects on the environment, or on a European site, which have occurred or which are occurring or could reasonably be expected to occur because the development concerned was carried out;
- (e) The report and the opinion of the planning authority under section 177I;
- (f) Any submissions or observations made in accordance with regulations made under section 177N;
- (g) Any report or recommendation prepared in relation to the application by or on behalf of the board, including the report of the persons conducting any oral hearing on behalf of the Board;

- (h) If the area is in a European site or an area prescribed for the purposes of section 10(2)(c), that fact;
- (i) Conditions may be imposed in relation to a grant of permission under section 34(4);
- (j) The matters referred to in section 143;
- (k) The views of a Member state where the member state is notified in accordance with regulations under this Act;
- (l) Any relevant provisions of this Act and regulations made thereunder

S177(3) The conditions referred to in subsection (1) may include –

- (a) one or more than one condition referred to in section 34(4)
- (b) a condition or conditions relating to remediation of all or part of the site on which the development the subject of the grant of substitute consent is situated,
- (c) a condition or conditions requiring a financial contribution in accordance with section 48, or
- (d) a condition or conditions requiring a financial contribution in accordance with a supplementary development contribution scheme under section 49.

Section 177F provides that:

- (1) A remedial environmental impact statement shall contain the following:
 - (a) a statement of the significant effects, if any, on the environment, which have occurred or which are occurring or which can reasonably be expected to occur because the development the subject of the application for substitute consent was carried out;
 - (b) details of –
 - (i) any appropriate remedial measures undertaken or proposed to be undertaken by the applicant for substitute consent to remedy any significant adverse effects on the environment;

- (ii) the period of time within which any proposed remedial measures shall be carried out by or on behalf of the applicant;
- (c) such information as may be prescribed under section 177N
- (d) and may have appended to it, where relevant, and were the applicant may wish to rely upon same;
 - (i) a statement of imperative reasons of overriding public interest;
 - (ii) any compensatory measures being proposed by the applicant.

5.0 Policy Context

5.1. Development Plan

5.1.1 The Galway County Development Plan 2015-2021 refers. Relevant policies and objectives include:

- Natural Heritage & Biodiversity Objectives. Objective NHB1 (Protected Habitats and Species)

“Support the protection of habitats and species listed in the Annexes to and/or covered by the EU Habitats Directive (92/43/EEC) as amended) and the Birds Directive (2009/147/EC), and regularly occurring-migratory birds and their habitats and species protected under the Wildlife Acts 1976-2000 and the Flora Protection Order.”

- NHB2 Biodiversity and Ecological Networks. *“Support the protection and enhancement of biodiversity and ecological connectivity within the plan area, including woodlands, trees, hedgerows, semi-natural grasslands, rivers, streams, natural springs, wetlands, stonewalls, geological and geo-morphological systems, other landscape features and associated wildlife where these form part of the ecological network and/or may be considered as ecological corridors or stepping stones in the context of Article 10 of the Habitats Directive.”*
- Objective LCM1 and Objective LCM2 (Landscape Sensitivity)

Landscape sensitivity rating for all the Islands is 5 – Unique

- An Ghaeltacht Policies and Objectives 10.5
PG1 Preserving and Promoting An Ghaeltacht in the Planning Process

Policy IS 1 – Supporting the Islands

“Support the inhabited islands in County Galway and recognise the special planning and development needs of islands and island communities, particularly access, infrastructure and services.”

- Policy IS 2- Development Proposals on the Islands
 - a) *Support sustainable development proposals that contribute to the long term economic and social development of the islands;*
 - b) *Priority shall be given to development that contributes to retention of the year-round population on the islands, that has a clear and identifiable economic and social benefit and that is compatible with the capacity of the local community to accommodate it;*
 - c) *Ensure that new development of any kind is sympathetic to the individual form and character of the islands landscapes and traditional building patterns.*

5.2. Natural Heritage Designations

The site is within the Inisheer Island SAC (Site Code 001275) which is designated for the following Annex 1 & 2 habitats and species:

Coastal Lagoons (priority habitat)

Reefs

European dry heaths

Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco Brometalia*) (important orchid sites priority habitat)

Lowland hay meadows

Limestone pavements (priority habitat)

5.3 Environmental Impact Assessment Screening

5.3.1 I note that having regard to the scale and nature of the development the likelihood of significant effects on the environment can be excluded for the purposes of EIA.

6.0 Planning Authority Report

6.1 A request issued to Galway County Council inviting submission of a report pursuant to Section 177I of the Planning and Development Acts 2000 as amended, however the planning Authority did not submit a report.

6.2 Observations

6.2.1 Submission from the Department of Culture Heritage and the Gaeltacht makes a number of observations:

- It should be noted that in addition to or irrespective of any planning requirements, European Sites are protected in Ireland under the European Communities (Birds and Natural Habitats) Regulations 2011. The protection extends to the Annex I (priority) habitats and/or Annex II species for which the sites have been designated (or which justified the designation of the site as an SAC in this case.
- The definition of limestone pavement includes exposed rock but also allows for patches of skeletal and deeper soils and pockets of grassland, heath and scrub, to be present in mosaic. The rNIS contains no information regarding the habitat and condition of the access to the site.
- Site specific conservation objectives dated 3/9/14 (Version 1) notes that in addition to limestone pavement the SAC has been selected for the conservation to two Annex 1 grassland sites. The conservation objectives for limestone pavement is to maintain the favourable conservation condition of the habitat within the SAC, as defined by various attributes and targets including area. The RNIS lacks specific analysis with respect to this conservation objective and any relevant attributes. The conclusions of the rNIS are generally that the loss of priority habitat within the European site is in contravention of the Habitats Directive. It is then indicated that removal of the

development would not repair the damage already caused. It should be noted that the rNIS does not reach findings with respect to

1) The implications of the development for the conservation objectives of the SAC and

2) whether the effects, which include lasting losses of a small area of limestone pavement, constitute an adverse effect to the integrity of the SAC.

It may be possible to make good the damage to the site and to the limestone pavement habitat that was present, noting the diversity of the elements and vegetation types that may occur (as above) – for example, removal of the building, followed by careful restoration, could enable rocky areas with mosaics of typical grassland, scrub and heath to (re) develop thereby recreating limestone pavement.

The ruling of the CJEU in relation to case C-258/11 (Galway City Outer Bypass) has application in the carrying out of retrospective appropriate assessment in this case as it involves some loss of an Annex I priority habitat *“Article 6(3) of the Council Directive 92/43/EC of 21st May 1992 on the conservation of natural habitats of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of the site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the full list of sites of ‘community importance in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.”*

7.0 Assessment

7.1. I note the specifics of the application as made which describes the development as “detached building, which extends to a height of 8.53m and which contains a total of 127.8 square metres”. The description does not expressly refer to the access road and entrance which from my review of available mapping and aerial photography is at least in part of recent construction / alteration. I note that this issue was not raised within enforcement notices issued by the Local Authority.

7.2. I propose to address the main issues in this application for substitute consent under the following broad headings:

- Proper Planning & Sustainable Development
- Appropriate Assessment

7.3 Proper Planning and Sustainable Development

7.3.1 In relation to the visual impact of the structure, I note its open and exposed siting within a relatively remote and undeveloped area on the island of Inis Oírr. The development of the structure results in a significant degree of visual obtrusion, particularly when viewed from the south, notwithstanding its limited scale. I note that having regard to the location of the site within a class 5 unique designated sensitive landscape area, the Galway County Development Plan 2015-2021 would specify an approach involving the avoidance of locally obtrusive locations, cognisance to be taken of the designation to ensure no adverse impact on the island or its characteristics. The Development Plan would normally require a visual impact assessment to address environmental and landscape sensitivities.

7.3.2 Having visited the site and reviewed the structure, I consider that the elevated and exposed siting, set back from the public road, orientation, (which is at odds with established pattern) scale and design gives rise to a significant level of visual impact, particularly when viewed from the south. In relation to the size and height of the structure, I note the absence of detailed information in terms of a justification for a structure of this scale and more particularly height, given the intended use as an agricultural dry goods store. I note for instance that details of the applicant's landholding have not been provided. The structure is in my view visually obtrusive, contrary to the special character of the island. In visual terms were the structure to be retained, I consider that modifications including reduction in height /roof bulk might be considered in terms of mitigation to aid integration into the landscape.

7.4 Appropriate Assessment AA

7.4.1 In terms of Screening the following Natura 2000 sites are identified within c15km of the site:

- Inisheer Island SAC (Site Code 001275)
- Inishmaan SAC (Site Code 000212)
- Inishmore SAC (Site Code 000213)
- Inismore SPA (Site Code 004152)
- Black Head Complex SAC (Site Code 000020)
- Cliffs of Moher SPA (Site Code 004005)

7.4.2 The Stage 1 AA screening exercise previously carried out by the Board under 07RL3496 and 07LS0031 which appropriately screened out of the European Sites apart from Inisheer Island SAC on the basis of the limited scale of the development, location on an island and lack of source pathway receptor link in terms of qualifying interests. Thus, the only Natura 2000 site screened in is the Inisheer Island SAC.

7.4.3 The qualifying interests for the Inisheer Island SAC are as follows:

- Coastal lagoons (priority habitat)
- Reefs
- European dry heaths
- Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco Brometalia*) (important orchid sites priority habitat)
- Lowland hay meadows
- Limestone pavements (priority habitat)

7.4.4 The Conservation Objectives (Version 1, 03 September 2014) for each of these qualifying interests seeks to maintain their favourable conservation condition, which is defined by a list of site specific attributes and targets.

7.4.5 As regards Coastal lagoons, Reefs, and European Dry Heaths these qualifying interests can be screened out from further assessment based on distance to this habitat type and lack of identified receptor pathway source linkage.

Three Qualifying interests occurring in the vicinity of the site are as follows:

- Limestone pavements
- Lowland hay meadows
- Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco Brometalia*) (important orchid sites and priority habitats)

7.4.6 Map No 5 of the NPWS Conservation Document notes that the site is within an area comprising potential limestone pavements including associated habitats. The conservation objectives note that semi natural dry grasslands and scrubland facies on calcareous substrates (*Festuco – Brometalia*) occurs in intimate association with other habitats including Limestone Pavements.

7.4.7 I note that the remedial NIS, it is asserted that negligible amount of the semi natural dry grasslands habitat is permanently lost resulting from the construction of the development and associated grounds works. It is asserted that this is not significant in the context of the abundance of this habitat type on Inis Oírr. No quantification of the extent of area is provided.

7.4.8 In relation to limestone pavement, significant effects (the direct loss and degradation of this habitat type) are identified. It is estimated that in addition to the footprint of the development (127.8 sq.m.) ground disturbance associated with the construction of the building resulted in the permanent loss / degradation of approximately 250 metres of limestone pavement resulting in a combined total loss of 378 square metres. The total area of limestone pavement within the Inisheer Island SAC is 290 hectares based on mapping in 2014. Thus, the development has resulted in the permanent loss / degradation of 0.13% of the limestone pavement within Inisheer Island SAC. This habitat loss contravenes the generic objective to maintain a favourable condition for all qualifying interests within the Inisheer Island SAC.

7.4.9 Impacts and mitigation measures are set out in Table 2 of rNIS as follows:

- Further limestone habitat loss - No further removal or damage to limestone pavement to be undertaken.
- Pollution events arising from housing of animals to be mitigated by suitable landspreading of used bedding and manure.
- No hard surfaces to be laid around the building to avoid soils sealing / impeding the soakage of rainfall and alteration to the hydrological regime.
- As regards cumulative / in combination impacts, it is noted that future development on the islands will be subject to appropriate Assessment.

7.4.10 I note the conclusions of the remedial NIS (Section 6.0) which acknowledge that the loss of limestone pavement habitat is in contravention of the EU Habitats Directive. *“Demolition of the development will not remedy the damage to the limestone pavement habitat however the prevention of further habitat loss /degradation of limestone pavement is critical. An attempt to repair the damaged limestone pavement surrounding the development should be undertaken as a compensatory measure for the loss and damage to the habitat.*

Whilst the pre-development integrity of the limestone pavement that has been lost and damaged cannot be restored, sand and gravel brought in during the construction of the development and subsequently spread around the development should be excavated and removed. A source of locally excavated limestone stone, such as an existing field ditch could be used to fill in the excavated areas around the development to restore the ground level. This may possibly create the soil conditions suitable for limestone pavement associated plant species to re-colonise in the long term. Any plans to repair the limestone pavement will require consultation and consent from the NPWS.”

7.4.11 I note the submission of the Department of Culture Heritage and the Gaeltacht, which is critical of the rNIS in a number of respects. Firstly, in relation to the failure to address the habitats and condition of the access to the site. Secondly it is asserted that more detailed assessment is required with regard to the analysis of the specific conservation objectives and relevant attributes. Finally, and significantly it is asserted

that there is a failure to reach findings with respect to the implications of the development for the conservation objectives of the SAC & whether the effects, which include lasting losses of a small area of limestone pavement, constitute an adverse effect on the integrity of the SAC.

7.4.12 The Department submission asserts that:

“It may be possible to make good the damage to the site and to the limestone pavement habitat that was present, noting the diversity of the elements and vegetation types that may occur – for example removal of the building followed by careful restoration, could enable rocky areas with mosaics of typical grassland, scrub and heath to (re) develop thereby recreating limestone pavement.”

Reference is made to the ruling of the CJEU in relation to Case C-258/11 (Galway City Outer Bypass) which it is noted has application in the carrying out of retrospective appropriate assessment in this case.

7.4.13 I consider that the remedial NIS provides insufficient detail in terms of the suggested restoration of limestone pavement related mosaic of habitats surrounding the development as suggested at Section 6.0. I note, in terms of the Board’s role as the competent authority, the limits of discretion and obligation to dispel any reasonable scientific doubt regarding adverse effects on the integrity of the European site, in light of the site’s conservation objectives. I note the suggestion of the Department regarding restoration and recreation of mosaic of habitats associated with limestone pavement habitat, however the approach is unclear.

7.4.14. I would at this point revisit the requirements under Article 6(3) and 6(4) of the Habitats Directive

“Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the

plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.”

7.4.15 Whilst I acknowledge the particulars of the case made on behalf of the first party with regard to the exceptional circumstances pertaining as also accepted by the Board in its determination of LS0031 Application for Leave to Apply for substitute consent, I note that the overall barrier for assessing whether impacts on Natura 2000 sites are acceptable is set at a high level within the legislation. The Board must be satisfied that there are no significant adverse effects on the integrity of the qualifying habitats for the SAC. Given that part of the limestone pavement habitat has effectively been destroyed the development subject of the application has clearly resulted in adverse effect. In this regard the judgement of the European Court of Justice in Case C258/11 Galway City Outer Bypass is noteworthy in terms of its ruling on the interpretation of Article 6 of the Habitats Directive :

“ Para 43 The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types. That would be particularly be so where there is a risk of an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned.

Para 48 Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.”

7.4.16As the development has prevented the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, ie. Limestone Pavement, the development results in adverse effect on integrity. Having regard to the nature of the development derogation procedures of Article 6(4) IROPI do not arise. On this basis I consider that recommendation to refuse substitute consent is the appropriate course.

8.0 Recommendation

8.1. Having regard to the foregoing I recommend refusal for the following reasons and considerations:

9.0 Reasons and Considerations

The Board had regard, inter alia, to the following

- (a) The provisions of the Planning and Development Acts, 2000 to 2011, as amended, and in particular Part XA.
- (b) The provisions of the Galway County Development Plan 2015-2021
- (c) The remedial Natura Impact Statement submitted with the application for substitute consent,
- (d) The submissions observations made in accordance with regulations made under Section 177N
- (e) The report of the Board's Inspector, and

The Nature and scale of the development the subject of this application for substitute consent.

The Board has concluded that the construction of the development has resulted in adverse effect on the integrity of the Inisheer Island SAC (Site Code 001275) by way of the permanent destruction of limestone pavement, priority habitat. Accordingly, the Board is precluded from granting substitute consent.

Bríd Maxwell
Planning Inspector
9th April 2019