



An
Bord
Pleanála

Inspector's Report

ABP-310968-21

Development	Retention of minor design change to existing dormer dwelling
Location	Ballynearla , Kilmacow , Co Kilkenny
Planning Authority	Kilkenny County Council
Planning Authority Reg. Ref.	21429
Applicant(s)	Shane Gaule
Type of Application	Permission
Planning Authority Decision	Grant with Conditions
Type of Appeal	Third Party
Appellant(s)	Margaret Foran.
Observer(s)	None.
Date of Site Inspection	10 th of November 2021
Inspector	Caryn Coogan

1.0 Site Location and Description

- 1.1. The site is to the east of Lower Kilmacow village in South Kilkenny. It is located off a short private cul de sac in a rural part of Kilmacow, which serves 3No. one off houses.
- 1.2. The subject site, 0.13Ha, includes a large dormer bungalow with a front and rear garden and integral boundary treatment.
- 1.3. There is a small commercial premises to the rear, and a dwelling immediately to the north.

2.0 Development

- 2.1 The application is for retention of minor design changes to the existing dormer dwelling on the site which was permitted under planning reference 19/43 and all associated works.
- 2.2 The gross floor area to be retained is 54.06sq.m.

3.0 Planning Authority Decision

3.1. Decision

Kilkenny Co. Co. granted planning permission for the proposed development subject to 4No. standard planning conditions relating to contributions, finishes and surface water.

3.2. Planning Authority Reports

3.2.1. *Planning Reports*

- The dwelling on the site was permitted in 2019 to the applicant's father Charles Gaule. The principle of the applicant's son Shane Gaule complying with the development plan's local needs policy (the applicant associated with the current application) is acceptable.
- The subject house design changes are minor in nature, and they match the dwelling.

- The development will not impact on the extent of the private open space area.

3.2.2. **Other Technical Reports**

None

3.3. **Prescribed Bodies**

Tramore House, Regional Design Office:- The site is located within the boundary of the constraints study area of the N24 Waterford to Cahir Project. There is no conflict or observations to be made.

3.4. **Third Party Observations**

Margaret Foran objected to the development on the grounds of:-

- Ownership
- Drawings
- House Type
- Housing Need
- Property Damage

4.0 **Planning History**

Enf 21/012

An enforcement file dealing with an alleged unauthorised non-compliance of conditions attached to planning permission P19/43. Namely, conditions 1, 11 and 12 relating to an occupancy agreement at Ballynearla, Kilmacow, Co. Kilkenny.

Planning Permission P19/43

Planning permission was granted to Charles Gaule for a dwelling house on the subject site in 2019. The development represented a subdivision of the family home curtilage to provide an additional house. The planning authority considered granting the second family home did not conform to the Rural Housing Policy. It was considered the occupation of the applicants dwelling house by his son would satisfy

Section 3.5.2.3 (3) of the development plan policy, providing the applicant entered into an occupation agreement.

5.0 Policy Context

5.1. Development Plan

3.5.2.3 Rural Generated Housing need In areas under urban influence and in stronger rural areas the Council will permit (subject to other planning criteria) single houses for persons where the following stipulations are met:

3. Persons who have no family lands but who wish to build their first home, on a site within a 10 km radius of their original family home, (the local rural area) in which they have spent a substantial and continuous part of their lives (minimum 5 years).

5.2. Natural Heritage Designations

SITECODE 002137

SITE_NAME Lower River Suir SAC

The Natura 2000 site is located 6.5km to the south of the site.

6.0 The Appeal

6.1. Grounds of Appeal

Peter Thomson Planning Solutions, has taken the third-party appeal on behalf of Mrs Margaret Foran, who lives in the farmhouse to the northwest of the private lane providing access to the subject dwellinghouse. The appellant sold the site to Charles Gaule to build a family home. She is the owner of the private lane where the house is accessed.

- Conditions No. 10 and 11 of planning reference 19/43 required restricted occupation to the applicant and the need for legal agreement to be entered into under Section 47. The wording in the planner's report strongly suggest that the principle of Shane Gaule occupying the house is being considered under the current proposal. Unless an alternative occupant of the house was agreed in writing with planning permission 19/43 under condition No. 11, prior

to planning application ref: 21/429 being submitted, the planning authority should have invalidated the application as it is incorrect and misleading. The planning authority is not empowered to amend the terms of a planning condition (Condition 11 of 19/43). If a request has or had been made to change the occupancy, it would have been expected this would have been done before works started on the construction of the house, and a detailed explanation why Charles Gaule no longer needed the new dwelling. The planning authority is not empowered to deviate from the wording of Condition No. 12.

- The Planner's Report confirms Charles Gaule did not strictly comply with 'rural generated housing need' policy under Section 3.5.2.3 of the Development Plan. That begs the question why planning permission was granted for P19/43 in the first instance, although it is accepted there are occasions where permission is granted to allow downscaling with a family member taking over the original house. However, the question now arises, if Charles Gaule misled the planning authority in claiming he was downscaling and that his son would take over the family home, as that arrangement never materialised.
- Under the planning application 18/487 it was stated Charles Gaule worked in financial services in Waterford City and that he wanted a new house for himself and to return home to Kilmacow, as his son had taken over his house. The justification for Shane Gaule having a housing need at the time, was not provided and it is not known his social and economic reasons are in accordance with National Policy Objective 19 of the National Planning Framework. There remains no justification for Shane Gaule to live in the house.
- An increase of the floor area permitted under reference 19/43 by 54sq.m. is not a minor increase. It has changed a 1.5 storey elevation to a full two storey dwelling.
- The existing right of way to the application site was not shown on the application plans.
- The applicant does not have consent to make the application.

- The granting of the development would set a highly undesirable precedent

6.2. Applicant Response

- Shane and Charles Gaule were not informed of a missing file. Letters explaining and satisfying Conditions 11 and 12 were submitted on 30th of September 2019 and 1st of March 2021. No mention was made of the missing file and there was no attempt to mislead the Council.
- The granting of both planning permissions would be considered clear consent to the occupation of the house by Shane Gaule having satisfied Conditions 11 & 12.
- Consent must be granted in Condition No. 11, according to the condition it does not state it must be agreed in writing. As retention was granted it would be deemed as consent, and the requirements of Condition No. 11 have been satisfied.
- Charles Gaule has full planning permission and has been living in his current dwelling for over forty years, and there is no requirement for him to explain why he wishes to remain living in his home providing the occupant of the new dwelling satisfies the council's requirements as stated. However, it should be noted that Charles Gaule has resided over 2 years in this dwelling with his daughter, son in law and two grandchildren, as the pandemic meant he could not leave his home.
- Shane Gaule, his wife and two young children have a clear housing need and satisfy all local affiliation links.
- The increase in floor area has been included in the retention application. The increase in floor area to the area of the dwelling which was required in order to rectify an error in the pitch of the roof and to allow for a plant room. The front of the dwelling remains true to the original plans.
- The right of way is not relevant to the appeal.

6.3. Planning Authority Response

There was no further comment on appeal.

7.0 Assessment

7.1. It would appear from the appeal file, the current planning application came on foot of a planning enforcement case, ENF 21/012 regarding an alleged non-compliance of conditions attached to Planning Permission P19/43, namely Conditions 1,11 and 12.

7.2. Planning Reference 19/43 was granted to Charles Gaule on 15th of May 2019 for a dwelling house at Ballynearla, Kilmacow (on the appeal site) subject to 13No. conditions. The planning application consisted of the subdivision of curtilage of the family home for an additional dwelling house immediately south of the existing dwelling. In the assessment of Planning Reference 19/43, the planning authority stated a second family home did not conform to the Rural Housing Policy in the development plan. However, it also considered the occupation of the applicants dwelling house by his son would satisfy Section 3.5.2.3 (3) of the development plan's rural housing policy, providing the applicant entered into a seven-year occupation agreement. It was stated in the application documentation that Charles Gaule wished to downsize, and that his son Shane would live in the main family home. Condition No. 11 of planning reference 19/43 stated:

(a) *The proposed dwelling when completed shall be first occupied as a place of residence by Charles Gaule and shall remain occupied for a period of at least seven years thereafter, unless consent is granted by the planning authority for its occupation by other persons who meet the criteria on local affiliation/links contained in the Kilkenny County Development Plan 2014-2020.*

(b) *Within two months of the occupation of the proposed dwelling, the applicant shall submit to the Planning Authority a written statement of confirmation of the first occupation of the dwelling in accordance with paragraph a) and date such occupation.*

This condition shall not affect the sale of the dwelling by a mortgage in possession or by any person deriving title from such a sale.

7.3 The current planning application and decision under appeal, relates solely to the retention of minor changes to the existing and as constructed dwelling permitted under planning reference 19/43. According to the planning report the principle of Shane Gaule rural housing need is considered to be acceptable in relation to

compliance with rural housing policy of the Kilkenny County Development Plan. However having studied the content and the conditions attached to planning reference, in particular Condition No. 11 cited above I do not consider this to be consent in accordance with terms of the planning condition. The planning authority is not empowered to amend the terms of Condition No. 11, and by accepting Shane Gaule as the applicant and owner occupier of the subject dwelling, do not in my opinion constitute consent of compliance with the condition. This issue is a matter for the planning authority and beyond the remit of the Board. In my opinion, the Board is not in a position to decide on this appeal as it materially contravenes Condition No. 11 of Planning Reference 19/43.

7.4 I note Condition No. 12 of the same permission P19/43, states the family house adjoining the proposed site to the north shall be restricted to its use as a dwelling by the applicant's son Shane Gaule for a period of at least seven years. Effectively, both parties have swapped houses, and Charles Gaule has remained in the original dwelling and his son Shane is the owner occupier of the new dwelling permitted under P19/43, and the current appeal. The planning application does not address the non-compliance with the conditions attached to P19/43, and the Board is precluded from granting planning permission for the retention of the alternations under the applicant's name which materially contravenes the terms of Conditions 11 and 12 of the parent planning permission for the dwelling house.

7.5 On a final note, having considered alterations to the dwelling the subject of retention under this current application which include the following:

(i) The roof profile squared off on the southern elevation on the main dwelling and sunroom

(ii) A new first floor section to the rear of the dwelling to include two additional bedrooms and a bathroom

(iii) A new ground floor section to include a utility room.

The total additional floor area is 54sq.m. and the dwelling house as viewed from the private laneway and public road appears to be substantially similar in appearance to the original dwelling permitted under planning reference P19/43. The alterations to the dwelling house are acceptable in principle and do not impact on neighbouring properties.

7.6 **Appropriate Assessment**

Having regard to the nature of development, which is for a relatively minor alteration and addition to a permitted dwelling house assessed under planning reference 19/43, which was screened for Appropriate Assessment, with no appropriate assessment issues arising, and it is not considered that the proposed development would likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.0 **Recommendation**

8.1. I recommend the Board refuse the development for the following reason.

9.0 **Reasons and Considerations**

The development would, by reason of a change of the occupancy/ ownership of the subject dwelling would contravene materially two conditions attached to an existing permission for development namely, condition numbers 11 and 12 attached to the permission granted by Kilkenny Co. Co. on the 15th day of May 2020 under planning register reference number reference number P19/43. Therefore, the Board is precluded from granting planning permission for the development.

Caryn Coogan
Planning Inspector

4th of January 2022\