



An  
Bord  
Pleanála

## Inspector's Report ABP-305247-19

### Development

Workshop, siting and adaption of container as domestic non-habitable outbuilding, underground stormwater storage tank, concrete hardstanding base, stone garden feature, and conversion & extension of house.

### Location

'Riverview', Sliguff, Bagnelstown, Co. Carlow.

### Planning Authority

Carlow County Council

### Applicant(s)

Alan Alyyan

### Type of Application

Leave to Apply for Substitute Consent under Section 177(C)(2)(b) of the Planning and Development Act, 2000, as amended.

### Date of Site Inspection

21<sup>st</sup> May, 2020

### Inspector

Robert Speer

## **1.0 Introduction:**

- 1.1. This is an application for leave to apply for substitute consent under Section 177C(2)(b) of the Planning and Development Act, 2000, as inserted by Section 57 of the Planning and Development (Amendment) Act, 2010, with respect to various development, including (but not limited to) the construction of a workshop, the siting and conversion of a storage container for use as a domestic non-habitable outbuilding, and the installation of an underground stormwater storage tank with associated pipework, carried out at an existing residential property. The applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

## **2.0 Site Location and Description**

- 2.1. The application site is located in the rural townland of Sliguff, Co. Carlow, approximately 3.0km south of Bagnelstown and 3.5km east of the village of Paulstown, where it occupies a backland position to the rear (west) of a series of houses situated alongside the R705 Regional Road on lands bounded by the River Barrow to the immediate west.
- 2.2. The wider site encompasses an extensive lawn / grassed area with a single-storey bungalow (which has been extended to include a two-storey garage with overhead accommodation) situated on the brow of an incline which falls sharply towards the River Barrow on travelling westwards. The lower and westernmost extent of the site area (bounded by the river and an associated blueway) includes a private marina, which provides for access by boat to the river, an expanse of hardstanding, and a newly constructed workshop as well as a former storage container which has been adapted for use as non-habitable accommodation (i.e. a home office / gymnasium) ancillary to the main house. Whilst the workshop is of a blockwork construction and remains to be rendered, the container-type structure is set into an embankment and has been finished to a very high standard in stonework / masonry with a series of steps providing access to a roof-top garden and seating area. The garden area between the marina and the dwelling house has been extensively landscaped whilst the remainder of the site is interspersed with a variety of items including a stone

garden feature, a concrete hardstanding area / base, assorted seating, stone-edged flowerbeds, and tree planting etc.

### 3.0 The Development

3.1. The development in question comprises the following:

- The construction of a workshop and associated works.
- The siting and adaption of a storage container for use as a domestic non-habitable outbuilding and associated works.
- The installation of an underground stormwater storage tank, pump and associated pipework.
- The installation of a concrete hardstanding base (this is described as originally comprising a base for a new shed, however, as that shed is no longer proposed for completion, the intention is to now use the base for domestic purposes such as barbeques etc.).
- The erection of a stone garden feature.
- The conversion and extension of a double garage attached to the dwelling house to use as a sun / living room.
- The extension of the dwelling house to provide for a two-storey garage and guest accommodation (the habitable space in question, which is understood to comprise part of the ground floor area and the entirety of the first floor space, encompasses a self-contained unit with bathroom and kitchen facilities that has seemingly been used as overnight accommodation for paying guests).

3.2. In reference to the stone garden feature, although this item was not mentioned previously in enforcement correspondence (nor was it seemingly raised at a meeting with the Planning Authority on 21<sup>st</sup> June, 2019), the applicant is amenable to its inclusion in any application for substitute consent should the Board consider it necessary. For the purposes of clarity, I propose to include this feature in my consideration of the subject application for leave to apply for substitute consent.

3.3. With regard to the use of the habitable space housed within the two-storey garage construction, the applicant has advised the Planning Authority that although this area was previously let as overnight guest accommodation, this practice has since ceased and will not recommence until such time as either substitute consent has been obtained (to allow the applicant to avail of an exemption) or, if necessary, a grant of planning permission has issued. In the interests of completeness, I propose to consider this development in my assessment of the subject application.

## 4.0 Planning History

### 4.1. On Site:

#### 4.1.1. *Planning Applications*

PA Ref. No. 90/61 / ABP Ref. No. PL1/5/81330. Was granted on appeal on 12<sup>th</sup> July, 1990 permitting David and Margaret Lamb permission for the erection of a bungalow and septic tank.

PA Ref. No. 96/89. Was granted on 13<sup>th</sup> August, 1991 permitting David & Margaret Lamb permission for the retention of a double garage and porch and the conversion of a garage to a bedroom.

PA Ref. No. 96/309. Was granted on 19<sup>th</sup> November, 1996 permitting D & M Lambe permission for a marina facility with workshop and lift-bridge.

PA Ref. No. 06447. Was refused on 22<sup>nd</sup> February, 2007 refusing Ballinagore Developments Ltd. permission for a holiday home development consisting of the following: 1) 19 No. timber holidays dwellings, 2) effluent treatment system, 3) change of use of existing residential building to bar and restaurant facilities, 4) erection of two tennis courts, 5) permission to upgrade existing marina, and all associated site works.

PA Ref. No. 18/163. Application by Alan Alyyan for permission for the retention and completion of a domestic garage and a workshop with a storage facility. This application was deemed to be invalid.

PA Ref. No. 18/231. Application by Alan Alyyan for permission for the retention and completion of a domestic garage and a workshop with a storage facility. This application was deemed to be invalid.

PA Ref. No. 18/482. Application by Alan Alyyan for permission for the retention of (1) storage sheds, (2) lorry container (built into hillside) and (3) hardstanding area and all associated site works. This application was returned to the applicant in accordance with Section 34(12B) of the Planning and Development Act, 2000, as amended, on the basis that having conducted a 'Stage 1' screening exercise for the purposes of appropriate assessment, it had been determined by the Planning Authority that, in the absence of mitigation measures, the potential for significant effects on the River Barrow and River Nore Special Area of Conservation consequent on the development, in combination with other existing developments on site and within the residential property and landholding to which they form part, could not be ruled out i.e. the unauthorised development in question would have required Appropriate Assessment.

*N.B.* In accordance with Section 34(12) of the Act, a planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required an appropriate assessment.

PA Ref. No. 19/24. Application by Alan Alyyan for permission for the retention of (1) garage with loft and car port, (2) garden feature walls, and all associated site works. This application was returned to the applicant in accordance with Section 34(12B) of the Planning and Development Act, 2000, as amended, on the basis that having conducted a 'Stage 1' screening exercise for the purposes of appropriate assessment, it had been determined by the Planning Authority that, in the absence of mitigation measures, the potential for significant effects on the River Barrow and River Nore Special Area of Conservation consequent on the development, in combination with other existing developments on site and within the residential property and landholding to which they form part, could not be ruled out i.e. the unauthorised development in question would have required Appropriate Assessment.

4.1.2. *Section 5 Referrals:*

PA Ref. No. 5/19/01. Determined that the construction of a shed / barn for use as a machinery store for agricultural purposes (i.e. to store a tractor, trailer & mini-digger etc.) constituted development which was not exempted development.

4.1.3. *Enforcement History:*

PA Ref. No. UD17/52. On 20<sup>th</sup> November, 2017 a Warning Letter was issued by the Planning Authority which stated that the following unauthorised development may have been carried out on site:

- Unauthorised construction of a domestic shed
- Unauthorised excavation works to facilitate drainage trenches
- Unauthorised excavation works to facilitate an unauthorised workshop
- Unauthorised installation of twin chambered tanks along the boundaries of the River Barrow and River Nore, a Special Area of Conservation
- Unauthorised discharge of surface water to the River Barrow and River Nore SAC without a Discharge Licence.

On 17<sup>th</sup> January, 2018 an Enforcement Notice was issued by the Planning Authority with respect to the following unauthorised works:

- Construction of a domestic shed
- Excavation works to facilitate drainage trenches
- Excavation works to facilitate an unauthorised workshop
- Installation of twin chambered tanks along the boundaries of the River Barrow and River Nore, a Special Area of Conservation
- Discharge of surface water to the River Barrow and River Nore SAC without a Discharge Licence.

This notice required the cessation of all unauthorised works and also necessitated the following steps to be taken within 5 No. weeks of the date of the service of the notice:

- Remove / demolish all unauthorised structures

- Removal of all demolition waste off site by a licensed construction waste contractor
- To reinstate the site to its previous condition.

## 4.2. Natural Heritage Designations

4.2.1. The following natural heritage designations are located in the general vicinity of the proposed development site:

- The westernmost extent of the application site encroaches into the River Barrow and River Nore Special Area of Conservation (Site Code: 002162).

## 5.0 Legislative Context

5.1. Section 177C of the Planning and Development Act, 2000, as amended, states *inter alia*:

(1) A person who has carried out a development referred to in subsection (2), or the owner or occupier of the land as appropriate, to whom no notice has been given under section 177B, may apply to the Board for leave to apply for substitute consent in respect of the development.

(2) A development in relation to which an applicant may make an application referred to in subsection (1) is a development which has been carried out where an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required, and in respect of which –

- b) the applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

5.2. Section 177D of the Act proceeds to state the following (by way of summation):

(1) the Board shall only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact

assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied –

- b) that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

- a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;
- d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;
- e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;
- g) such other matters as the Board considers relevant.

## **6.0 The Applicant's Case for Leave for Substitute Consent**

6.1. By way of background, the applicant has set out a detailed planning history of the subject lands and his communications with the Planning Authority as regards the developments in question.



6.2. The applicant is seeking leave to apply for substitute consent pursuant to Part XA of the Planning and Development Act, 2000, as amended, and, more specifically, under the provisions of Section 177C(2)(b). In this respect, Section 177D(2) of the Act sets out those matters to which the Board should have regard in considering whether exceptional circumstances exist and thus the applicant has put forward a case for leave to apply for substitute consent by submitting the following in response to the provisions of Sections 177D(2)(a) - (f) of the Act:

6.2.1. *Whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive:*

- It is not considered that any of the works carried out have given rise to any pollution, nuisance, or other significant effects.
- There are no discharges from the structures to be retained to the River Barrow and River Nore Special Area of Conservation. The sanitary ware in the extension to the north of the dwelling house connects to the existing on-site wastewater treatment system which shows no signs of malfunctioning and is maintained by the applicant. The only discharge from the other unauthorised structures is stormwater runoff which, in the case of the house, discharges to ground away from the SAC. Surface water from the unauthorised structures within the SAC discharges to a contained attenuation tank and is pumped back to the dwelling house for re-use.
- The nature and scale of the developments in question do not require Environmental Impact Assessment. None of the works fall within Parts 1 or 2 of Schedule 5 of the Planning and Development Regulations, 2001, as amended, and, therefore, an Environmental Impact Assessment Report would not have been required (it is further submitted that the Planning Authority concurs with this view).
- An Appropriate Assessment Screening Report was submitted to the Planning Authority which found, at the time, that the structures within and next to the Special Area of Conservation did not give rise to any individual or cumulative impacts and, therefore, had not adversely affected the integrity of any

European site. No works have been carried out since that report was prepared, save for making the structures watertight.

- When the Appropriate Assessment Screening Report was prepared, the unauthorised works at the house had not been deemed by the Planning Authority to require substitute consent.
- If leave to apply for substitute consent is granted, a Remedial Natura Impact Statement will be prepared which will address all the works undertaken and the ongoing maintenance of the structures.

*6.2.2. Whether the applicant had or could reasonably have had a belief that the development was not unauthorised:*

- The applicant and his family had no previous dealings with planning matters and were entirely reliant on the advice of a development consultant, building contractor and landscape consultant engaged in 2017.
- With regard to the house extensions, the applicant was advised that it was permissible to convert an existing garage into living accommodation, however, he now acknowledges that this advice was incorrect as the original garage had already been converted to a bedroom c. 1996 whilst the conversion works also included for an extension. The applicant was also advised that the construction of the new garage and guest accommodation constituted exempted development as its footprint was less than 40m<sup>2</sup>, however, it is similarly accepted that this advice was incorrect as the works were located to the side of the house and exceeded 40m<sup>2</sup> in area.
- With respect to the re-use of the shipping container, the applicant was advised that this was permissible as it was not a permanent structure. It is accepted that this advice was incorrect and that, in any event, the container had been inserted into an excavation and was embedded into an embankment thereby making a permanent structure.
- The applicant was advised that the workshop had previously been permitted as part of the marina development and that the regulations allowed for the provision of domestic workshops to the rear of a dwelling house.

- The applicant did not question the advice he received from his agents who were all in agreement with one another. It was only when contacted by the Planning Authority that he queried this advice despite continuing to be told that the Council was incorrect in its stance.
- The applicant instructed a development consultant to lodge an application for permission for retention (as had been requested by the Planning Authority) and it was only after the second planning application had been invalidated that a second opinion was sought when the services of surveyors, engineers and a planning consultant were commissioned.

6.2.3. *Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired:*

- Any application for substitute consent will be accompanied by a Remedial Natura Impact Statement and will be subject to full public participation.
- It is not considered that the ability to carry out a Remedial Natura Impact Statement has been compromised. It is further anticipated that any such RNIS will find that no adverse impacts arose during the works and are not arising at present (based on the Appropriate Assessment Screening Report which was prepared after the works next to the river were largely complete). This Remedial Natura Impact Statement can address the future management, maintenance, and use of the unauthorised developments once regulated.

6.2.4. *The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development:*

- The potential for significant impacts on the qualifying interests of the Special Area of Conservation will be considered in an updated 'Appropriate Assessment Screening' and the Remedial Natura Impact Statement.
- It is reiterated that the Appropriate Assessment Report (dated March, 2018) found that the works had not adversely impacted on the Special Area of

Conservation. It is further submitted that the works to the house will be found not to have had any adverse impacts.

- The Remedial Natura Impact Statement can address the future management, maintenance and use of the unauthorised developments once regulated.

6.2.5. *The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated:*

- It is considered the unauthorised developments have not caused any significant impacts on the environment or the integrity of a European site and, therefore, no remedial measures are anticipated.

6.2.6. *Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development:*

- When the applicant acquired the dwelling house and marina, both were planning compliant (as confirmed by the accompanying site history).
- With respect to the Planning Authority's reference in correspondence to unauthorised excavations to facilitate the workshop, the applicant has since clarified, to the apparent satisfaction of the Council, that the roadway from the house to the marina and the area of hardstanding between the unauthorised shed and the marina were developed in conjunction with the marina. The Planning Authority has also been advised that the area on which the workshop now sits was excavated by the previous owner in accordance with an earlier grant of planning permission.
- When the applicant acquired the property, the steel container was positioned within the excavated area and had been used by the previous owner to store equipment associated with the marina. The ground around the steel container was completely overgrown and was only cleared by the applicant.
- The applicant has only weeded, cleared and resurfaced (with additional stone) the access road to the marina, the excavated area on which the workshop now sits, and the area of hardstanding between the workshop and the marina (as shown in the accompanying aerial imagery).

6.3. In the concluding remarks of the applicant's submission, it has been acknowledged that certain unauthorised works were carried out on foot of poor advice, however, it

has also been submitted that none of those works adversely impacted on the qualifying interests of the Special Area of Conservation and thus the applicant should be afforded the opportunity to apply for substitute consent with an updated appropriate assessment screening and a Remedial Natura Impact Statement. It is further asserted that no remedial actions will be required and that the ongoing maintenance of the structures will have no adverse impacts on the SAC.

6.4. The application for leave has also been accompanied by a number of attachments, including a '*Screening Report to inform [the] Appropriate Assessment Process*' dated 7<sup>th</sup> March, 2018 and prepared by JRE Environmental with regard to the development of a workshop building on the subject site / lands (Section 3.1 of the report expressly states that it only relates to the (partially constructed) workshop building located to the southwest of the dwelling house and to the south of the marina). This screening exercise has concluded that there is no likelihood of significant adverse effects arising from the workshop development on the adjacent River Barrow and River Nore Special Area of Conservation, whether direct, indirect, or in-combination, to the conservation objectives of the habitats or species for which it was designated, either alone or in combination with other plans or projects, and thus it does not require Stage 2 Appropriate Assessment and the submission of a Natura Impact Statement.

#### 6.5. **Planning Authority Response**

- The Planning Authority has no objection to the making of the application for leave to apply for substitute consent.
- By way of background, the Board is advised that the developments on site were initially the subject of enforcement action by the Planning Authority in 2017 (Ref. No. UD17/52) with both a Warning Letter and an Enforcement Notice having been issued. Two planning applications (PA Ref. Nos. 18/482 & 19/24) were subsequently lodged seeking permission for retention, however, each of these was returned to the applicant pursuant to Section 34(12) of the Planning and Development Act, 2000, as amended. In both instances, having screened the development for the purposes of appropriate assessment, it was determined that if an application for permission had been made prior to the commencement of development, then the applications would have

necessitated Stage 2: Appropriate Assessment (i.e. the submission of a Natura Impact Statement). These decisions were informed by the Planning Authority's 'Stage 1: Appropriate Assessment Screening Reports' which concluded that, in the absence of mitigation measures, the potential for significant effects on the River Barrow and River Nore Special Area of Conservation, in combination with other existing developments on site and within the residential property and landholding to which they form part, could not be ruled out. Both the construction and operational stages of the developments were considered in this regard as well as the precautionary principle and the 'source-pathway-receptor' model of risk assessment.

## 6.6. Observations

None.

## 6.7. Further Responses

### 6.7.1. Response of the Applicant to Section 132 Notification:

This submission comprises a series of site location maps and a site layout plan (Drg. No. 18-189-001) accompanied by a covering letter dated 25<sup>th</sup> October, 2019 and was received by the Board on 1<sup>st</sup> November, 2019.

### 6.7.2. Response of the Planning Authority to Circulation of the Applicant's Submission:

No further observations.

## 7.0 Assessment

### 7.1. Introduction:

#### 7.1.1. Scope of Application:

The Board has been requested to confirm that an application for Substitute Consent can be sought in respect of the developments in question.

#### 7.1.2. Tests for Leave:

Section 177D(1)(b) of the Planning and Development Act specifies that the Board can only grant leave to apply for substitute consent in respect of an application under

Section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment was or is required, in respect of the development concerned and where it is further satisfied that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

Section 177D(2) provides that in considering whether exceptional circumstances exist the Board must have regard to the following:

- a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;
- d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;
- e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;
- g) such other matters as the Board considers relevant

## **7.2. Qualifying Development:**

### **7.2.1. Environmental Impact Assessment (EIA):**

Having regard to the classes of development specified in Schedule 5 of the Planning and Development Regulations, 2001, as amended, and to the scale and nature of the development that has taken place, I am satisfied that there is no requirement for

either environmental impact assessment or a determination as to whether an environmental impact assessment is required and that the likelihood of significant effects on the environment can be excluded for the purposes of EIA.

#### 7.2.2. **Appropriate Assessment (AA):**

In consideration of the screening of the development for the purposes of appropriate assessment, at the outset, I would advise the Board of the following:

- The 'Screening Report to inform [the] Appropriate Assessment Process' dated 7<sup>th</sup> March, 2018 and submitted with the subject application for leave to apply for substitute consent (and which also accompanied PA Ref. Nos. 18/163 & 18/482) is limited in its scope and relates solely to the then partially constructed workshop building.
- The screening exercise undertaken by the Planning Authority in respect of PA Ref. No. 18/482, which informed its decision to return that application in accordance with Section 34(12B) of the Planning and Development Act, 2000, as amended, relates to the retention of (1) storage sheds, (2) lorry container (built into hillside) and (3) hardstanding area, and all associated site works, however, it states that the potential for significant effects on the River Barrow and River Nore Special Area of Conservation in combination with other existing developments on site, and within the residential property and landholding to which they form part, could not be ruled out.
- The screening exercise undertaken by the Planning Authority in respect of PA Ref. No. 19/24, which informed its decision to return that application in accordance with Section 34(12B) of the Planning and Development Act, 2000, as amended, relates to the retention of (1) garage with loft and car port, (2) garden feature walls, and all associated site works, however, it states that the potential for significant effects on the River Barrow and River Nore Special Area of Conservation in combination with other existing developments on site, and within the residential property and landholding to which they form part, could not be ruled out.
- Neither PA Ref. No. 18/482 nor PA Ref. No 19/24 included for the retention of the existing concrete hardstanding base (which is proposed to be used for domestic purposes such as barbeques etc) or the retention of the conversion



and extension of the double garage attached to the dwelling house to use as a sun / living room. With respect to the underground stormwater storage tank, pump and associated pipework, it would be reasonable to accept that these items formed part of the 'associated site works' for which retention had been sought under PA Ref. No. 18/482.

- The subject application for leave has not been accompanied by a Stage 1: Screening Assessment which relates to the entirety of the development in question nor does it include a Remedial Natura Impact Assessment.
- The '*Screening for Appropriate Assessment & Natura Impact Statement Report*' dated 3<sup>rd</sup> July, 2019 and prepared by The RPS Group on behalf of Carlow County Council (in addition to the associated '*Outline Construction Environmental Management Plan*') with respect to PA Ref. No. UD17/52 relates to the decommissioning of the following unauthorised works:
  - The underground pipeline and twin-chambered tank and associated discharge to the River Barrow and River Nore SAC.
  - The foundations for a proposed domestic shed located near the southern site boundary in an area of grassland.
  - The partially completed building / unauthorised workshop located at the south-western corner of the site within the SAC.

This exercise is limited to certain specified 'proposed' decommissioning works and does not include a Remedial Natura Impact Statement as regards the retention of any aspect of the wider development.

7.2.3. It is apparent from the foregoing that the various individual elements of the unauthorised development which forms the subject matter of this application have not been screened in their totality (as a single project) as regards their potential likelihood to give rise to significant effects on any European Site in view of the site's conservation objectives by either the applicant or the Planning Authority. Rather, the various components of the subject development have been screened on a somewhat piecemeal basis, although cognisance has been taken of the potential for likely in-combination effects with other development on site and within the residential property and landholding to which they form part. Therefore, whilst I would concur

with certain aspects of the aforementioned screening exercises, in the interests of completeness, it is necessary to elaborate on the screening of the proposal for the purposes of appropriate assessment.

7.2.4. In accordance with the advice contained in the *'Appropriate Assessment of Plans and Projects in Ireland, Guidance for Planning Authorities'* published by the Department of Environment, Heritage and Local Government, it can be established that the following 2 No. European Sites are within a 15km radius of the proposed works:

- The River Barrow and River Nore Special Area of Conservation (Site Code: 002162)
- The Blackstairs Mountains Special Area of Conservation (Site Code: 000770)

7.2.5. In addition to the foregoing, using the precautionary principle, I would also advise the Board that I have given consideration to Natura 2000 sites located outside of the defined 15km radius, however, as no potential pathways for any significant impacts can be established, it can be concluded that there is no potential for any impacts on those Natura 2000 sites located outside the 15km radius.

7.2.6. In terms of assessing the potential direct, indirect or secondary impacts of the proposed development on the conservation objectives of the aforementioned Natura 2000 sites, it should be noted at the outset that the existing workshop, storage container (which has been converted to use as a domestic non-habitable outbuilding), underground stormwater storage tank & pump, and the associated works, are located either partially within or immediately adjacent to the River Barrow and River Nore Special Area of Conservation. The remaining elements of the project under consideration (i.e. the concrete hardstanding base used for domestic purposes such as barbeques etc, the stone garden feature, the extension to the side of the dwelling house to provide for a two-storey garage and guest accommodation, and the conversion and extension of the former double garage attached to the dwelling house to use as a sun / living room, are situated more distant from that European site.

7.2.7. Having reviewed the available information, in light of the nature and scale of the development in question, the specifics of the site location relative to the identified Natura 2000 sites, and having regard to the site topography, in my opinion, by

employing the source / pathway / receptor model of risk assessment, it can be determined that specific consideration needs to be given to the likelihood of the development having an adverse effect on the conservation objectives of the River Barrow and River Nore Special Area of Conservation on the basis that aspects of the development have involved the carrying out of excavation and construction works both within and in close proximity to that European site (resulting in a direct loss of habitat and the potential release of sediments and other contaminants to the riverine system) whilst the wider site area drains towards the River Barrow i.e. it will be necessary to consider the potential implications for down-gradient protected habitats & species arising from any potential deterioration in water quality attributable to the development given the hydrological connectivity between the application site and the European site.

7.2.8. With respect to the Blackstairs Mountains Special Area of Conservation, in light of the separation distances involved and as no potential pathways for any significant impacts can be established (noting that the application site is located upstream of that SAC), it can be concluded that there is no potential for any impact on that Natura 2000 site.

7.2.9. Accordingly, the screening exercise for the purposes of appropriate assessment should be focused on the following:

European Site: The River Barrow and River Nore Special Area of Conservation (Site Code: 002162)

*Distance & Direction:* Within the confines of the project site.

*Qualifying Interests:* [1016] Desmoulin's whorl snail *Vertigo moulinsiana*  
[1029] Freshwater pearl mussel *Margaritifera margaritifera*  
[1092] White-clawed crayfish *Austropotamobius pallipes*  
[1095] Sea lamprey *Petromyzon marinus*  
[1096] Brook lamprey *Lampetra planeri*  
[1099] River lamprey *Lampetra fluviatilis*  
[1103] Twaite shad *Alosa fallax*

[1106] Atlantic salmon (*Salmo salar*) (only in fresh water)

[1130] Estuaries

[1140] Mudflats and sandflats not covered by seawater at low tide

[1310] Salicornia and other annuals colonizing mud and sand

[1330] Atlantic salt meadows (*Glauco-Puccinellietalia maritimae*)

[1355] Otter *Lutra lutra*

[1410] Mediterranean salt meadows (*Juncetalia maritimi*)

[1421] Killarney fern *Trichomanes speciosum*

[1990] Nore freshwater pearl mussel *Margaritifera durrovensis*

[3260] Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitriche-Batrachion* vegetation

[4030] European dry heaths

[6430] Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels

[7220] \*Petrifying springs with tufa formation (*Cratoneurion*)

[91A0] Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles

[91E0] \*Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*)

**Conservation Objectives:** To maintain or restore the favourable conservation condition of the species and habitats for which the SAC has been selected.

(The status of the freshwater pearl mussel (*Margaritifera margaritifera*) as a qualifying Annex II species for the River Barrow and River Nore SAC is currently under review. The outcome of this review will determine whether a site-specific conservation objective is set for this species. The Nore freshwater pearl mussel (*Margaritifera durrovensis*) remains a qualifying species for this SAC).

7.2.10. With respect to the construction of the workshop, the installation of the underground stormwater storage tank & pump, and the completion of associated site development works (including the installation of pipework & assorted drainage excavations), whilst the carrying out of these works has resulted in a direct loss of habitat within the SAC, given the nature of the site location, and having regard to the habitats mapping appended to the applicable Conservation Objectives, it is reasonable to conclude that the works in question have not resulted in the direct loss or reduction of any of the marine or coastal habitats identified as qualifying interests of the Natura 2000 site i.e. 'Estuaries', 'Mudflats and sandflats not covered by seawater at low tide', 'Salicornia and other annuals colonizing mud and sand', 'Atlantic salt meadows (*Glauco-Puccinellietalia maritima*)', & 'Mediterranean salt meadows (*Juncetalia maritimi*)'. Similarly, from a review of historical aerial imagery, the characteristics of the affected area (and surrounding lands) prior to the works having been carried out as submitted by the applicant, and noting the distribution of 'Petrifying springs with tufa formation (*Cratoneurion*)', 'Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles', & 'Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*)' as identified in Map 6 of the Conservation Objectives, I would consider it reasonable to conclude that the habitats formerly present within the subject lands were unlikely to correspond with any of the foregoing qualifying interests. Furthermore, given the site context, it can be reasonably said that the subject lands would not correspond with the selected habitat of 'European dry heaths'. It also seems unlikely that the development in question would have resulted in the direct loss of any habitat comprising 'Watercourses of plain to montane levels with the *Ranunculion fluitantis* and *Callitricho-Batrachion* vegetation' given the siting of the works outside of the river body, or 'Hydrophilous tall herb

fringe communities of plains and of the montane to alpine levels' as supported by the 'Screening for Appropriate Assessment & Natura Impact Statement Report' prepared by The RPS Group on behalf of Carlow County Council which states that the footprint of the developments concerned do not support any habitats for which the SAC has been designated. However, whilst it may be reasonable to conclude that the developments in question have not impacted on those protected habitats identified as qualifying interests of the SAC, it cannot be discounted that habitats suitable for use by non-volant qualifying species, with particular reference to otter, were not directly impacted or otherwise disturbed by the construction and excavation works.

- 7.2.11. In addition to the foregoing, following consideration of the 'source-pathway-receptor' model, there is a potential hydrological connection between the wider development and the SAC by way of ground and surface water flows towards the River Barrow which borders the project site. In light of this hydrological connection, the potential for indirect effects arises with the need to maintain good water quality forming a key element of the conservation objectives, with particular reference to lamprey species, white-clawed crayfish, twaite shad, Atlantic salmon, & freshwater pearl mussel (noting that the project site is outside the catchment for the Nore freshwater pearl mussel). For example, with respect to Atlantic salmon, poor water quality can affect this species by reducing the available dissolved oxygen levels in the water as well as impacting on the quality of spawning habitats due to nutrient and sediment impacts.
- 7.2.12. Furthermore, in the absence of any mitigation, potentially negative impacts on downstream water quality could have arose during the works stage of the development due to the pollution of watercourses through the release of suspended solids / sediment or the discharge of hydrocarbons / other contaminants. By applying the precautionary principle, concerns would also arise as regards the potential for the discharge of contaminated waters as a result of the use of the workshop (and any storage of potentially pollutant materials) given its location relative to the floodplain.
- 7.2.13. Therefore, the likelihood of the construction of the workshop, the installation of the underground stormwater storage tank & pump, and the completion of associated site development works (including the installation of pipework & assorted drainage

excavations), adversely affecting the aforementioned Natura 2000 site cannot be objectively ruled out.

7.2.14. With regard to the storage container which has been converted to use as a domestic non-habitable outbuilding, due to the location of these works outside of the SAC, its construction will not have directly impacted on the European Site (such as by way of habitat loss or reduction). However, similar to the existing workshop etc., by employing the source / pathway / receptor model of risk assessment, in the absence of any mitigation measures, the potential for the pollution of the River Barrow through the release of suspended solids / sediment or the discharge of hydrocarbons / other contaminants during the construction phase of the development cannot be objectively ruled out.

7.2.15. At this point, it is my opinion that a distinction can be drawn between the aforementioned items and the following elements:

- The installation of the concrete hardstanding base
- The erection of the stone garden feature
- The conversion and extension of the double garage attached to the dwelling house to use as a sun / living room
- The extension of the dwelling house to provide for a two-storey garage and guest accommodation.

7.2.16. In relation to the concrete hardstanding base, although this was originally proposed to accommodate the construction of a shed, the applicant has indicated that it is now his intention to use it for domestic purposes such as barbeques etc. In this regard, it should be noted that whilst the Planning Authority has previously raised concerns that foul effluent and roof water runoff from the shed was to have been drained via pipework installed alongside the southern site boundary to the twin-chambered tank beside the river (with the foul water to be pumped to the existing wastewater treatment system serving the dwelling house and surface water runoff to be discharged to the river), the current use of the construction in question does not generate any foul water. Furthermore, in the absence of any additional drainage works to purposively direct surface water runoff from the base (as opposed to the shed roof as originally proposed), it would appear that the likelihood is that uncontaminated surface water runoff simply discharges to ground in the vicinity of

the base. Whilst it is possible that some runoff may drain via the existing pipework to the underground stormwater storage tank, I would suggest that the uncontaminated nature of the runoff and the minor volumes involved are unlikely to give rise to any significant impact on the SAC. Accordingly, having regard to the limited nature and scale of this aspect of the development, the separation distance of approximately 95m between it and the SAC, and the absence of any more purposive drainage arrangement between it and the SAC, it is my opinion that no appropriate assessment issues arise and that the development would not be likely to have a significant effect, either individually or in combination with other plans or projects, on any Natura 2000 site.

- 7.2.17. In respect of the stone garden feature, given the minor nature and scale of its construction and usage, its physical separation from the Special Area of Conservation, and the absence of any definable pathway between it and the European site (noting the absence of any drainage connection), I am similarly satisfied that this element of the development would not be likely to have a significant effect, either individually or in combination with other plans or projects, on any Natura 2000 site.
- 7.2.18. The remaining aspects of the development which require consideration comprise the conversion and extension of the double garage to use as a sun / living room and the further extension of the dwelling house to provide for a two-storey garage and guest accommodation. With regard to the former, I am inclined to suggest that in view of the minor nature and scale of the works involved in the conversion and extension of the former garage, the siting and separation of the development from the SAC, and the physical barrier partially created between the works area and the SAC due to the presence of the existing dwelling house, this element of the development would not be likely to have a significant effect, either individually or in combination with other plans or projects, on any Natura 2000 site. Similarly, given the limited scale and nature of the two-storey garage and the associated guest accommodation, its separation from the SAC, the submission by the applicant that stormwater runoff from the house discharges to ground away from the SAC, and as foul water / effluent from the kitchen and sanitary facilities within the self-contained guest accommodation discharges to the existing on-site wastewater treatment system which seemingly shows no signs of malfunctioning and is maintained by the



applicant, I am satisfied that it is reasonable to conclude that this element of the development would not be likely to have a significant effect, either individually or in combination with other plans or projects, on any Natura 2000 site.

*7.2.19. Concluding Remarks:*

- 7.2.20. With regard to the construction of the workshop, the siting and adaption of a storage container for use as a domestic non-habitable outbuilding, the installation of the underground stormwater storage tank & pump, and the completion of associated site development works (including the installation of pipework & assorted drainage excavations), following consideration of the 'source-pathway-receptor' model, with particular reference to the potential for negative impacts on down-gradient water quality as a result of the release of sediment / silt or other contaminants during the construction of these elements of the development, it is my opinion that, in accordance with the precautionary principle, it is not possible to rule out the likelihood of those developments having adversely impacted on a Natura 2000 site and that particular consideration needs to be given to the likelihood of the proposal to have an adverse effect on the conservation objectives of the River Barrow and River Nore Special Area of Conservation. Accordingly, it is reasonable to conclude on the basis of the information available, which I consider adequate in order to issue a screening determination, that the likelihood of the proposed development adversely affecting the aforementioned Natura 2000 site cannot be objectively ruled out and therefore it is necessary to proceed to 'Appropriate Assessment (Stage 2)'.
- 7.2.21. In relation to the installation of the concrete hardstanding base, the erection of the stone garden feature, the conversion and extension of the double garage attached to the dwelling house to use as a sun / living room, and the extension of the dwelling house to provide for a two-storey garage and guest accommodation, it is reasonable to conclude on the basis of the information available, which I consider adequate in order to issue a screening determination, that the aforementioned developments, individually or in combination with other plans or projects would not be likely to have a significant effect on the River Barrow and River Nore Special Area of Conservation, or any other European site, in view of the site's Conservation Objectives, and a Stage 2 Appropriate Assessment (and submission of a NIS) is not therefore required. Accordingly, the preliminary requirements in respect of Section

177D(1) of the Act have not been met in that Appropriate Assessment is not considered to be required in respect of the foregoing.

**7.3. Exceptional Circumstances:**

7.3.1. Having established that Stage 2 Appropriate Assessment would only be required with respect to the construction of the workshop, the siting and adaption of a storage container for use as a domestic non-habitable outbuilding, the installation of the underground stormwater storage tank & pump, and the completion of associated site development works, I propose to limit my consideration of the applicable tests set down in Section 177D(2) of the Act to those developments as follows.

**7.3.2. Whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive:**

In my opinion, the regularisation of the development concerned would not circumvent the purpose and objectives of either the EIA Directive or the Habitats Directive in that the application does not concern a class of development specified in Schedule 5 of the Planning and Development Regulations, 2001, as amended, whilst any application for substitute consent would be required to be accompanied by a Natura Impact Statement prepared in accordance with the Habitats Directive with any such application and statement having to be evaluated and determined on its merits.

**7.3.3. Whether the applicant had or could reasonably have had a belief that the development was not unauthorised:**

The applicant has asserted that he had no previous dealings with planning matters and was entirely reliant on the advice of third parties as regards the construction of the development in question and, therefore, I would accept that there may be some merit to the applicant's initial belief that he would have been entitled to construct the workshop building on the basis that such a structure had previously been granted permission as part of the marina development and as the regulations allowed for the provision of domestic sheds etc. to the rear of a dwelling house. Similarly, I am amenable to the applicant's supposition that the re-use of the shipping container was permissible on the basis that it was not a 'permanent' structure and also by reference to the exempted development provisions of the regulations.

However, it is apparent from a review of the enforcement file (PA Ref. No. UD17/52) that during the course of a site inspection on 10<sup>th</sup> November, 2017 by officials of the Planning Authority, the applicant was informed in person that the works he had already undertaken at that stage (which included the installation of the underground stormwater storage tank and associated excavation and drainage works) required planning permission and were being carried out within the River Barrow and River Nore Special Area of Conservation. It was also then noted by the Planning Authority that the contactor on site had indicated that the underground tank was to serve a workshop building proposed to be constructed within the south-western corner of the site. Notably, the applicant was advised at this time by the officials of the Planning Authority to cease any further works and is he recorded as having understood what he was being told.

On 20<sup>th</sup> November, 2017 a Warning Letter was subsequently issued by the Planning Authority which stated that various unauthorised development may have been carried out on site, including the excavation works to facilitate drainage trenches, excavation works to facilitate the construction of a workshop, the installation of twin chambered tanks along the boundaries of the River Barrow and River Nore, a Special Area of Conservation, and the discharge of surface water to the River Barrow and River Nore SAC without a Discharge Licence.

At this point, given the formal nature of the Warning Letter and the implications arising from the issuing of same, in my opinion, it would be reasonable to expect that the applicant would have been aware of the Planning Authority's concerns that the works in question constituted unauthorised development. However, it would appear that notwithstanding the Warning Letter, works progressed on site with an internal memo within the Planning Authority dated 4<sup>th</sup> December, 2017 referencing the carrying out of further excavation works and the construction of a concrete pad / apron substructure to facilitate the erection of a workshop comprising a steel container located to the rear of the site.

Notably, in further correspondence issued by the Planning Authority on 20<sup>th</sup> December, 2017 (seemingly in response to correspondence received from the applicant as regards the Warning Letter) the applicant seems to have been expressly advised that '*the works to date on site are unauthorised development and should cease until planning is regularised*'.

At this point, the applicant had been informed in writing twice of the Planning Authority's concerns as regards the unauthorised development, however, in an internal memo dated 15<sup>th</sup> January, 2018 it is recorded that on 11<sup>th</sup> January, 2018 it was observed that further extensive works (supported by photographs) had been carried out on site during the intervening period since the service of the Warning Letter, including the substantial construction of the existing workshop building within the SAC. Accordingly, it was recommended that enforcement action commence which culminated in the service of an Enforcement Notice by the Planning Authority on 17<sup>th</sup> January, 2018 as regards specified unauthorised works (including those the subject of this application), which required the cessation of all unauthorised works and the following steps to be undertaken within 5 No. weeks of the date of the service of the notice:

- Remove / demolish all unauthorised structures
- Removal of all demolition waste off site by a licensed construction waste contractor
- To reinstate the site to its previous condition.

Therefore, it is apparent from the foregoing that despite having been informed on a number of occasions in writing of the Planning Authority's concerns as regards unauthorised development, works continued on site before the applicant claims to have ceased works on 31<sup>st</sup> January 2018 (I would have some reservations in this regard given that my own observations would suggest that a considerable amount of further work was carried out on site post 11<sup>th</sup> January, 2018 as regards the completion of the storage container for use as a domestic non-habitable outbuilding and the roofing of the workshop. Indeed, the applicant has conceded in the subject application that works were carried out with a view to making the structures watertight).

While the applicant has made efforts to regularise the subject development by way of engagement with the Planning Authority and through the lodgement of a series of (invalid) planning applications seeking permission for retention, and although he has submitted that he did query his advisors when contacted by the Planning Authority, he only sought a second opinion when he commissioned the services of surveyors, engineers and a planning consultant after his second planning application had been

invalidated (on 14<sup>th</sup> June, 2018). In my opinion, it is inconceivable that the applicant had or could reasonably have had a belief that the development in question was not unauthorised despite having been informed of such by the Planning Authority both on site and in writing, including by way of a Warning Letter. Indeed, notwithstanding the issuing of the Warning Letter, it is apparent from the evidence on file that works continued on site and only ceased in large part once the Enforcement Notice was issued at which time the principle construction works were largely complete.

**7.3.4. Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired:**

Having regard to the planning history of the site and the fact that the applicant has applied for permission for retention on several occasions under which third party observations could have been submitted, I do not consider that the provision for public participation in such an assessment has been substantially impaired and as such it could be subject to public scrutiny in the event of an application for substitute consent.

**7.3.5. The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development:**

Given the absence of a Remedial Natura Impact Statement pertinent to the development as has been constructed on site and its future use, I am not in a position to determine the likelihood of actual or likely effects on the environment in the absence of a detailed and robust assessment of the potential and likely anticipated impacts and the mitigation measures proposed to address these impacts. However, it is possible that in the absence of mitigation, the construction of the development could have had a negative impact on water quality considerations within the SAC through the release of sediment / silt or other contaminants during the works stage, although I would concede that there is no evidence on file to suggest that any such adverse effects arose.

**7.3.6. The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated:**

It is not possible to assess the extent to which adverse effects on the integrity of the European site can be remediated without a comprehensive and robust assessment of a Remedial Natura Impact Statement pertinent to the development in question.

It is not the purpose of the current assessment to evaluate the planning and environmental merits of the application. The current application is restricted to deliberating on whether or not there is sufficient merit in granting leave to apply for substitute consent.

**7.3.7. Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development:**

There is no evidence to suggest that the applicant has engaged in any unauthorised development other than that which is the subject of this application and I note that the enforcement file pertaining to same is on-going.

**7.3.8. Such other matters as the Board considers relevant:**

Nothing occurs under this heading.

## **8.0 Recommendation**

- 8.1. It is recommended that the application for leave to apply for substitute consent be refused under section 177D(4) of the Planning and Development Act, 2000, as amended, based on the reasons and considerations below.

## **9.0 Reasons and Considerations**

1. Having regard to section 177D of the Planning and Development Act, 2000, as amended, the Board considered that Appropriate Assessment was not and is not required in respect of the following development:
  - The installation of the concrete hardstanding base;
  - The erection of the stone garden feature;
  - The conversion and extension of the double garage attached to the dwelling house to use as a sun / living room; and

- The extension of the dwelling house to provide for a two-storey garage and guest accommodation;

due to the scale and nature of the development to be retained and was not likely, either by itself or in combination with other plans and projects to have had, or would not be likely to have an adverse impact on a European Site, and, in particular, on the River Barrow and River Nore cSAC, in view of its conservation objectives. In these circumstances, a need for substitute consent does not apply.

2. Having regard to section 177D of the Planning and Development Act, 2000, as amended, the Board considered that Appropriate Assessment is required in respect of the following development.

- The construction of the workshop and associated works.
- The siting and adaption of the storage container for use as a domestic non-habitable outbuilding and associated works.
- The installation of the underground stormwater storage tank, pump and associated pipework.

Furthermore, the Board examined whether or not exceptional circumstances exist such that it would be appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

In this regard, the Board:

- a) considered that the regularisation of the development would not circumvent the purpose and objectives of the Habitats Directive;
- b) considered that the applicant could not reasonably have had a belief that the development was not unauthorised;
- c) considered that the ability to carry out an Appropriate Assessment and for the public to participate in such an Assessment had not been substantially impaired;
- d) considered that adverse effects on the integrity of a European site could not be ruled out at an initial stage having regard to the absence

of a detailed and robust assessment of the impacts in respect of development already undertaken at the subject site;

- e) considered that the extent to which adverse effects on the integrity of a European site could not be remediated without a comprehensive and robust assessment of a Remedial Natura Impact Statement pertinent to the development in question; and
- f) considered that there was no evidence to suggest that the applicant had carried out any unauthorised development other than that which is the subject of this application.

Taking all of the above into consideration, the Board concluded that exceptional circumstances do not exist such that it would be appropriate to permit the opportunity for the regularisation of the development by permitting an application for substitute consent, and decided to refuse leave to make an application for substitute consent.

---

Robert Speer  
Planning Inspector

26<sup>th</sup> June, 2020