



An  
Bord  
Pleanála

## Inspector's Report ABP-304334-19

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| <b>Development</b>                  | Retention of slatted cattle shed with lie back, concrete apron, retaining wall and associated site works. |
| <b>Location</b>                     | Knockmoylan, Knocktopher, Co. Kilkenny.   |
| <b>Planning Authority</b>           | Kilkenny County Council.  |
| <b>Planning Authority Reg. Ref.</b> | 18/376.   |
| <b>Applicant</b>                    | James Murphy.   |
| <b>Type of Application</b>          | Retention.  |
| <b>Planning Authority Decision</b>  | Refuse.   |
| <b>Type of Appeal</b>               | First Party.  |
| <b>Appellant</b>                    | James Murphy.   |
| <b>Observers</b>                    | None.   |
| <b>Date of Site Inspection</b>      | 30 <sup>th</sup> August 2019.   |
| <b>Inspector</b>                    | Dáire McDevitt.   |

## 1.0 Site Location and Description

- 1.1 The appeal site is located in the townland of Knockmoylan in southern Co. Kilkenny. The site forms part of a larger farmyard complex which is bounded by the M9. Access is via an underpass accessed off on minor road on the western side of the M9.
- 1.2 The appeal site, with an area of 0.59ha, forms part of a larger farmyard and associated farm within the Murphy family ownership.
- 1.3 There are intermittent views of the farmyard from the M9 when approaching from the north but for the most part is screened from view by a large earth embankment which separates the Murphy farm from the M9.

## 2.0 Proposed Development

- 2.1 Permission is sought for the retention of the existing slatted cattle shed with lie back (c.379.84sq.m), concrete apron, retaining wall and associated site works on a site with a stated area of c.0.59 hectares where there is an existing farm yard and c. 626.p3 sq.m of agricultural development.

### 2.2 Further Information (11<sup>th</sup> March 2019)

This addressed issues relating to the concerns raised in the TII submission, drainage and boundary treatment.

## 3.0 Planning Authority Decision

### 3.1 Decision

The planning authority decided to **refuse** permission for retention for the following reasons:

- 1. The proposal if approved would create an adverse impact due to its location and nature on the M9 National Road reserve lands where the maximum speed limit applies and would be at variance with national policy in relation to control of frontage development on national roads. The proposed development as constructed encroaches onto motorway lands and has interfaced with a motorway fence without lawful permission. The proposed*

*development would, therefore, be contrary to the operation and safety of the M9 and the proper planning and sustainable development of the area.*

2. *On the basis of the submissions made in connection with the planning application, the Planning Authority is not satisfied that the application has been made by a person who has:*

*(a) Sufficient legal interest in all of the land the subject of the retention permission application to enable the applicant to carry out proposed development,*

*Or*

*(b) The approval of the person who has such legal interest.*

*The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.*

## **3.2 Planning Authority Reports**

### **3.2.1 Planning Report** (02/08/18 and Report signed =01/04/19 by the EP and countersigned 02/04/19 by the SEP).

- Refers to the Further Information request recommended by the Environment Section.
- Refers to the TII submission.
- The applicant was advised at further information stage and that there should be no encroachment of building/structure footprint onto the motorway network boundary. The applicant is not proposing any cattle shed and retaining wall design set back changes to rectify this matter. Furthermore, the revised two no. soakaway proposal locations may be within the lands under the applicants control but the cattle shed building, retaining wall and roof water downpipes the subject of the retention permission are not. The case officer considered this to be a serious breach of planning and would, if permitted, set an undesirable precedent and is contrary to the proper planning and sustainable development of the area.

A recommendation to refuse permission was made having regard to the submission by both the TII and KCC Road Design Section.

- The planner has made reference to an AA Screening exercise in their report, no copy of this on file.

### **3.2.2 Other Technical Reports**

**Environment Section** 31<sup>st</sup> July 2018 & 29<sup>th</sup> March 2019). Following a request for further information to address outstanding issues relating to stormwater management and management of solid waste (dung). No objection was noted subject to conditions.

#### **Road Design Office (28<sup>th</sup> March 2019)**

The following points were highlighted:

- The farm building is constructed on land which is registered to Kilkenny County Council, but under the terms of the CPO acquisition (letter from Kilkenny CC dated 16<sup>th</sup> September 2008) the lands inside the motorway fence-line was to be returned to Mr James Murphy. It is noted that an earthen embankment was constructed obscuring views of the works undertaken.
- In erecting the farm building, Mr Murphy has removed c.30-40m of the post and rail motorway boundary fence and replaced it with a concrete wall which in part is the supporting wall of the farm building but continues as a boundary wall for the farmyard. The post and rail fence finishes flush with the inside face of the wall which means that the wall is erected partially inside the fence-line. It is not permitted to interfere with a motorway fence without lawful permission. This did not occur. A roof water downpipe also discharges directly onto the M9 verge from the said building. The building and structures need to be removed and the original fence-line replaced.
- A drainage soakaway in an area beyond the concrete wall is on lands beyond the concrete wall where the post and rail fence resumes but is stepped out and is recessed into the M9 lands. This area was acquired by Kilkenny County Council under the terms of the CPO. The status of

the recessed fence is unclear and the matter needs to be clarified in the context of any pending transfers of land to finalise the CPO originally agreed as part of the M9.

- No works should be carried out until the ownership of the recessed area is resolved.

### **3.3 Prescribed Bodies**

TII (30<sup>th</sup> July 2018) is summarised as follows:

- The proposal, if approved would create an adverse impact due to its location and nature on the M9 national road where the maximum permitted speed limit applies and would be at variance with national policy in relation to control of frontage development on national roads.
- Insufficient information has been provided in relation to drainage proposals. There should be no discharge to the motorway drainage regime nor any outfall to motorway lands. All drainage shall be accommodated on the landowners property and shall not interfere with motorway lands.
- The site layout plan and building plan details contain insufficient information to fully assess the proposed structure impacts on the adjoining motorway lands. The site layout plan appears to indicate the structure encroaching on motorway lands which is unacceptable. This needs to be clarified.

### **3.4 Submissions**

None.

## **4.0 Planning History**

### **Farmyard:**

None as per planning Register.

### **Landholding:**

**PA Ref. No. 19574** refers to a current application by John Murphy & Ann Marie Phelan for a house.

## **Enforcement**

**ENF 18016.** Warning Letter issued in relation to unauthorised development.  
The current application before the Board is in response to this action.

## **5.0 Policy & Context**

### **5.1 Kilkenny County Development Plan 2014-2020**

The site is in open countryside without a specific designation in the Kilkenny County Development Plan 2014-2020.

**Chapter 6** refers to Rural Development and **Section 6.2.4** sets out policy for agricultural developments.

### **5.2 Project Ireland 2040 - National Planning Framework** Outcome 2 includes an objective to maintain strategic capacity and safety of the national roads network.

### **5.3 Guidelines**

**Spatial Planning and National Roads Guidance for Planning Authorities (2012), Department of Environment, Community and Local Government.**

### **5.4 Natural Heritage Designations**

The nearest designated site is Hugginstown Fen SAC (site code 000404) is c.135m west of the site on the western side of the M9.

### **5.5 EIA Screening**

Having regard to nature of the development comprising the retention of a slatted shed, concrete apron, retaining wall and associated works, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

## **6.0 The Appeal**

An appeal has been received from the applicant which seeks to address the planning authority's reasons for refusal. The grounds of appeal are summarised as follows:

### **6.1 Grounds of Appeal**

#### **6.1.1 Background**

- The site comprises an existing farm complex located immediately to the rear of a high motorway embankment. The motorway embankment was constructed as part of the development of the M9 motorway and designed to buffer noise and block vehicle lights associated with traffic on the motorway from the farm house and farm yard.
- The parcel of land was the subject of a CPO during the construction of the M9. The new section of roadway that facilitates access to the applicant's farmhouse does not follow the line of the roadway initially proposed by the NRA (now TII). As a result the parcel of land acquired from James Murphy was no longer required and it was agreed that it would be transferred back into his ownership (plot ref. 185b104). The agreed transfer of this parcel of land has not happened to date.
- In 2018 the applicant fell ill and his nephew was running the farm in his absence. At this time due to increase herd number a new shed was required and the applicant's nephew was not aware of the issue relating to land transfers, assumed the land was his uncles and erected the shed.
- A warning letter was issued by Kilkenny County Council (16<sup>th</sup> April 2018). Following this an application for retention permission was submitted. It is outlined that the applicant's nephew did not understand the reference to the footprint of the shed allegedly encroaching onto motorway land as he understood it to be built on his uncle's land.
- A request for deed rectification is in motion (solicitor's letter enclosed).

## **6.1.2 Grounds of Appeal:**

### **6.1.2.1 Reason No. 1**

- The proposed development of itself has no adverse impact on the motorway. The building is largely screened by the high motorway embankment and is no closer than other farm buildings which predate the motorway.
- The development does not involve access onto the motorway and the building to be retained does not front onto the motorway. Therefore does not comprise road 'frontage' development as noted in the reason for refusal.
- In terms of building design, there is no light reflective material used which would impair motorway driver's vision and cause distraction to the detriment of road safety. The building, which is mostly screened from passing traffic is typical in design and colour to numerous agricultural buildings along the motorway network and does not represent a traffic hazard.

### **6.1.2.2 Reason No. 2**

- The farm building is constructed on land which is registered to Kilkenny County Council, but under the terms of the CPO acquisition (letter from Kilkenny CC dated 16<sup>th</sup> September 2008) the lands inside the motorway fence line were to be returned to Mr James Murphy (applicant). An earthen embankment was constructed obscuring views of the works undertaken.
- In erecting the farm building c. 30-40m of the post and rail motorway boundary fence was removed and replaced with a concrete wall which in part is the supporting wall of the farm building, but continues as a boundary wall for the farmyard.
- In terms of ownership the applicant is of the view that there is no fundamental issue that can't be resolved by regularising the long



standing agreement of the 16<sup>th</sup> September 2008 to transfer the land back to Mr. Murphy. This has been an oversight by both parties.

- The issues relating to the encroachment of the new boundary wall over the width of the fence and post (4"-6"). The wall is stated to have been constructed on the assumption that the boundary was a shared boundary. The encroachment onto land still in the registered ownership of Kilkenny County Council is a legal matter. A Deed of Rectification has been requested and, at the time of lodging the appeal the legal advisors for Kilkenny County Council had sought more information and were discussing the matter with Mr. Murphy.
  - Legal ownership aside, the applicant's planning consultant argues that from a planning point of view, the replacement of a section of post and wire fence with a section of wall largely obscured by a motorway embankment is not objectionable and mirrors similar situations along motorways.
  - The second reason for refusal is considered unreasonable and invalid. The issue of ownership came to light after the application was lodged through a submission by TII. The Planning Authority did not raise it as part of their further information request.
  - As stated throughout the grounds of appeal the issue of landownership is in hand and correspondence has been included to support this.

#### **6.1.2.3 Documentation Included:**

- Letter from Kilkenny County Council to John Crowley Consulting (Re: James Murphy) dated 16<sup>th</sup> September 2008. This sets out 'lands to be returned'. Plot 185b.104 is included in the list of plots to be fully returned at the conclusion of the scheme. Map Attached.
- Copy of Section 152 Warning Letter, dated 16<sup>th</sup> April 2018 (Enf. Ref. ENF18016) relating to:

- Alleged unauthorised agricultural shed with encroachment of building footprint onto the motorway network boundary.
- Alleged unauthorised removal of a section of the motorway network boundary fence.
- Alleged unauthorised construction of a drainage outfall to the rear of the shed which out falls onto motorway lands.

## **6.2 Planning Authority Response**

The Board is referred to the reports on the planning application from Roads Design, Planning, Environment and Transport Infrastructure Ireland (TII).

Point of note include:

- For the purposes of clarity, the vesting order transferring the relevant lands the subject of the original CPO to Kilkenny County Council was only completed in autumn 2018. It is only after that process has been completed can Kilkenny County Council commence the procedures necessary to transfer lands back in accordance with any original agreement. That process has commenced with the preparation of drawings, etc.
- As referred to in the original report the key issue is the removal of the motorway fence and encroachment of structures onto what was to always remain as national motorway lands. In those circumstances the Road Design Section of Kilkenny County Council and TII was obliged to recommend refusal. Notwithstanding the information supplied by the applicant this is still considered the case.

## **6.3 Observations**

None.

## **6.4 Prescribed Bodies Response**

**TII (22<sup>nd</sup> May 2019)**

The submission reiterates the points made in the TII submission to the Planning Authority dated 30<sup>th</sup> July 2018. In addition the following points of note were included:

- TII seeks to ensure that official national objectives are not undermined and that the anticipated benefits of investment made in the national road network are not jeopardised. Reference to the National Strategic Outcome 2 of the NPF which includes the objective to maintain the strategic capacity and safety of the national roads network.
- It is also an investment priority of the NDP 2018-2027, to ensure that the extensive transport networks which have been greatly enhanced over the last two decades, are maintained to a high level to ensure quality levels of service, accessibility and connectivity to transport users.
- Having regard to the foregoing, TII consider that the subject development proposal conflicts with the objective to safeguard the strategic function of the national road network and to safeguard the investment made in the transport network to ensure quality levels of service, accessibility and connectivity to transport users.
- TII concurs with the decision of the Council to refuse planning permission for the subject application and the TIIs position remains as set out in the Authority's initial submissions on the planning application.

## **6.5 Further Responses**

### **6.5.1 Applicants response to the TII submission of the 21<sup>st</sup> June 2019 (date stamped 8<sup>th</sup> July 2019)**

This reiterates issues raised previously in relation to lands transfers and mapping issues. No objection to a landscaping condition if the Board consider this necessary. Copy of Solicitors letter relating to the rectification of mapping is enclosed.

### **6.5.2 Planning Authority response to the TII submission (date stamped 9<sup>th</sup> July 2019)**

No further comments to make.

### **6.5.3 TII Submission of the 8<sup>th</sup> July 2019 in relation to the PA Response**

Reiterates that permission should be refused as the development conflict with the objective to safeguard the strategic function of the national road network and to safeguard the investment made in the transport network to ensure quality levels of service, accessibility and connectivity to transport users.

## **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. Appropriate Assessment also needs to be considered. The issues are addressed under the following headings;

- Legal Interest in the land.
- Impact on the M9
- Appropriate Assessment

### **7.1 Legal interest in the land**

7.1.1 The Planning Authority refused permission on the premise that the applicant has not clearly demonstrated that he has sufficient interest in the land in order to carry out works on same or has not obtained the consent of the relevant landowners for same.

7.1.2 Based on this premise, the applicant would require the consent of the TII and Kilkenny County Council to carry out any works or lodge a planning application respectively in relation to the portion of affected land/structures which are the subject of legal proceeding between Kilkenny CC and Mr J Murphy. I note that Kilkenny County Council was satisfied with the validity of the application and proceeded to assess it.

7.1.3 The issue of land ownership is a civil matter. In this instance the track of land which is the subject of dispute was part of a CPO by TII (formerly NRA) as part of the M9 CPO acquisition process. There is correspondence on file from Kilkenny County Council dated 16<sup>th</sup> September 2008 acknowledging that the track of land was to be returned to Mr J.Murphy. This transfer has not occurred

to date. Based on the correspondence on file and the available information it would appear that the issue of transferring plots of land back to the applicant did not arise until 2018 when the structures which are the subject of this application were erected. I note that Kilkenny County Council in its submission on the appeal has acknowledge that the process of transferring the relevant plot of land to the applicant in accordance with the original agreements has commenced.

7.1.4 The erection of the development which is the subject of this appeal required the removal of c. 30-40m of post and rail motorway boundary fence and its partial replacement with a boundary wall, part of which is a supporting wall for the farm building to be retained. The wall in question according to the TII is partially erected inside the fence line and therefore encroaches on motorway reservation lands, furthermore the removal of the fence was done without the consent of the TII. Issues relating to a downpipe and drainage has also been raised. This again relates to a track of land which is the subject of legal proceedings.

7.1.5 The question of landownership is a legal matter and outside the scope of a planning permission. In this context, I would draw attention to Section 34 (13) of the Planning and Development Act 2000 (as amended) which reads '*A person shall not be entitled solely by reason of a permission under this section to carry out development*'.

## **7.2 Impact on the M9**

7.2.1 The TII have raised concerns relating to the potential that the development by virtue of being road frontage development would have an adverse impact on the motorway and that works were carried out without consent. I note that no access is proposed off the M9 and the structures form part of an established farmyard at this location. The wall in question is set back from the edge of the hard shoulder of the M9 where maximum speed limits of 120km apply. An earthen mound separates the wall from this carriageway. I do not consider in this instance that the development which is the subject of this application is at variance with national policy in relation to control of frontage development on

national roads. The issue of land encroachment and third party authorisations is a legal matter.

7.2.2 I do not consider that the development to be retained would conflict with national policy to safeguard the strategic function of the national road network.

### **7.3 Appropriate Assessment**

7.3.1 There are no watercourses in the immediate vicinity of the site. While a leaking slatted tank could potentially contaminate groundwater, I would consider that if it is built and managed in accordance with its certification and Department of Agriculture regulations and NSAI standards, then there would be no effect on the conservation objectives of the SAC. In this regard I note the separation distances to Hugginstown Fen SAC (site code 000404) on the western side of the M9.

7.3.2 Having regard to the nature and scale of the development and its location relative to European sites, I consider it is reasonable to conclude that on the basis of the information on the file, which I consider adequate in order to issue a screening determination, that the development to be retained, individually or in combination with other plans or projects would not be likely to have a significant effect on European Site No. 000404 or any other European site, in view of the site's Conservation Objectives. A Stage 2 Appropriate Assessment (and submission of a NIS) is not therefore required.

## **8.0 Recommendation**

I recommend that retention permission be granted for the reasons and considerations and subject to the conditions set out below.

## **9.0 Reasons and Considerations**

Having regard to the scale and nature of the development, it is considered that, subject to compliance with the conditions set out below, the development to be retained would not seriously injure the amenities of the area and would not interfere with the strategic function of the national road network. The development to be retained and the proposed development would, therefore,

be in accordance with the proper planning and sustainable development of the area.

## 10.0 Conditions

1. The development shall be carried out, completed and retained in accordance with the plans and particulars lodged with the application, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

**Reason:** In the interest of clarity.

2. Water supply and drainage arrangements for the site, including disposal of surface and soiled water, shall comply with the requirements of the planning authority for such works and services. In this regard-
  - (a) uncontaminated surface water run-off shall be disposed of directly in a sealed system, and
  - (b) all soiled waters shall be directed to a storage tank.

Drainage details shall be submitted to and agreed in writing with the planning authority, prior to commencement of development.

**Reason:** In the interest of environmental protection and public health.

3. The slatted shed shall be used only in strict accordance with a management schedule which shall be submitted to and agreed in writing with the planning authority, prior to commencement of development. The management schedule shall be in accordance with the European Union (Good Agricultural Practice for Protection of Waters) (Amendment) Regulations, 2017, as amended, and shall provide at least for the following:
  - (1) Details of the number and types of animals to be housed.
  - (2) The arrangements for the collection, storage and disposal of slurry.

(3) Arrangements for the cleansing of the buildings and structures (including the public road, where relevant).

**Reason:** In order to avoid pollution and to protect residential amenity.

4. All foul effluent and slurry generated by the proposed development and in the farmyard shall be conveyed through properly constructed channels to the proposed and existing storage facilities and no effluent of slurry shall discharge or be allowed to discharge to any stream, river or watercourse, or to the public road.

**Reason:** In the interest of public health.

5. All uncontaminated roof water from buildings and clean yard water shall be separately collected and discharged in a sealed system to existing drains, streams or adequate soak pits and shall not discharge or be allowed to discharge to the foul eluent drains, foul effluent and slurry storage tanks or to the public road.

**Reason:** In order to ensure that the capacity of effluent and storage tanks is reserved for their specific purposes.

6. Slurry generated by the proposed development shall be disposed of by spreading on land, or by other means acceptable in writing to the planning authority. The location, rate and time of spreading (including prohibited times for spreading) and the buffer zones to be applied shall be in accordance with the requirements of the European Union (Good Agricultural Practice for Protection of Waters) (Amendment) Regulations, 2017, as amended.

**Reason:** To ensure the satisfactory disposal of waste material, in the interest of amenity, public health and to prevent pollution of watercourses.

7. A minimum of 16 weeks storage shall be provided in the underground storage tanks. Prior to commencement of development, details showing how it is intended to comply with this requirement shall be submitted to and agreed in writing with the planning authority.



**Reason:** In the interest of environmental protection and public health.

8. The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme.

**Reason:** It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.

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Dáire McDevitt

Planning Inspector  
13<sup>th</sup> September 2019