



An  
Bord  
Pleanála

## Inspector's Report ABP-307460-20

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<b>Development</b>	To construct a storage shed for private use, all ancillary site works and services.
<b>Location</b>	New Acre, Athy Road, Carlow.
<b>Planning Authority</b>	Carlow County Council
<b>Planning Authority Reg. Ref.</b>	19408
<b>Applicant(s)</b>	Gwynne Thomas
<b>Type of Application</b>	Permission
<b>Planning Authority Decision</b>	Grant subject to conditions
<b>Type of Appeal</b>	Third Party v. Decision
<b>Appellant(s)</b>	Fionnuala Mitchell
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	31 <sup>st</sup> August, 2020
<b>Inspector</b>	Robert Speer

## **1.0 Site Location and Description**

- 1.1. The proposed development site is located in the rural townland of Newacre, Co. Carlow, approximately 3.2km north of the N80 National Road in Carlow town and 400m east of the River Barrow, where it occupies a position to the west of the R417 (Athy) Regional Road alongside an existing engineering / steel fabrication business trading as 'Thompson of Carlow'. It has a stated site area of 1.8 hectares, is of an irregular elongated shape, and presently comprises a combination of the existing access arrangement, parking spaces and circulation areas associated with the adjacent commercial premises as well as an area of undeveloped grassland. The proposed storage shed will be situated within the northern extent of the site area and is to be positioned between a secure yard area enclosed by palisade fencing to the west and the regional road to the east. With the exception of that section of the western site boundary which adjoins the fabrication business, the remaining site boundaries are generally defined by mature hedgerow growth.

## **2.0 Proposed Development**

- 2.1.1. The proposed development consists of the construction of a freestanding, single storey, storage shed (floor area: 131.14m<sup>2</sup>) for the purposes of accommodating a private vintage car collection. The overall design is based on a simple rectangular plan measuring 18.402m x 8.092m and will utilise a mono-pitched roof construction extending to a maximum height of 4.464m. External finishes would appear to comprise corrugated steel cladding. Access to the proposal will be obtained via the existing entrance arrangement serving the adjacent engineering / fabrication premises. No connections to a water supply or wastewater services are shown whilst surface water runoff will be discharged to ground by way of on-site soakaways.

## **3.0 Planning Authority Decision**

### **3.1. Decision**

- 3.1.1. Following the receipt of responses to requests for further information and subsequent clarification, on 11<sup>th</sup> June, 2020 the Planning Authority issued a notification of a decision to grant permission for the proposed development, subject

to 11 No. conditions. These conditions are generally of a standardised format and relate to issues including external finishes, infrastructural works, construction management, and development contributions, however, the following conditions are of note:

*Condition No. 2 –*

- a) Requires the recommendations and construction control measures detailed in the revised Stage 1 Appropriate Assessment Report received by the Planning Authority on 1<sup>st</sup> April, 2020 to be strictly adhered to and implemented in full.
- b) Refers to surface water drainage.
- c) Requires the implementation of measures to prevent the spread of invasive species during the construction works.
- d) Specifies that the finished floor levels shall be 49.79m as detailed in the Site-Specific Flood Risk Assessment.

*Condition No. 4 –* States that the shed is to be used for private purposes only and for the storage of private vintage cars / vehicles as detailed. It is not to be used for commercial, trade or industrial purposes or for human habitation.

## **3.2. Planning Authority Reports**

### *3.2.1. Planning Reports*

An initial report detailed the site context, planning history, and relevant policy considerations before recommending that further information be sought in respect of a number of items. In this respect, it was considered that the site location within a flood plain identified by the CFRAM mapping gave rise to a requirement for the submission of a site-specific flood risk assessment whilst the proximity of the proposed development to a stream which flows directly into the River Barrow and River Nore Special Area of Conservation warranted the provision of a Stage 1 Appropriate Assessment Screening Report. Further details were also required as regards the intended use of the shed, its external finishes, and any commentary on the third-party submissions received.

Following a request for clarification of further information which culminated in the submission of an amended site-specific flood risk assessment and a revised Stage 1 Appropriate Assessment Screening Report, and upon consideration of that additional information, a final report was prepared which recommended a grant of permission, subject to conditions.

### 3.2.2. *Other Technical Reports*

*Carlow Municipal District:* No objection, subject to conditions.

*Water Services:* No objection.

*Environment:* Although initial reports recommended a grant of permission, subject to conditions, following the receipt of further information, it was subsequently recommended that clarification be sought as regards the nature of the construction protocols to be implemented as referenced in the Appropriate Assessment Screening Report as well as the amendment of the site-specific flood risk assessment to include for the proposed floor levels in order to assess the impact of the development and any required flood resilience measures. Upon consideration of the response to the request for clarification of further information, a final report was prepared which recommended a grant of permission, subject to conditions.

*Carlow Fire Authority:* No objection, subject to conditions.

*Transportation Dept.:* No objection.

### 3.3. **Prescribed Bodies**

*Irish Water:* No objection.

### 3.4. **Third Party Observations**

- 3.4.1. A single submission was received from the appellants, the contents of which are reiterated in the grounds of appeal.

## 4.0 **Planning History**

### 4.1. *On Site:*

PA Ref. No. 19260. Was granted on 28<sup>th</sup> January, 2020 permitting Thompson Property Management Ltd. permission to erect a 2.4m high steel palisade security fence to the front of the existing industrial premises, all ancillary site works and

services (*N.B.* Condition No. 2 of this grant of permission required the erection of 2.4m high green coloured powder coated paladin fencing as a replacement for the proposed palisade fencing).

#### 4.2. *On Adjacent Sites:*

PA Ref. No. 20222. Application by Thompson Project Management Ltd. for permission to construct an extension to a workshop, and all ancillary site works and services at Newacre, Athy Road, Carlow. No decision to date.

PA Ref. No. 19/35. Was granted on 16<sup>th</sup> December, 2019 permitting Thompson Property Management permission to retain an agricultural field entrance as constructed and all ancillary site works at Newacre, Athy Road, Carlow.

PA Ref. No. 06/1159 / ABP Ref. No. PL01.222519. Was refused on appeal on 19<sup>th</sup> October, 2007 refusing P. Thomas permission to construct a storage and stock yard as an extension to existing storage yard for previously approved steel workshop (planning register reference number 03/104) together with all associated site works and services, all at Newacre, Athy Road, Carlow, Co. Carlow.

- Having regard to the large scale of the yard (2.89 hectares approximately) proposed and the location of the site in an unserved rural area of noted sensitivity, it is considered that the proposed development would result in an inappropriate intensification of industrial development on a sensitive site which would further erode the landscape characteristics of the area and would, therefore, be contrary to the proper planning and sustainable development of the area.
- Having regard to the low lying location of the site relative to the River Barrow and in proximity to areas which flood annually, the Board is not satisfied, on the basis of the submissions made in connection with the planning application and the appeal, that the proposed development would not exacerbate the risk of flooding in the area. The proposed development would, therefore, constitute disorderly development and be contrary to the proper planning and sustainable development of the area.
- The appeal site is located in close proximity to the River Barrow, a candidate Special Area of Conservation. In the absence of an appropriate assessment

of its impact, the Board is not satisfied that the proposed development would not adversely affect the integrity of the designated site. It is considered that the proposed development would, therefore, be premature and contrary to the proper planning and sustainable development of the area

PA Ref. No. 06/938 / ABP Ref. No. PL01.223482. Was granted on appeal on 21<sup>st</sup> January, 2008 permitting P. Thomas permission for an extension to previously approved steel workshop (PA Ref. No. 03/104), to construct new ESB substation and switchroom, to modify existing car parking and internal access routes, to construct additional car parking areas, together with all associated siteworks and services, all at Newacre, Athy Road, Co. Carlow.

PA Ref. No. 06/460 / ABP Ref. No. PL01.221033. Was refused on appeal on 12<sup>th</sup> September, 2007 refusing Pellet Power Ireland Limited permission for the construction of 1 No. industrial unit for the manufacturing and distribution of wood and bio-mass pellets, associated plant and machinery in yard, connecting into existing services on site and all associated site works, using existing site entrance, at Newacre, Athy Road, Carlow.

- The applicant has not demonstrated an essential need for the location of the proposed development in a rural area, and the proposed development would result in an inappropriate intensification of industrial development in a rural area which, having regard to the extent of lands which are zoned for industrial purposes in the Proposed Carlow Local Area Plan and at other settlements within the county, would be contrary to the proper planning and sustainable development of the area.

PA Ref. No. 03/104 / ABP Ref. No. PL01.202896. Was granted on appeal on 15<sup>th</sup> September, 2003 permitting P. Thomas permission for the construction of an industrial building comprising a steelwork workshop with associated two-storey offices and staff facilities including kitchen, canteen and locker room. The proposed building will use the existing vehicular access to the site provided off the Athy Road (R417). The proposal also makes provision for internal roads, parking, storage areas, landscaping, proprietary effluent disposal system and associated site development works all on a site adjacent to the R417 (Athy Road) and the River Barrow at Newacre, Co. Carlow.

## 5.0 Policy and Context

### 5.1. National and Regional Policy

5.1.1. The '*Planning System and Flood Risk Management, Guidelines for Planning Authorities*' published by the Department of the Environment, Heritage and Local Government in November, 2009 introduce comprehensive mechanisms for the incorporation of flood risk identification, assessment and management into the planning process. The core objectives of the Guidelines are to:

- Avoid inappropriate development in areas at risk of flooding;
- Avoid new developments increasing flood risk elsewhere, including that which may arise from surface water run-off;
- Ensure effective management of residual risks for development permitted in floodplains;
- Avoid unnecessary restriction of national, regional or local economic and social growth;
- Improve the understanding of flood risk among relevant stakeholders; and
- Ensure that the requirements of the EU and national law in relation to the natural environment and nature conservation are complied with at all stages of flood risk management.

In achieving the aims and objectives of the Guidelines the key principles to be adopted should be to:

- Avoid the risk, where possible,
- Substitute less vulnerable uses, where avoidance is not possible, and
- Mitigate and manage the risk, where avoidance and substitution are not possible.

The Guidelines outline the need to identify flood zones and to categorise these according to their probability of flood events. Notably, these should be determined ignoring the presence of flood protection structures as such areas still carry a residual risk of flooding from overtopping or breach of defences and as there is no guarantee that the defences will be maintained in perpetuity.

A staged approach to Flood Risk Assessment is advocated with only such appraisal and / or assessment as is needed to be carried out for the purposes of decision-making at the regional, development and local area plan levels, and also at the site specific level. Stage 1 entails the identification of flood risk by way of screening of the plan / project in order to determine whether there are any flooding or surface water management issues related to the area or the site that may warrant further investigation. This is followed by Stage 2 (Initial flood risk assessment) which seeks to confirm the sources of flooding that may affect a plan area or site, to appraise the adequacy of existing information and to scope the extent of the risk of flooding which may involve preparing indicative flood zone maps. Where hydraulic models exist, the potential impact of a development on flooding elsewhere and of the scope of possible mitigation measures can also be assessed. The third and final stage (Stage 3: Detailed flood risk assessment) aims to assess flood risk issues in sufficient detail and to provide a quantitative appraisal of potential flood risk to a proposed or existing development or land to be zoned, its potential impact on flood risk elsewhere and of the effectiveness of any proposed mitigation measures.

Chapter 3 of the Guidelines states that the key principles of a risk-based sequential approach to managing flood risk in the planning system are to:

- Avoid development in areas at risk of flooding;  
If this is not possible, consider substituting a land use that is less vulnerable to flooding.  
Only when both avoidance and substitution cannot take place should consideration be given to mitigation and management of risks.
- Inappropriate types of development that would create unacceptable risks from flooding should not be planned for or permitted.
- Exceptions to the restriction of development due to potential flood risks are provided for through the use of a Justification Test, where the planning need and the sustainable management of flood risk to an acceptable level must be demonstrated.

It is a key instrument of the Guidelines to undertake a sequential approach in order to guide development away from areas at risk from flooding such as through the use



of flood zones and the vulnerability of different development types, however, it is recognised that several towns and cities whose continued growth and development is being encouraged (through the National Development Plan, Regional Planning Guidelines etc.) in order to bring about compact and sustainable urban development and more balanced regional development, contain areas which may be at risk of flooding. Where a planning authority is considering the future development of areas at a high or moderate probability of flooding that would include types of development that are inappropriate in terms of their vulnerability, the 'Justification test' set out in Box 5.1 of the Guidelines should be employed.

The vulnerability of development to flooding depends on the nature of the development, its occupation and the construction methods used. The classification of different land uses and types of development as highly vulnerable, less vulnerable and water-compatible is influenced by various factors including the ability to manage the safety of people in flood events and the long-term implications for the recovery of the function and structure of buildings.

## **5.2. Development Plan**

### **5.2.1. Carlow County Development Plan, 2015-2021:**

*Chapter 2: Development Strategy*

*Chapter 9: Natural and Built Heritage:*

*Section 9.1: Natural Heritage*

*Chapter 10: Environmental Management, Infrastructure and Water Services:*

*Section 10.5: Flooding*

*Chapter 11: Design and Development Standards:*

*Section 11.1.7: Flood Risk Management*

## **5.3. Natural Heritage Designations**

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

- The River Barrow and River Nore Special Area of Conservation (Site Code: 002162), approximately 400m west of the site.
- The Oakpark Proposed Natural Heritage Area (Site Code: 000810) approximately 1.0km east-southeast of the site.

#### **5.4. EIA Screening**

5.4.1. Having regard to the nature and minor scale of the development proposed, the site location outside of any protected site and the nature of the receiving environment, the limited ecological value of the lands in question, and the separation distance from the nearest sensitive location, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

### **6.0 The Appeal**

#### **6.1. Grounds of Appeal**

- The application site and adjacent lands have previously been the subject of objections which were upheld in part by the Board which resulted in strict conditions being imposed as regards the finish and upkeep of the wider site that have not been complied with or enforced by Carlow County Council.
- The scale and nature of the construction is not in keeping with its intended use as a private shed and, therefore, there are concerns as regards its potential future use.
- The siting of the proposed shed to the front of the existing buildings set within a pastoral landscape is completely out of character with the area. The proposed building will be very visible from the roadway and will have a further impact on the surrounding countryside. At present, the existing buildings on site are out of character with the area.
- Recently, there has been an increase in noise levels emanating from the site.

- The area is historically prone to flooding and any further construction on site may result in changes in this regard which will need to be addressed. This a real and pertinent danger given that locals have experienced unprecedented levels of flooding. All indications are that we are entering a period where water levels are rising.
- The Board is advised that Inland Fisheries Ireland previously raised concerns as regards flooding in relation to an earlier planning application for retention on site and it is submitted that the subject proposal would only serve to compound these concerns.
- The addition of the gateway has resulted in unprecedented flooding of the roadway to the front of the proposed development with water having recently flowed directly from the site onto the road.

## 6.2. Applicant Response

None.

## 6.3. Planning Authority Response

6.3.1. No further comments.

## 6.4. Observations

None.

## 6.5. Further Responses

None.

## 7.0 Assessment

7.1. From my reading of the file, inspection of the site and assessment of the relevant policy provisions, I conclude that the key issues relevant to the appeal are:

- The principle of the proposed development
- Alleged non-compliance / unauthorised development

- Flooding implications
- Visual impact
- Appropriate assessment

These are assessed as follows:

## **7.2. The Principle of the Proposed Development:**

- 7.2.1. The proposed development, as initially submitted to the Planning Authority, was described somewhat vaguely as comprising the construction of a storage shed for 'private use', however, it was subsequently clarified in response to a request for further information that this was to entail the storage of a private vintage car collection (the applicant seemingly being a director of the adjacent engineering / steel fabrication business). Notably, the initial planning application was accompanied by a fee of €34 which would seem to imply that the proposed shed is intended to be used for purposes incidental to the enjoyment of a dwelling house (despite the fact that there is no residence either within or bounding the site and that the lands in question are used for purposes ancillary to the adjacent industrial operation).
- 7.2.2. Given the site location on unzoned and unserviced lands in a predominantly rural area, the absence of any dwelling house on site to which the 'private' shed could be considered incidental, and noting that the proposed development is unrelated to the operation or expansion of the adjoining business premises, in my opinion, the rationale for locating the proposed 'private' shed at the subject site is unclear and would appear to stem solely from the applicant's position as a director of the company which retains ownership of the lands in question. Accordingly, I would suggest that there is an onus on the applicant to establish a need for the proposed shed at the subject location (as distinct from its siting at his home where he presumably engages in his hobby as a collector of vintage cars or elsewhere such as on zoned and / or serviced lands within an urban centre). A further consideration is the appropriateness of siting such a 'private' storage use alongside a large industrial / commercial premises and its compatibility with the operation of same, particularly as it is proposed to share the existing access arrangement from the R417 Regional Road (noting that Trans - Policy 4 of County Development Plan aims to exercise control over new developments requiring direct access to regional roads by

restricting new access points to a minimum to preserve their strategic function and in the interests of traffic safety).

- 7.2.3. Therefore, on balance, in the absence of any clear need or rationale for siting a development of the nature proposed at the subject location, I am not satisfied that the proposal as submitted is conducive to the proper planning and sustainable development of the area.

**7.3. Alleged Non-Compliance / Unauthorised Development:**

- 7.3.1. In relation to the appellant's allegations as regards instances of non-compliance / unauthorised development on site, it should be noted that the Board has no function in respect of issues pertaining to enforcement and that the pursuit of such matters is generally the responsibility of the Planning Authority. Furthermore, whilst I would acknowledge the concerns raised in the grounds of appeal as regards the possibility of non-compliance with the terms and conditions of any grant of permission issued in respect of the subject proposal, with particular reference to any future use of the shed for purposes other than as have been set out in the submitted particulars, in my opinion, it would be inappropriate for the Board to speculate on such matters and I would reiterate that any future breaches of conditions or instances of unauthorised development should be referred to the Planning Authority.

**7.4. Flooding Implications:**

- 7.4.1. From a review of the available information, consideration needs to be given to the potential flooding implications of the proposed development given its proximity to the River Barrow. In this respect I would advise the Board at the outset that whilst the National Flood Hazard Mapping available from the Office of Public Works does not record any flood events within the confines of the site itself, flooding has previously been recorded at a short distance away to the north in Newacre, Co. Carlow (and in the adjoining townland of Jerusalem, Co. Kildare) as a result of the River Barrow & the River Lerr (in addition to associated tributaries) overtopping their banks, although this mapping is not definitive and serves only as a useful tool in highlighting the potential for flood events in a particular area. It is also of relevance to note that the mapping identifies a substantial tract of land to the north of the application site that might benefit from the implementation of an Arterial (Major) Drainage Scheme as it comprises an area subject to flooding or poor drainage.

7.4.2. On examination of the most up-to-date flood mapping prepared by the Office of Public Works as part of its CFRAM programme, which has recently been made available on [www.floodinfo.ie](http://www.floodinfo.ie) and serves to inform the development of Flood Risk Management Plans for specific areas, it would appear that the northernmost extent of the application site is within Flood Zone 'A' as defined by the *'Planning System and Flood Risk Management, Guidelines for Planning Authorities'* in that it is presently subject to a *'medium probability'* of fluvial flooding from a minor watercourse / mill race c. 20m to the north (*'Medium Probability'* flood events have approximately a 1 in 100 chance of occurring or being exceeded in any given year). A considerably greater proportion of the site area, including the location of the proposed storage shed, is shown to be within the *'low probability'* 0.1% (1 in 1,000 chance in any given year) AEP fluvial flood extent which would equate to 'Flood Zone B'. However, it must also be accepted that this mapping has limitations in terms of identifying flood risk in any given area, although its findings would appear to broadly correspond with those of the Strategic Flood Risk Assessment included in Appendix 7 of the Carlow County Development Plan, 2015-2021.

(*N.B.* The Strategic Flood Risk Assessment appended to the County Development Plan has been informed (in part) by the Draft Preliminary Flood Risk Assessment prepared by the Office of Public Works and published in 2011 (as part of the CFRAM programme). In this regard I would draw the Board's attention to the contents of Circular PL2/2014 issued by the Department of the Environment, Community and Local Government on 13<sup>th</sup> August, 2014 which states that the Draft Indicative Preliminary Flood Risk Assessment Maps were prepared for the purpose of an initial assessment, at a national level, of areas of potentially significant flood risk and that *'the maps provide only an indication of areas that may be prone to flooding. They are not necessarily locally accurate and should not be used as the sole basis for defining Flood Zones, or for making decisions on planning applications'*. This Circular further recommends that for the purposes of decision-making in respect of planning applications, a Stage II Flood Risk Assessment as set out in *'The Planning System and Flood Risk Management, Guidelines for Planning Authorities, 2009'* should be undertaken where there are proposals for development in areas that may be prone to flooding).

- 7.4.3. Given the potential flooding implications associated with proposed development, the applicant was required by way of a request for further information to submit a site-specific flood risk assessment for the proposed development. Accordingly, on 17<sup>th</sup> January, 2020 the applicant submitted a flood risk assessment prepared by BFP Consulting Engineers which sought to assess the risk to the proposed development from potential sources of flooding and the necessity for the implementation of suitable mitigation measures where appropriate. However, the contents of that report were subsequently superseded by an updated Flood Risk Assessment ('Site Specific Flood Risk Assessment, March, 2020') received by the Planning Authority on 1<sup>st</sup> April, 2020 which was submitted in response to a request for clarification of further information and, therefore, in the interests of conciseness, I propose to focus my analysis on the contents of that latter assessment.
- 7.4.4. The revised site-specific flood risk assessment acknowledges that the application site is located on lands identified as being subject to a '*low probability*' 0.1% (1 in 1,000 chance in any given year) risk of fluvial flooding from the River Barrow and its tributaries which would equate to 'Flood Zone B' as per the Guidelines. It further notes that the CFRAM mapping would appear to accord with the aerial photography taken in 2009 when flooding of adjacent lands and the public road was recorded. Having established that the application site is primarily located within Flood Zone 'B' as defined by the '*Planning System and Flood Risk Management, Guidelines for Planning Authorities*', the report proceeds to refer to Table 3.1 of those Guidelines which sets out the classification of various land uses / development types which are either highly vulnerable, less vulnerable, or water-compatible. It then asserts that the proposed storage shed comprises a '*less vulnerable*' form of development which is considered to be '*appropriate*' within Flood Zone B in accordance with Table 3.2 of the Guidelines thereby negating any requirement to undertake a 'Justification Test' or to compile a more detailed Stage 3 FRA.
- 7.4.5. It is proposed to set the finished floor level of the shed at 49.79mOD to match that of the neighbouring workshop buildings thereby providing for a freeboard of c. 400mm above the projected 1 in 1,000 year flood level (i.e. 49.40mOD). Although this raising of levels will result in some loss of on-site flood storage, it has been submitted that the development will have no measurable impact on the flood regime elsewhere (in reference to the displacement of flood waters).

7.4.6. Having considered the foregoing, it is my opinion, on balance, that the submitted proposal includes for an adequate assessment of the risk of flooding and broadly satisfies the requirements of the *'Planning System and Flood Risk Management, Guidelines for Planning Authorities'* in that the proposal is unlikely to have any significant adverse impact on the existing flood regime of the area. However, I am nevertheless conscious that the Guidelines advocate a risk-based sequential approach to flood risk management which aims to minimise the risk to persons and property by avoiding inappropriate development in areas at risk of flooding with the substitution of less vulnerable uses where avoidance is not possible followed by suitable mitigation and management where avoidance and substitution are not possible. In this regard, given the nature of the development proposed (i.e. a shed intended for private storage purposes unrelated to the existing industrial / commercial operation on the neighbouring lands), I am not satisfied that it has been established that there is a specific or demonstrable need for the shed in question to locate at this particular site. Chapter 3 of the Guidelines sets out the key principles of a risk-based sequential approach to managing flood risk and states that developments in areas at risk of flooding are to be avoided in the first instance with consideration to be given to substituting a land use that is less vulnerable to flooding when avoidance is not possible. Similarly, only when both avoidance and substitution cannot take place should consideration be given to the mitigation and management of flood risk. In my opinion, this approach places on onus on applicants to provide some level of explanation as to why a particular site at risk of flooding was selected for a given development. Accordingly, in the absence of any reasonable rationale for locating a private shed for the storage of a vintage car collection on lands which are at risk of flooding, I am not satisfied that the subject proposal is conducive to the proper planning and sustainable development of the area.

## 7.5. **Visual Impact:**

7.5.1. Having regard to the limited size, scale and nature of the proposed construction when compared to the adjacent industrial buildings, the specifics of the site context, and the level of screening offered by the existing roadside boundary, which will be supplemented further through the provision of additional planting / landscaping and the erection of 2.4m high paladin fencing as permitted under PA Ref. No. 19260, I am satisfied that the visual impact of the proposed development will be minor and



will not unduly detract from the prevailing character and amenity of the surrounding rural area.

#### 7.6. **Appropriate Assessment:**

7.6.1. From a review of the available mapping, including the data maps from the website of the National Parks and Wildlife Service, it is apparent that whilst the proposed development site is not located within any Natura 2000 designation, it is situated approximately 400m east of the River Barrow and River Nore Special Area of Conservation (Site Code: 002162). In this respect, it is of relevance to note that it is the policy of the planning authority, as set out in Section 9.1 of the Carlow County Development Plan, 2015-2021, to ensure the protection of the natural heritage and biodiversity assets of the county, including European sites that form part of the Natura 2000 network, by way of adherence to the relevant EU Environmental Directives. More specifically, '*Heritage – Policy 2*' of the Plan aims to protect and maintain the favourable conservation status and conservation value of all Natura 2000 sites designated or proposed for designation in accordance with European legislation and further states that all projects / plans will be screened for the purposes of Appropriate Assessment pursuant to Article 6 of the Habitats Directive and will only be authorised after it has been ascertained, based on scientific evidence, Screening for Appropriate Assessment, and an Appropriate Assessment where necessary, that:

- The Plan or project will not give rise to significant adverse direct, indirect or secondary effects on the integrity of any European site (either individually or in combination with other plans or projects) or
- The Plan or project will have significant adverse effects on the integrity of any European site (that does not host a priority natural habitat type/and or a priority species) but there are no alternative solutions and the plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature. In this case, it will be a requirement to follow procedures set out in legislation and agree and undertake all compensatory measures necessary to ensure the protection of the overall coherence of Natura 2000 or

- The Plan or project will have a significant adverse effect on the integrity of any European site (that hosts a natural habitat type and/or a priority species) but there are no alternative solutions and the plan or project must nevertheless be carried out for imperative reasons for overriding public interest, restricted to reasons of human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest. In this case, it will be a requirement to follow procedures set out in legislation and agree and undertake all compensatory measures necessary to ensure the protection of the overall coherence of Natura 2000.

7.6.2. In effect, a proposed development may only be authorised after it has been established that the development will not have a negative impact on the fauna, flora or habitat being protected through an Appropriate Assessment pursuant to Article 6 of the Habitats Directive (other than in instances of IROPI). Accordingly, it is necessary to screen the subject proposal for the purposes of ‘appropriate assessment’.

7.6.3. *Stage 1 Appropriate Assessment: Screening:*

In screening the subject proposal for the purposes of appropriate assessment, in the first instance, I would refer the Board to the initial report prepared by the case planner, with particular reference to the preliminary ‘screening’ exercise appended to same, wherein it is noted that there is a stream / watercourse located c. 14m north of the application site which flows directly into the River Barrow and River Nore Special Area of Conservation (Site Code: 002162), approximately 400m west of the site. Moreover, in its assessment of the likelihood for the proposed development to give rise to significant effects on the European site in view of the site’s conservation objectives, the ‘screening’ exercise appended to the planning report simply states that any such likelihood is ‘*unknown*’ and thus the submission of a ‘*Stage 1: Appropriate Assessment Screening Report*’ is required. This preliminary analysis was subsequently incorporated into the request for further information issued by the Planning Authority which included the following statement:

*‘It is considered that the nature of the proposed development has the potential to impact on the European designated site and therefore on those species for*

*which the site is designate. The development has the potential to have a significant effect, either individually or in combination with other plans and projects, on this and other European sites of conservation importance. Appropriate Assessment screening is therefore required in accordance with Regulation 42(1) of the European Communities (Birds and Natural Habitats) Regulations, 2011 and Article 6(3) of the Habitats Directive’.*

- 7.6.4. In this initial appraisal of the subject application the Planning Authority has at the outset placed the onus on the applicant to prepare a screening report for the purposes of appropriate assessment. Whilst such an approach is not necessarily problematic, I would suggest that the wording of the request for further information, by seemingly accepting that the proposed development has the potential to impact on the European Site, is perhaps more reflective of a need for Stage 2 Appropriate Assessment and the submission of a Natura Impact Statement.
- 7.6.5. In response to the request for further information, the applicant submitted an ‘*Appropriate Assessment Screening*’ report, the purpose of which is to examine the proposed development for possible ecological impacts on the integrity on the Natura 2000 network, with a particular focus on the adjacent River Barrow and River Nore Special Area of Conservation. This report proceeds to identify that are only 2 No. Natura 2000 sites within a 15km radius of the proposed development site as follows:
- The River Barrow and River Nore Special Area of Conservation (Site Code: 002162), approximately 300m west of the site.
  - The Slaney River Valley Special Area of Conservation (Site Code: 000781), approximately 12km west-southwest of the site.
- 7.6.6. It subsequently discounts the likelihood for the proposed development to have any significant impact on the Slaney River Valley SAC on the basis that it is located within a different river catchment and as there are no pathways between the project and that European Site.

(For the purposes of completeness, I would advise the Board that I have also given consideration to Natura 2000 sites located outside of the defined 15km radius, however, in light of the separation distances involved and as no potential pathways for any significant impacts can be established, it can be reasonably concluded that

there is no potential for those Natura 2000 sites to be impacted by the subject development).

7.6.7. The remainder of the screening exercise focuses on the River Barrow and River Nore Special Area of Conservation as follows:

European Site: The River Barrow and River Nore Special Area of Conservation

Distance & Direction: c. 300m west

Qualifying Interests: Estuaries [1130]  
Mudflats and sandflats not covered by seawater at low tide [1140]  
Reefs [1170]  
Salicornia and other annuals colonising mud and sand [1310]  
Atlantic salt meadows (*Glauco-Puccinellietalia maritimae*) [1330]  
Mediterranean salt meadows (*Juncetalia maritimi*) [1410]  
Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitricho-Batrachion* vegetation [3260]  
European dry heaths [4030]  
*Hydrophilous* tall herb fringe communities of plains and of the montane to alpine levels [6430]  
Petrifying springs with tufa formation (*Cratoneurion*) [7220]  
Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles [91A0]  
Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*) [91E0]

*Vertigo moulinsiana* (Desmoulin's Whorl Snail) [1016]

*Margaritifera margaritifera* (Freshwater Pearl Mussel)  
[1029]

*Austropotamobius pallipes* (White-clawed Crayfish)  
[1092]

*Petromyzon marinus* (Sea Lamprey) [1095]

*Lampetra planeri* (Brook Lamprey) [1096]

*Lampetra fluviatilis* (River Lamprey) [1099]

*Alosa fallax fallax* (Twaiite Shad) [1103]

*Salmo salar* (Salmon) [1106]

*Lutra lutra* (Otter) [1355]

*Trichomanes speciosum* (Killarney Fern) [1421]

*Margaritifera durrovensis* (Nore Pearl Mussel) [1990]

*Conservation Objectives:* To maintain or restore the favourable conservation condition of the of the Annex I habitat(s) and/or the Annex II species for which the SAC has been selected.

(*N.B.* The Board is advised that 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).

- 7.6.8. The applicant's screening report states that the only qualifying interests relevant to the subject site are aquatic animals (i.e. white-clawed crayfish, river lamprey, Atlantic salmon and otter) and that as none of the other features occur on or within the range of outflows from the application site they are not potentially at risk from the proposed development. It is also stated that larval lampreys are rare within the main channel of the River Barrow and are not often found within its tributaries.

7.6.9. Section 3.5: '*Potential Effects*' of the report proceeds to state that as the project site is located outside of the SAC and has no role in supporting any of the protected habitats or species, no direct impacts will arise from the construction of the proposed development. However, it is acknowledged that there is the potential for possible indirect impacts arising from waterborne sediment as there is a small stream about 60m to the north of the project site which flows into the SAC (c. 350m downstream), although it has also been submitted that as the construction site is located on grassland very little material will be left on the paved surfaces and this could be contained by adherence to normal construction protocols.

7.6.10. The report thus concludes by asserting that the proposed development will not have any significant effect on the integrity of the Natura 2000 site network, with particular reference to the ecology of the River Barrow and River Nore Special Area of Conservation, nor will it have any influence on the attainment of the conservation objectives. By extension, it was also considered that there was no likelihood of 'in-combination' effects with other nearby projects and thus the need for Stage 2 Appropriate Assessment did not arise.

7.6.11. Upon consideration of this Stage 1 screening report, the Environment Section of the Local Authority noted that the potential for indirect effects was to be controlled by way of '*normal construction protocols*'. Accordingly, the applicant was required by way of a request for clarification of further information to submit an amended 'Stage 1 Appropriate Assessment' which outlined the nature of these construction protocols. In response, Section 3.2: '*Project Description*' of an updated screening report received by the Planning Authority on 1<sup>st</sup> April, 2020 details the following '*precautionary measures*' which will be out in place during the construction works:

- To minimise any impact on the subsurface strata from material spillages, all oils, solvents and paints used during construction will be stored within specially constructed dedicated temporary bunded areas.
- Refuelling of construction vehicles and the addition of hydraulic oils or lubricants to vehicles will take place in a designated area, away from surface water gullies or drains.
- Spill kits and hydrocarbon absorbent packs will be stored in a designated area and operators will be fully trained in the use of this equipment.

- Any raw materials, fuels and chemicals, will be stored within bunded areas to guard against potential accidental spills or leakages.
- All equipment and machinery will have regular checking for leaks and quality of performance.
- All potential runoff will be diverted through appropriate grit traps before it leaves the paved area.

7.6.12. Following consideration of the amended 'Stage 1 Appropriate Assessment', including the aforementioned measures, a further report was prepared by the Environment Section of the Local Authority which concluded that the proposed development, both alone or in combination with other projects, would not be likely to have a significant effect on any identified Natura 2000 site. However, the subsequent recommendation to grant permission was subject to the inclusion of a number of conditions and in this regard I would draw the Board's attention in particular to Condition No. 2(a) of the notification of the decision to grant permission which required the following:

*'The recommendations and construction control measures as detailed in the revised Stage 1 Appropriate Assessment Report received by the Planning Authority on the 1<sup>st</sup> April, 2020 shall be strictly adhered to and carried out in full'.*

7.6.13. Having reviewed the available information, it is my opinion that any adherence to the construction protocols / precautionary measures detailed in the revised screening report would be purposively intended to mitigate against any indirect impact on water-dependent species within the SAC caused by a deterioration in water quality attributable to the construction of the proposed development such as by way of sedimentation, the accidental spillage of fuels / oils from equipment / machinery, or the release of other contaminants during construction activities in the vicinity of nearby watercourses. In this regard, I would submit that to take account of the 'precautionary measures' contained in the screening assessment (as included by way of condition in the grant of permission) would be contrary to the judgement of the European Court of Justice in the case of "*People over Wind*" (C-323/17- CJEU) wherein it was determined that it was not appropriate, in screening for Appropriate Assessment, to take account of mitigation measures or "*measures intended to avoid or reduce the harmful effects of a plan or project on a European site*" as to do so

would be liable to undermine the protection afforded by the Habitats Directive and would run the risk of circumventing the requirements for Stage 2 Appropriate Assessment when a comprehensive analysis of such measures would be carried out and a determination reached as to their effectiveness (this legal position has been reiterated in more recent case law, including in the judgment of *Sweetman (IGP) -v- An Bord Pleanala & Ors* [2020] IEHC 39).

7.6.14. On balance, in my opinion, it is reasonable to conclude that the ‘precautionary measures’ detailed in the applicant’s screening report (and relied upon by the Planning Authority in its decision to grant permission) are intended to avoid, or mitigate, likely adverse effects on the River Barrow and River Nore Special Area of Conservation, attributable to a deterioration in water quality consequent on the proposed development. Therefore, on the basis that no account can be taken of the mitigation measures set out in the screening report, and by applying the ‘precautionary principle’, I would submit that the Board cannot be satisfied that the proposed development individually, or in combination with other plans or projects would not be likely to have a significant effect on European Site No. 002162, or any other European site, in view of the sites’ Conservation Objectives. In this regard, the subject works constitute development which necessitates Stage 2 Appropriate Assessment.

## 8.0 Recommendation

8.1. Having regard to the foregoing, I recommend that the decision of the Planning Authority be overturned in this instance and that permission be refused for the proposed development for the reasons and considerations set out below:

## 9.0 Reasons and Considerations

1. Having regard to the location of the site in an unzoned and unserviced rural area on lands at risk of flooding, the nature of the proposed development which has no functional association with neighbouring land or development, and the key principles of the risk-based sequential approach to flood risk management set out in ‘The Planning System and Flood Risk Management, Guidelines for Planning Authorities, 2009’, it is considered that in the absence



of any proven reason for its location in this area of open countryside, the proposed development would be inappropriately located and would, therefore, be contrary to the proper planning and sustainable development of the area.

2. On the basis of the information provided with the application, including the 'Appropriate Assessment Screening' received by the planning authority on the 1<sup>st</sup> day of April, 2020, which concluded that the proposed development would not have significant effects on the River Barrow and River Nore Special Area of Conservation, subject to the implementation of precautionary measures, and noting that such measures appear to the Board to be measures that are intended to avoid or reduce the harmful effects of the development on the European site concerned and accordingly cannot be taken into account in screening for Appropriate Assessment having regard to the judgement of the European Court of Justice in case C-323/17, the Board cannot be satisfied, beyond reasonable scientific doubt, that the proposed development, in the absence of those mitigation measures, would not have significant effects in the light of the conservation objectives and qualifying interests of the European site. Therefore, in the absence of a Natura Impact Statement, the Board cannot be satisfied that the proposed development individually, or in combination with other plans or projects would not be likely to have a significant effect on European Site No. 002162, or any other European site, in view of the site's Conservation Objectives. In such circumstances the Board is precluded from granting permission.

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Robert Speer  
Planning Inspector

8<sup>th</sup> September, 2020