



An
Bord
Pleanála

Inspector's Report ABP-307172-20

Development	Infilling of land at Tulla Road, Knockanoura, Ennis, Co. Clare
Location	Tulla Road, Knockanoura, Ennis, Co. Clare
Planning Authority	Clare County Council
Planning Authority Reg. Ref.	
Applicant(s)	Valley Healthcare Fund Infrastructure Investment Fund
Type of Application	Leave to apply for substitute consent
Date of Site Inspection	14 th October 2020
Inspector	Colin McBride

1.0 Introduction

- 1.1. ABP-307172-20 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 infill groundworks at Tulla Road, Knockanoura, Ennis, Co. Clare.

2.0 Site Location and Description

- 2.1. The appeal site, which has a stated area of 0.32 hectares, is located in the north-eastern environs of Ennis Town Centre on the southern side of the Tulla Road. The site is currently undeveloped and filled with hardcore material. The site fronts onto the Tulla Road and the site is located between a petrol station (to the south west) and a housing development (Castle Rock) located to the north east. The southern boundary of the site is not defined by any boundary with the appeal site appearing to be part of larger undeveloped plot that extends further south and to the rear of the petrol station. The River Fergus which forms part of the Lower Shannon SAC is located to south west and runs on western side of the petrol station.

3.0 Planning History

- 3.1 RL.307625-20: Referral on whether the groundworks undertaken, including importation and deposition of fill material to create a hard standing area and the raising of ground levels from 2013 onwards is or is not development and/or is or is not exempted development at Tulla Road, Knockanoura. Pending determination.
- 3.2 RL03RL.3611: Referral sought on whether groundworks including the importation and deposition of fill material, creation of a hardstanding area and raising of land areas is or is not development or is or is not exempted development. Determined to

be development and exempted development. Decision quashed by court order. This relates to a larger site (1.5 hectares) including the appeal site.

- 3.3 RL03.RL3202: Whether the removal of fill material at Kilnacally/woodstock, Ennis, Co.Clare is or is not development or is or is not exempted development. Determined to be development and is exempted development.

4.0 The Applicants Case for Leave for Substitute Consent

- 4.1 The site is located in close proximity to the River Fergus, which is part of the Lower Shannon SAC. The planning status of the site is uncertain due to the fact that a declaration sought under RL03RL.3611, under which the infill of lands at this location including the appeal site was determined to be development and exempted development was quashed as a result of a court challenge. It is also noted that the River Fergus drains into the Ballyallia Lake SAC/SPA 900m to the north of the site. The status of the site needs to be regularised before the land owner can make an application for a primary care centre development with the applicant seeking leave to apply for substitute consent under Section 177C(2)(b). It is stated that applicant bought the land on foot of the Boards determination under RL03RL.3611 and did not carry out the infill works in question.

- 4.2 The background to the case indicates that a Certified Drainage Scheme was carried out (by the OPW) in relation to the River Fergus with an EIA and NIS undertaken for such works. It is noted that the site in questioned labelled Area A and the larger portion of land adjacent labelled Area B were infilled in conjunction with the Certified Drainage Works. It is stated that Area B was infilled in 2013 the same time as the works on the drainage scheme and then later Area A was infilled. It is noted area A is outside of the scope and area of drainage scheme.

- 4.3 The applicant states that under Section 177D(1)(b) of the Planning Development Act 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 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.

- 4.4 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 exist. The applicants go through each scenario.
- 4.5 Whether the regularisation of the development would circumvent the purpose and objectives of the EIA Directive or Habitat Directive.

The applicant states that there would have been no requirement for an EIA having regard to the nature and scale of development and to the definition of development subject to mandatory EIA under Schedule 5, Part 2 of the Planning and Development regulations 2001 (as amended). In regards to whether an Appropriate Assessment would have been required it is noted the site is 66m from the boundary of the Lower Shannon SAC and 900m from the Ballyailla SAC and SPA. The applicant notes that in absence of information that demonstrates that the works carried out would not have significant effects on Natura 2000 sites in the vicinity, the applicants are willing to submit a remedial Natura Impact Statement with a future application for substitute consent if required by the Board.

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

The applicant states that they did not carry out the works in question and purchased the site on the basis of the belief that the works carried out were satisfactory in regards to planning status and on foot of a declaration issued by the Board that

works on a larger site including the appeal site was development and exempted development (quashed by court order).

- 4.7 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 stated that the ability to carry out appropriate assessment has not been impaired. An NIS was undertaken for the Certified Drainage Scheme and this report can be used as a baseline for a remedial NIS, if required by the Board. An application for substitute consent if permitted will be subject to full public participation and there will be no impairment of such.

- 4.8 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 state that the site is an urban area, is zoned for urban development and adjoins existing urban development. The site is not subject to flooding or located within a designated Natura 2000 site. It is stated impacts during construction would have been temporary and that there are no known likely significant effects on the environment. The qualifying interests and conservation objective of the Lower Shannon SAC are noted as being marine habitats and species and in the case of the River Shannon and River Fergus Estuaries SPA relating to birds. It is stated that significant effects on the integrity of a European site are not readily obvious and can be addressed in a remedial Natura Impact Statement if deemed necessary.

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

It is stated that the Boards assessment of RL03RL.3611 (quashed) deemed that no appropriate assessment issues arose. It is stated that need for specific remediation

is not quantifiable based on current information. The making of any application for substitute consent would examine the need for such remediation.

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

The applicant reiterates that the land was purchased on foot of the Boards declaration under RL03RL.3611 (subsequently quashed). The applicants in this case have not carried out unauthorised development and seek regularise the status of the site to advance development proposals.

5.0 Planning Authority Submission

- 5.1 No submission.

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 is an application for which an EIA or screening for EIA is necessary. The application relates to infill groundworks on a site of 0.32 hectares in an urban area 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 site is located 66m from the boundary of the Lower Shannon SAC (to the south west) and 900m from the Ballyailla SAC and SPA (to the north). The history of the site appears to suggest that it was infilled as well as a larger site to the south west as a result of drainage works carried out to the River Fergus by the OPW under a Certified Drainage Scheme. The current applicants and owners of the site state that they bought the site after the infilling works was carried out and on foot of declaration issued by the Board under ref no. RL03RL.3611 determining that infilling works on a larger site including the appeal site is development and is exempted development. This determination was quashed by the High Court.

7.3 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 works 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 works in question were not authorised. The current applicants and owners of the site state that they bought the site after the infilling works was carried out and on foot of a declaration issued by the Board under ref no. RL03RL.3611. I would consider that the applicant would have had a reasonable expectation, that the development was capable of being regularised under the provision of the Planning and Development Act, 2000 (as amended).

(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, 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. There is potential 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 such. 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. I would note that an NIS would be required to provide details of mitigation measures if deemed necessary. 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 not carried out unauthorised development and is attempting to regularise the planning status of a site they acquired after the fact.

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

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

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 the provisions of the Planning and Development Act, 2000 (as amended);
 - 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 Natura Impact Statement. This may include reference to proposed mitigation measures where appropriate.

Colin McBride
Planning Inspector

09th September 2020