



An
Bord
Pleanála

Inspector's Report

ABP-306153-19

Development	Leave to apply for substitute consent for a house.
Location	An Formna, Inis Oírr, Aran Island, Co. Galway.
Planning Authority	Galway County Council
Planning Authority Reg. Ref.	
Applicant(s)	Olive Faherty
Type of Application	Leave to apply for substitute consent
Date of Site Inspection	No site inspection
Inspector	Colin McBride

1.0 Introduction

- 1.1 ABP-306153-19 relates to a request to seek Leave to Apply for Substitute Consent under the provisions of Part XA of the Planning and Development Act, 2000 (as amended) and specifically under the provisions of Section 177C(2)(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. The development in this instance relates to a dwelling at An Formna, Inis Oirr, Co. Galway. Given the current situation regarding Covid-19 no site inspection was possible. Notwithstanding such I would consider the nature of the application and information on file is such that the application can be assessed without a site inspection. If the Board are of the view that such is not the case then a decision should be deferred pending a time when a site inspection can be facilitated.

2.0 Site Location and Description

- 2.1. The appeal site is located on the island of Inisheer. The site is located to the south of the airport and to the west of An Loch Mhor. The appeal site is occupied by an existing dwelling located on the eastern side of the public road. There is an existing dwelling on the site immediately to the north. To the east and south are agricultural lands.

3.0 Planning History

- 3.1. 19/236: Permission sought for retention for the change of house type which has been built on this site (which is a different dwelling to the development which was previously granted permission under planning register reference number 15/1313, along with the retention of all associated site development works. The structure which has been erected on this land contains a gross floor space of 244sqm. The application also proposes to change the fenestration pattern on the front façade of the house. The application is accompanied by a Natura Impact Statement. Gross floor space of work to be retained: 244.0 sqm. The application was deemed incomplete on the basis that the application requires a full Appropriate Assessment.

- 3.2. 18/1822: Permission sought for retention for the change of house type which has been built on this site (which is a different dwelling to the development which was previously granted permission under Planning Register Ref. No. 15/1313) along with the retention of all associated site development works. The structure which has been erected on this land contains a gross floor space of 244 sqm.) The application also proposes to change the fenestration pattern on the façade of the house. Gross floor space of work to be retained 244.0sqm. The application was deemed incomplete on the basis that the application requires a full Appropriate Assessment.
- 3.3 17/1265: Permission refused for retention of development that will consist of: (a) the retention of the change of house type (which is a change of house type from the previously granted permission (granted under planning register reference number 15/1313); (b) completion of minor internal works and (c) all associated site development works (gross floor space 244sqm). Permission refused on the basis that the design and scale of the proposal would interfere adversely with landscape character/visual amenity, would be contrary the preservation of the rural environment and contravene development objectives of the County Development Plan and set an undesirable precedent.
- 3.4 15/1313: Permission granted for (a) Proposed new 4 bedroom house (b) Envirocare mechanical aeration system or similar approved system and percolation area (c) All associated site development works. Gross floor space of proposed works: 136.64sqm.
- 3.5 14/366: Permission sought for (a) Proposed new 4 bedroom house (b) Envirocare mechanical aeration system or similar approved system and percolation area (c) All associated site development works. Gross floor space of proposed works: 136.64sqm. Application withdrawn.

4.0 The Applicants Case for Leave for Substitute Consent

- 4.1 Permission was granted under ref no. 15/1313 for a single-storey four bed dwelling house (136.64sqm GFC) with a ridge height of 6.5m set back 19.05m from the public road. The dwelling constructed on site deviates from the plans approved with an increased ridge height to 7.893m and increased floor area of 244sqm, 3 dormer windows and accommodation at first floor level and a reorientation of the dwelling on site. It is noted that a septic tank system was installed and not the proprietary system approved under ref no. 15/1313. The applicant applied for retention under ref no. 17/1265 but was refused permission.
- 4.2 Two subsequent applications for retention were deemed invalid on basis that the Planning Authority determined that a full Appropriate Assessment is required and that it is not possible to make an application for retention permission directly to the planning authority.
- 4.3 The applicant is seeking leave to apply for substitute consent under the provisions of Part XA of the Planning and Development Act, 2000 (as amended) and specifically under the provisions of Section 177C(2)(b). It is noted that section 177D(2) sets out the matters to which the Board should have regard in considering whether exceptional circumstances existing. The applicants go through each scenario.
- 4.4 Whether the regularisation of the development would circumvent the purpose and objectives of the EIA Directive or Habitat Directive.

The applicant notes that as part of the application ref no. 15/1313 a Natura Impact Statement (NIS) was submitted and a full Appropriate Assessment was carried out. It was noted that the site did not contain any protected orchid species or an Annex I habitats and would have no significant effects on the Inisheer Island SAC. This was accepted by the Planning Authority and permission was granted. It is noted that the screening assessment for ref no. 17/1256 concluded that no significant effects were

likely on any Natura 2000 sites and that no further assessment was required in relation to habitats. It is noted that the Planning Authority's opinion on AA screening changed in the applications under ref no. 18/1822 and 19/1236. It is noted that the AA screening undertaken in relation to alterations subject to ref no. 17/1256, 18/1822 and 19/1236 concludes that the proposed development would have no significant effects on the Inisheer SAC.

- 4.5 Whether the applicant has or could reasonably had a belief that the development was not unauthorised.

It is noted that the applicant at the time of construction was abroad (residing abroad) and managing construction remotely led to issues of oversight. The applicant notes that there was belief that the alterations made during construction could be considered 'de minimis' or non-material at the time of construction. The applicant acknowledges that the alterations to the permitted dwelling are material and require permission and but at the time of the work being carried out they did not believe this to be the case.

- 4.6 Whether the ability to carry out an EIA or AA and to provide for public participation in such assessments has been substantially impaired.

In this regard it is noted that permission was granted for a dwelling under ref no. 15/1313 and it was consulted that there were no significant effects in the Inisheer Island SAC. It is noted that subsequent applications have complied with the relevant regulations in terms of public notices to facilitate public participation. An application for substitute consent if permitted will be subject to full public participation and there will be no impairment of such.

- 4.7 Whether the 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 applicant reiterates that the permitted dwelling under ref no. 15/1313 was subject to an NIS with the conclusion that no significant effects on any Natura 2000 site. The same conclusion was reached when the retention application under ref no. 17/1265 was assessed with such being refused based on design/visual amenity grounds. A screening assessment has been carried out by the applicants agents and concludes the proposed development, individually or in combination with other plans and projects, will not have a significant effect on Inisheer Island SAC and that a stage 2 Appropriate Assessment is not required.

4.8 The extent to which significant effects on the environment or adverse effects on a European site can be remedied.

As above.

4.9 Whether the applicant has complied with previous planning permission or has previously carried out unauthorised development.

The applicant notes that they have not been granted any previous permissions and have not have they previously carried out any unauthorised development. The applicant takes full responsibility for the material alteration of the permitted dwelling and wishes to regularise the planning status of their dwelling.

The submission includes details of the planning history of the site and an Appropriate Assessment Screening report.

5.0 **Planning Authority Submission**

5.1 No response.

6.0 **Legislative Provisions**

6.1 The European Court of Justice (ECJ) decision in the case of C-215/06 resulted in the removal of the facility to apply for retention of planning permission for

development which require EIA. Thus under the amended Section 34(12) of the 2000 Act, a retention application cannot be accepted by the Planning Authority for a development which would have required EIA (screening for EIA) or Appropriate Assessment under the Habitats Directive.

The provisions of 177C of the Act permits an application for leave to apply for substitute consent where a Court has found that there was procedural error in the original consent or where the Board grants leave to a developer to apply for substitute consent in other exceptional circumstances.

Under Section 177D(2) in considering whether exceptional circumstances exist the Board shall regard to the following matters:

(a) Whether the regularisation of the development concerned would circumvent the purpose of 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 purposes 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 unauthorised development.

(g) Such other matters as the Board considers relevant.

7.0 **Assessment**

7.1 The first question which arises in respect of the application for leave for substitute consent is whether or not the application for retention, is an application for which an EIA or screening for EIA is necessary. The application relates to retention of alterations to a permitted dwelling site which is below the statutory threshold for EIA as set out in Schedule 5 of the 2001 Planning and Development Regulations as amended. There are no specific circumstances in my opinion which would warrant a determination for a sub-threshold EIS in light of the potential adverse impacts on the environment.

7.2 In relation to an assessment under the Habitats Directive it is notable that the whole of the Island of Inisheer is defined as Inisheer Island SAC (site code 001275). The applicant was granted permission under ref no. 15/1313 for a single-storey dwelling and associated site works. This application was accompanied by an NIS, which included a Stage 2 Appropriate Assessment. It was concluded that the proposed development would have no significant effects on the Inisheer SAC. In constructing the dwelling on site alterations were made including a reorientation/relocation of the dwelling, provision of an increased ridge height and dormer windows with a first floor accommodation, changes to the external elevations including fenestration and installation of a septic tank instead of the proprietary wastewater treatment system specified in the approved permission. An application for retention was submitted under ref no. 17/1265. This application was refused on the basis of design/visual amenity grounds. The application included a screening report for AA and concluded that the proposal would have no significant effects on Inisheer Island SAC. This was accepted by the Planning Authority and permission was granted. It is noted that the screening assessment for ref no. 17/1256 concluded that no significant effects were

likely on any Natura 2000 site and no further assessment was required in relation habitats. It is noted that the Planning Authority's opinion on AA screening changed in the applications under ref no. 18/1822 and 19/1236, which were both ruled to incomplete as outlined earlier in the planning history.

7.3 For the purposes of determining the current application before the Board, it is not necessary or indeed appropriate to evaluate the contents of the Natura Impact Statements previously submitted or the Appropriate Assessment Screening report submitted as part of this application. The Board in this instance is merely required to determine whether or not sufficient exceptional circumstances exist in order to permit an application to apply for substitute consent in accordance with the provisions of the Act. If the Board accept that exceptional circumstances do exist, it can evaluate the planning merits of the case in any subsequent application for substitute consent. In this regard I will go through each scenario under to the tests Section 177D(2).

(a) Whether the regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or Habitats Directive.

I do not consider that the regularisation of the development concerned would circumvent the purpose and objectives of either the EIA Directive or the Habitats Directive in that the application relates to retention of alterations to a permitted dwelling site which is below the statutory threshold for EIA as set out in Part 11(E) of Schedule 5 of Part 2 of the 2001 Planning and Development Regulations as amended and the fact that an application for substitute consent should include a Natura Impact Statement in accordance with the Habitats Directive and this statement would be evaluated and determined on its merits in any subsequent substitute consent application.

(b) Whether the applicant had or could have reasonably had the belief that the development was not authorised.

Having regard to the planning history associated with the site, I do not consider that the applicant had or could reasonably have had a belief that the development was not unauthorised. I would note that the alterations to the dwelling permitted under ref no. 15/1313 to which this leave to apply for substitute consent has never been assessed by Board and I would consider that the applicant would have had a reasonable expectation, that the development was capable of being regularised under normal Section 34 application for retention

(c) Whether the ability to carry out an assessment of environmental impacts of development for the purposes of an environmental impact assessment or appropriate assessment and to provide for public participation in such an assessment has been substantially impaired.

Again having regard to the planning history of the site and the fact that the applicant has applied for permissions 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 such could be subject to public scrutiny in the event of an application for substitute consent.

(d) The actual or likely effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of development.

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 having regard to the fact previous decisions made in relation to the original permission for a dwelling under ref no. 15/1313 and a subsequent application for retention under ref no. 17/1256 (refused on design/visual amenity grounds) indicate that the proposed development would have no significant

effects on any Natura 2000 sites, there is evidence to indicate that the development subject to this application may have no actual or likely effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of development and merits an assessment to determine whether this is the case under a substitute consent application.

(e) The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.

Likewise it is not possible to assess the extent to which adverse effects on the integrity of a European site can be remediated without a comprehensive and robust assessment of the NIS submitted with the application. I reiterate that 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. As with the aforementioned section I would consider there is sufficient merit in granting leave to apply for substitute consent.

(f) Whether the applicant has complied with previous planning permissions granted or has previously carried out unauthorised development.

Again it is clear from the history relating to the site that the applicant has contravened conditions in respect of a previous planning permission and by extension carried out unauthorised development.

(g) Such other matters as the Board considers relevant.

I refer the Board to the first part of this assessment and the fact that the applicant has applied and been refused retention of planning permission by the Planning Authority under re no. 17/1256 however such was never assessed by the Board. The applicant does not have the option of regularising the development on site through the normal provisions of the Planning Acts and is seeking to regularise the

development through the substitute consent process under the provisions of S.177. I consider that exceptional circumstances do apply to warrant a grant of leave for substitute consent in this instance.

8.0 Conclusions and Recommendation

8.1 Having regard to my assessment above I consider that An Bord Pleanála should decide to grant leave to apply for substitute consent under Section 177D(4) of the Planning and Development Act 2000, based on the reasons and considerations set out below.

Having regard to Section 177D, Planning and Development Act, 2000, as inserted by Section 57, Planning and Development (Amendment) Act, 2010, the Board is satisfied that:

- a) the development is one where an EIA or a determination as to whether EIA is not required and an appropriate assessment is required, and
- b) that exceptional circumstances exist by reference, in particular, to the following:
 - the fact that the regularisation of the development would not circumvent the purpose or objectives of the Environmental Impact Assessment or Habitats Directive;
 - that the ability to carry out EIA and AA and provide for public participation has not been substantially impaired;
 - the applicant's reasonable expectation, that the development was capable of being regularised under normal Section 34 application for retention;
 - and the limited nature of the actual/likely significant effects on a European site resulting from the development.

The Notice to the applicants advising of the decision should also direct that:

- a) the application be made within 12 weeks of the giving of the notice or such longer period as the Board may, on request, consider appropriate, and
- b) The application includes a remedial NIS. This may include reference to proposed mitigation measures where appropriate.

Colin McBride
Planning Inspector

11th May 2020