



An
Bord
Pleanála

Inspector's Report ABP309566-21

Development	Retain and complete mixed-use development (residential and retail) in 5 three-storey blocks.
Location	Main Street, Ashford, County Wicklow.
Planning Authority	Wicklow County Council
Planning Authority Reg. Ref.	N/A
Applicant(s)	Vartry Developments Limited
Type of Application	Application for Leave to Apply for Substitute Consent
Planning Authority Decision	N/A
Observer(s)	None
Date of Site Inspection	9 th July 2021
Inspector	Hugh Mannion

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1.0 Site Location and Description

- 1.1. The site is on the right (western) side of the R 772 regional route in Ashford, County Wicklow. It is generally rectangular and is occupied by the partially constructed development which was the subject of the application under ABP303081- 18. The site is fenced off from the public street by security fencing. A three storey building faces onto the street and there is partially completed additional development to the rear of this.

2.0 Proposed Development

- 2.1. The proposed development consists of the retention and completion of a mixed-use development (total floor area: 3,621.7m²) comprising 5 No. three-storey blocks as follows:
- Block 'A': A three-storey block positioned alongside Main Street which consists of 3 No. retail units (to be subdivided into 5 No. units) at ground floor level with 5 No. two-storey dwelling units overhead.
 - Block 'B': A three-storey block positioned alongside Main Street which consists of 4 No. retail units at ground floor level with 4 No. two-storey dwelling units overhead.
 - Block 'C': A series of 6 No. three-storey terraced dwelling houses constructed in a stepped arrangement with a staggered building line alongside Local Road No. L1096.
 - Block 'D': A series of 5 No. three-storey terraced dwelling houses constructed alongside Local Road No. L1096.
 - Block 'E': A total of 4 No. three-storey, semi-detached dwelling houses positioned to the rear of Blocks 'C' & 'D'.
 - The proposal also includes for a new vehicular entrance onto Main Street to serve Blocks 'A' & 'B' and a second entrance onto Local Road No. L1096 which will provide access to Block 'E' and car parking serving the wider scheme. Associated site development works include site services,

landscaping and boundary treatments. Water and sewerage services are available via connection to the public mains.

All at Ashford, County Wicklow.

3.0 Planning History

- 3.1. Permission was granted under PA Ref. No. 08/1704 on 18th May, 2009 to Chieftain Construction Ltd. for the demolition of existing site structures and construction of a new mixed use development comprising (a) 528m² retail space (b) 9 no. three bedroom terraced houses (1.5/2storey) over ground level retail (c) 11 no. three bedroom terraced houses (2.5/3 storey) incorporating ground level home office unit (d) 8 no. four bedroom semi-detached houses (2.5 storey) and (e) all associated and ancillary access roads, parking facilities, footpaths, site enclosures, landscaping, boundary treatments and services infrastructure.
- 3.2. An Extension of Duration was granted under PA Ref. No. 14/1188 on 25th April 2014 for the lifetime of the permission under 08/1704 until 15th August 2019.
- 3.3. Permission was refused under ABP303081- 18 for the retention/completion of the development on site because –

It is considered, on the basis of the documentation submitted by the applicant, including Appropriate Assessment Screening and a Natura Impact Statement, that the proposed construction works involved in the subject development have the potential to have significant effects on The Murrough Wetlands Special Area of Conservation (site code 002249) and The Murrough Special Protection Area (site code 004186), in the light of the conservation objectives and qualifying interests of these two European Sites, through negatively affecting water quality in these sites via groundwater, and that, in the absence of mitigation measures, as set out in the submitted Natura Impact Statement, the development would adversely affect the integrity of these European Sites. Since the planning application, as submitted, involves not only future development but also the retention of existing development that has already taken place, and because that existing development also involved construction works on the subject site, including substantial removal of soils and excavation into the site to the rear, the Board cannot be satisfied, beyond reasonable scientific doubt, that the development for which retention is sought would not have

had significant effects on these European sites and therefore that the development for which retention is sought would have required Appropriate Assessment. In such circumstances, having regard to case law and to the provisions of Section 34 (12) of the Planning and Development Act, 2000, as amended, the Board is precluded from granting planning permission or the subject development

4.0 Statutory Provisions

- 4.1. Section 177A provides for applications for substitute consent.
- 4.2. Section 177B provides that where a planning authority becomes aware that a development would have required an EIA, determination as to whether an EIA was required or an AA and a court within the state of the ECJ had invalidated a grant of permission in relation to that development the planning authority must inform the developer that an application for substitute consent should be made to the Board.
- 4.3. Section 177C provides that in the absence of a notice under 177B the owner or occupier of land where development has been carried out where that development would have required an EIA, determination as to whether an EIA was required or an AA may apply to the Board for substitute consent if;
 - There is a material defect in a permission as determined by a court within the state, the ECJ because of the absence or inadequacy of an EIA or AA, any error of fact or law or,
 - where the applicant is of the opinion that exceptional circumstances exist, which would make it appropriate to permit the regularisation of the development by way of an application for substitute consent.

5.0 The Grounds for the Application.

- The site is the same as under ABP303081-18 where the Board refused permission because the proposed development was for retention of development which required a remedial NIS (rNIS). The site has been partially developed but previous permissions have lapsed, and a new permission is required which requires an application for substitute consent.

- The site is in the centre of Ashford village in County Wicklow fronting onto the R772.
- Permission was granted under 08/1704 for 28 residential units, office and retail development. The duration of that permission was extended under 14/1187. The development was partially carried out and a retention permission was sought under ABP303081-18. The Board refused permission having regard to case law and section 34 (12) of the Planning and Development Act¹. Because of the Board's decision in ABP303081-18 cannot be progressed.
- This application for leave meets the criteria set out in the Act in that it requires AA and that the planning authority made several material errors in its consideration of various applications on site by not requiring AA.

6.0 Planning Authority Response

- Permission was granted on this site in 2009 for 24 houses and office/retail development under 08/1704. Under planning reference 14/1188 the lifetime of that permission was extended to 15th August 2019. Fifteen residential units were commenced in 2015 and 9 units were commenced in 2016.
- The development was not carried out in accordance with reference 08/1704. The main point of non-compliance was the provision of additional floor areas to the rear of the houses facing the street.
- An application to regularise this situation was made under reference 18/603 but that application was subsequently refused at appeal when the Board decided that an AA was required.
- The regularisation of the proposed development could prevent impacts on a European site.
- The applicant did not undertake the development as he/she is the Receiver of the site.

¹ Section 34(12) precludes a planning authority from considering an application for retention where the development, before it was commenced, would have required an EIA, screening for EIA and AA.

- The ability to carry out an environmental assessment for the purposes of AA and public participation in that process has not been impaired.
- Any likely adverse effects on a European site can be prevented by the completion of the proposed development.
- The planning authority is not aware of any adverse effects on any European site.
- The planning authority is unaware of any instance where the current applicant has previously carried out any unauthorised development.

6.1. Further Responses

None.

7.0 Assessment

- 7.1. This is an application under section 177C of the Planning and Development Act 2000, as amended, whereby the owner or occupier of land to whom no notice has been issued by a planning authority in relation to unauthorised development may make an application for leave to apply for substitute consent.
- 7.2. The Board in ABP303081-18 determined that the development which is the subject of this application for leave is one which requires AA and therefore this application is one to which Section 117(C)(2) applies. Additionally, the applicant states that exceptional circumstances apply which fulfil the criteria for exceptional circumstances required by section 177(2)(b) which would allow the Board to grant leave to apply for substitute consent under section 177D.
- 7.3. The exceptional circumstances are set out in Section 177D and I consider the provisions of Section 177D (2) as follows (the criteria set out in the section is in bold while my assessment is bullet pointed).

7.4. “Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive”

- This application for leave to apply for substitute consent arises from a decision by the Board that the development proposed for retention under ABP303081-18 could not lawfully be considered in light of the Section 34(12) of the Planning and Development Act 2000, as amended, because that development would have required AA.
- Therefore, I conclude that an application for substitute consent which would include a rNIS and carrying out of AA would not circumvent the objectives of the Habitats Directive.

7.5. “Whether the applicant had or could reasonably have had a belief that the development was not unauthorised”

- The applicant in ABP303081-18 was the receiver for the purposes of the Companies Acts for a previous applicant for permission. The present applicant appears to have acquired sufficient legal interest in the property sometime in the last year to make a planning application. It appears unlikely that the present applicant was not aware of the planning status of the development on the site. Nevertheless, I consider that such awareness does not preclude a grant of leave to make an application for substitute consent.

7.6. “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.”

- The process of AA involves the research and provision of information to the public and consenting authorities in relation to likely significant effects on European sites having regard to the sites’ conservation objectives. In the present case the ability to provide such information has not been substantially impaired and the provision of information would facilitate public participation in the assessment/consent process. I conclude that the ability to prepare an

rNIS to assess the effects on the Murrough Wetlands Special Area of Conservation (site code 002249) and the Murrough Special Protection Area (site code 004186) or any other European site has not been substantially impaired nor has the capacity for public participation in the process through the making of submissions to the Board in relation to any application for substitute consent been substantially impaired.

7.7. “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”

- In the ABP303081-18 case the reporting inspector stated on foot of carrying out an AA that the proposed development would not adversely affect the integrity of the Murrough Wetlands SAC (002249) or the Murrough Wetlands SPA (004186). Whereas the Board refused permission in that case the refusal was of a ‘technical’ nature not a judgement of adverse effects on any European sites. Having regard, in particular the material in ABP303081-18 the submissions by the applicant and planning authority in this case, I conclude that granting leave to make an application for substitute consent would facilitate the assessment of actual or likely adverse effects on the integrity of a European Site resulting from the carrying out or continuation of the development.

7.8. “The extent to which significant effects on the environment or adverse effects on the European site can be remedied”

- The site is within the red line development boundary of Ashford village which is designated a small growth town in the current County Development Plan. This plan has been subject to SEA and AA. The county development plan states that the town is served by the Wicklow Sewerage Scheme which is operating well within capacity and that there is sufficient drinking water from the Cronroe Reservoir. In the previous application under ABP303081-18 the Board raised the issue of surface water management and the reporting

inspector was satisfied that the proposed development would not adversely affect any European site because of the discharge of surface water.

- On the basis of the material available, including the information set out in the County Development Plan, in the previous case under ABP303081-18 and in the submissions by the applicant and planning authority in this case I conclude that it is possible to remedy any adverse effects on any European site.

7.9. “Whether the applicant has complied with previous planning permissions or previously carried out an unauthorised development”

- The planning authority states that there are no outstanding enforcement files in relation to the applicant in this case. I conclude that the applicant is making appropriate efforts to regularise this development by engaging in the substitute consent procedure.

7.10. “Such other matters as the Board consider relevant”

I consider that no further matters need be considered by the Board in this case.

7.11. Recommendation

I recommend that leave to apply for substitute consent should be granted.

8.0 Reasons and Considerations

- 8.1. Having regard to Section 177D of the Planning and Development Act, 2000, as amended, the Board is satisfied that an appropriate assessment is required in this case, in the light of the scale and nature of the development and its relationship with European sites.

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

In this regard the Board;

- considered that this application for leave to apply for substitute consent has demonstrated that the regularisation of the development would not circumvent the purposes and objectives of the Habitats Directive because it would allow for the provision of information and an analysis of the likely significant effects of the development on European sites in the vicinity of the development site.
- considered that this application for leave to apply for substitute consent has demonstrated that the ability to carry out an appropriate assessment and that public participation in such an assessment have not been substantially impaired.
- considered the submission of an rNIS would facilitate an assessment of the potential for the remediation of any significant effects on European sites,
- noted that the planning authority is not currently pursuing enforcement proceedings against the applicant in this case and considered that the applicant is making reasonable efforts to regularise the planning status of the development.

Having regard to the foregoing it is considered that exceptional circumstances do exist such that it would be appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent in relation to the site outlined in this application.

Hugh Mannion
Senior Planning Inspector

12th July 2021