



An
Bord
Pleanála

Inspector's Report

ABP-312254-21

Development	Demolition and reconstruction of part-completed two-storey dwelling house.
Location	No 23 Lighthouse View, Caherciveen, Co Kerry.
Planning Authority	Kerry County Council
Planning Authority Reg. Ref.	21605
Applicant(s)	Barraduff Homes Ltd.
Type of Application	Permission
Planning Authority Decision	Grant with Conditions
Type of Appeal	Third Party
Appellant(s)	Nicolas Browne
Observer(s)	None
Date of Site Inspection	29 th of April 2022
Inspector	Adrian Ormsby

1.0 Site Location and Description

- 1.1. The appeal site is located to the south west of Caherciveen in County Kerry and south of the N70 National Road that links Tralee, Killorglin, Caherciveen to Kenmare. Much of this route forms part of the loop known as the Ring of Kerry. The application is c. 1.5 km from the centre of Caherciveen
- 1.2. The site has a stated area of 0.058 ha and includes an unfinished house in an unfinished housing estate known as Lighthouse View. Works are ongoing to a number of houses in the estate. While it was unclear at the time of the inspection if any of the houses were currently occupied it was evident that some houses appeared ready for occupation.
- 1.3. The estate is accessed from an existing private road off the N70 that passes a graveyard to its north and the Skellig Distillery building to its south.

2.0 Proposed Development

- 2.1. The proposed development comprises-
 - demolition of part-completed two-storey house (142 sq.m) and
 - reconstruction of a two storey house (142 sq.m)
 - originally permitted under plan ref 05/2032
- 2.2. The Planning Authority sought further information (FI) on the 27/07/21 relating to the following-
 - It appears the Applicants are accessing the site along an unauthorised access route. Details of access arrangements to the site are required and the Applicants legal entitlement in this regard.
 - Proposals for a childproof structural restraining barrier to the existing site boundary to the west of the site.
- 2.3. The Applicants responded to the FI request on the 04/11/21 (incomplete response) and the 17/11/11 (complete response) as follows-
 - The application site and development proposed relates to demolition and reconstruction of a house only.

- The Applicant understands the dwelling house relies on the access permitted under planning ref. 05/3082.
- The dispute in this regards is a civil matter.
- The application is merely a procedural regularisation of the property given the expiry of the parent permission.
- The Applicant is happy to raise the level of the block wall to 1.1m above the site and provide a native hedge on the garden side

3.0 Planning Authority Decision

3.1. Decision

The Planning Authority decided to grant permission on the 10/12/21 subject to 12 conditions generally of a standard nature and including-

- C4- The use of the dwelling shall be a primary permanent all year round private residence. It shall not be used as a holiday home or second home.
- C5- The dwelling shall be occupied as a place of permanent residence by the initial occupant and shall remain so for 7 years. A section 47 agreement shall be entered into.
- C10- Vehicular access to the site shall be located via the access roadway granted under Planning Register No. 05/2032. The house shall not be occupied until the site development works permitted under 05/2032 have been completed to the satisfaction of the council.
- C12- The level of the block wall shall be raised as per the details of the 17/11/21 to satisfaction of the Planning Authority and prior to initial occupation of dwelling.

4.0 Planning Authority Reports

4.1. Planning Reports

The second planners report (dated 06/12/21) reflects the decision of the Planning Authority. The following is noted from the report-

- No negative impacts on any neighbouring residential amenities.
- Condition requiring units to be full time residences to be included as per Objective RS-3.
- The issue of ownership of lands would be a civil matter and is outside the red line site boundary in this case.

4.2. Other Technical Reports

- Housing Estates Unit 24/06/21
 - Services are not indicated
 - A childproof structural restraining barrier is required to western boundary to prevent falling from a height, timber should not be allowed
 - The estate road outside of red line boundary is unfinished and unsurfaced. This should be surfaced and appropriate services in place prior to grant of permission. Application may be premature.
 - There appears to be a dispute regarding use of the existing access.
- Housing Estates Unit 23/11/21
 - Services are not indicated
 - Can 1.0m lateral clearance be provided from the edge of the estate road.
 - Matters relating to access road finish and dispute repeated

4.3. Prescribed Bodies

- Transport Infrastructure Ireland

- 20/07/21- no observations

4.4. Third Party Observations

Three third party submissions were received including the Appellant. The matters raised generally include those raised in the grounds of appeal as set out in section 7.1 below. Others matters raised include-

- Non-compliance with parent permission 05/2032
- Insufficient information on traffic, transport, environmental or any other impacts that are required for such applications.
- Inaccuracies in the submitted drawings including site boundaries of adjoining properties and applications.

5.0 Planning History

- This site- None
- Adjoining site- Current appeal
 - 21/606 & ABP-312260-21- Demolish and reconstruct house originally permitted under plan ref 05/2032
- This site forms part of a larger site-
 - 05/2032 & ABP- PL08.215370- 33 houses and an access road, **Grant** 24/04/2006. Applicant- Tom O'Sullivan.

6.0 Policy Context

6.1. National Context

- Lighthouse View in Caherciveen is identified in the Department of Housing, Local Government and Heritage's Unfinished Housing Developments - Annual Reports most recently updated on 30 August 2021.¹

¹ <https://www.gov.ie/en/collection/706ac-unfinished-housing-developments-annual-reports/>

6.2. Ministerial Guidelines

- Development Management Guidelines 2007. Section 5.13 states-
'The planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution in the Courts. In this regard, it should be noted that, as section 34(13) of the Planning Act states, a person is not be entitled solely by reason of a permission to carry out any development. In this regard, it should be noted that, as section 34(13) of the Planning Act states, a person is not be entitled solely by reason of a permission to carry out any development. Where appropriate, an advisory note to this effect should be added at the end of the planning decision. Accordingly, where in making an application, a person asserts that he/she is the owner of the land or structure in question, and there is nothing to cast doubt on the bona fides of that assertion, the Planning Authority is not required to inquire further into the matter. If, however, the terms of the application itself, or a submission made by a third party, or information which may otherwise reach the authority, raise doubts as to the sufficiency of the legal interest, further information may have to be sought under Article 33 of the Regulations. Only where it is clear from the response that the Applicant does not have sufficient legal interest should permission be refused on that basis. If notwithstanding the further information, some doubt still remains, the Planning Authority may decide to grant permission. However such a grant of permission is subject to the provisions of section 34(13) of the Act, referred to above. In other words the developer must be certain under civil law that he/she has all rights in the land to execute the grant of permission.'
- Managing and Resolving Unfinished Housing Developments, Guidance Manual (DoECLG 2011).
"The overall aim of this manual is to support the delivery of sustainable communities and government policy in relation to proper planning and sustainable development by supporting the restoration of confidence in the housing development sector and by identifying effective mechanisms for

resolving issues that have arisen with particular unfinished housing developments.” Page 5.

6.3. Kerry County Development Plan 2015-2021 (CDP)

6.3.1. The site is located outside of the Caherciveen settlement boundary and in a rural area. Section 3.3.1 of the CDP states-

It is the policy of the Kerry County Council to ensure that future housing in rural areas complies with the Sustainable Rural Housing Guidelines for Planning Authorities, 2005 (DoEHLG) and this will be achieved through greater emphasis on the following:-

(a) Establishing that there is a genuine housing need for permanent occupation.

(b) Giving priority to the reduction of residential vacancy rates in the Rural Areas Under Strong Urban Influence and Stronger Rural Areas in preference to new residential development.

(c) The replacement, renovation or modification of existing structures in rural areas for residential use.

(d) Encouraging people who wish to reside in the countryside to live in existing settlements or development nodes where there are services available.

6.3.2. The following rural housing objectives are relevant-

- *RS-4 Ensure that the provision of rural housing will protect the landscape, the natural and built heritage, the economic assets and the environment of the County.*
- *RS-6 Ensure that all permitted residential development in rural areas is for use as a primary permanent place of residence. In addition such development shall be subject to the inclusion of an occupancy clause for a period of 7 years.*

6.3.3. Section 3.3.5- Renovation and Restoration of Existing and Vacant Buildings Situated in Rural Areas.

6.3.4. Section 3.3.6- Vacant and Incomplete Dwellings in Rural Areas. This section states-

“There are a considerable number of vacant or incomplete one-off houses in rural areas due to the economic downturn and lack of availability of finance. It is a priority of the Council to see the completion and occupation of these dwellings. In order to ensure that these houses are occupied during the lifetime of the Plan, the Council will consider a relaxation of the “occupancy criteria” for such houses in the following circumstances:-

- The owner can satisfy the Planning Authority (in confidence) that financial difficulties exist which require the disposal of the house.*
- The intended purchaser can satisfy the Planning Authority that the house will be used as a permanent place of residence.*
- The purchaser does not own a house already.*
- The sale does not give rise to unsustainable travel, i.e. the purchaser must be within a reasonable distance from place of work.*
- This policy will only apply to fully and partially complete houses. Furthermore the sale should not give rise to a subsequent application for another house on the same land holding.”*

6.3.5. Housing Objective HS-7-

It is an objective of the Council to:-

Address the issue of unfinished housing estates in the County by implementing the guidance manual Managing and Resolving Unfinished Housing Developments (DoECLG 2011).

6.4. West Iveragh Local Area Plan 2019-2025-

6.4.1. This plan was adopted on July 24th 2019 and became effective from September 4th 2019. It replaced the previously adopted LAP's contained in the Cahersiveen, Waterville & Sneem Functional Areas 2013-2019 for the corresponding areas. The

site is located outside the settlement boundary of Caherciveen on lands that are not zoned.

6.5. Natural Heritage Designations

6.5.1. There are no relevant designated areas within the vicinity of the site. The site is however located-

- c. 1km south east of the Valencia Harbour/Portmagee Channel SAC 002262 and
- c. 1.3 km south east of the Iveragh Peninsula SPA (004154)

6.6. EIA Screening

6.6.1. The proposed development is of a class but substantially under the threshold of 500 units to trigger the requirement for submission of an EIAR and carrying out of an EIA. Having regard to the nature of the development, which is a new house replacing an incomplete house and noting the proximity of a similar development on the adjoining site, and the absence of features of ecological importance within and near the site, I conclude that the necessity for submission of an EIAR and carrying out of EIA can be set aside at a preliminary stage.

7.0 The Appeal

7.1. Grounds of Appeal

One third party appeal has been received from Nicholas Browne. The appeal has been prepared on the Appellants behalf by Frank Curran Consulting Engineers Ltd. The grounds of appeal can be summarised as follows-

- The FI request required the submission of folio details and land registry maps of the Applicants legal rights to access the site.
- The Planning Authority stated that they would not be in a position to grant permission without the Applicant having actual vehicular access to same.

- This information was never supplied yet Kerry County Council granted permission.
- The Appellant was never informed of the submitted further information and therefore never had a chance to comment on same.
- Condition 10 of the Planning Permission as granted cannot be complied with as the access road that has been constructed is not the same as the access road for which Planning Permission was granted under Planning Register No: 05/2032.
- The existing road is not compliant, is an unauthorised development and a planning application is required to regularise this road.
- A map is attached showing the difference between the access roads as permitted under 05/2032 and the actual road that is on the ground.
- The Applicants do not have a right of way on the road and this has been show on the Land Registry Map submitted with the Appellants original submission/objection to the development on the 05/07/2021.
- A solicitor's letter is also attached.

7.2. Applicant Response

- None received

7.3. Planning Authority Response

- None received

7.4. Observations

- None

8.0 Assessment

8.1. Introduction

8.1.1. I have examined the application details and all other documentation on file, including the appeal. I have inspected the site and have had regard to relevant local/regional/national policies and guidance.

8.1.2. I consider that the main issues for this appeal are as follows-

- Principle of Development
- The Grounds of Appeal
- Matter of Unauthorised Development
- The Proposed Development
- Other Matters
- Appropriate Assessment

8.2. Principle of Development

8.2.1. The application is for the demolition of a shell of an incomplete dwelling and construction of a new development on lands that are located outside of a settlement boundary and on unzoned lands. The application site includes for one house within an overall development of 33 houses permitted under 05/2032 and which connect to public services.

8.2.2. Generally applications for individual houses on unzoned lands and outside of settlement boundary's should be assessed under the criteria for individual one off houses and I note the site is located in an area under strong urban influence (Map 3.1 of CDP). It is clear that this context is different in that the application is evidently part of an unfinished housing development and is a legacy of the financial crash. Therefore a pragmatic consideration of the application is required in order to restore confidence in the housing sector and to resolve and deliver on Housing Objective HS-7 i.e. to address the issue of unfinished housing estates.

8.2.3. Section 3.3.6 of the CDP also deals with Vacant and Incomplete Dwellings in Rural Areas. This section details that It is a priority of the Council to see the completion

and occupation of these dwellings and that the Council will consider a relaxation of the “occupancy criteria” for such houses in a number of circumstances.

8.2.4. The application does not make any case for the relaxation of occupancy criteria. In granting permission for the development the Planning Authority have imposed conditions requiring-

- C4- The use of the dwelling shall be a primary permanent all year round private residence. It shall not be used as a holiday home or second home.
- C5- The dwelling shall be occupied as a place of permanent residence by the initial occupant and shall remain so for 7 years. A section 47 agreement shall be entered into.

8.2.5. The Applicants have not sought to appeal the decision of the Planning Authority or its conditions including the two above and it must therefore be considered they have no objection to the conditions. Having considered the sites location outside a settlement boundary and in an area under strong urban influence (Map 3.1 of the CDP), it would be unreasonable to remove these conditions in the context of the criteria set out in section 3.3.6 of the CDP and the absence of a first party appeal.

8.2.6. Having considered the above the proposed development is generally in keeping with the provisions of the County Development Plan and the proper planning and development of the area.

8.3. The Grounds of Appeal

8.3.1. The main grounds of the appeal generally relate to the alleged unauthorised private access road to the site, the Applicants legal entitlement to use same for the proposed development and the absence of information to support same.

8.3.2. The Planning Authority originally sought further information (FI) relating to these matters. The Applicants responded advising they are seeking permission for the demolition and reconstruction of a house only and the house to be demolished was permitted under 05/3082. The red line only identifies the application site and not the access road. The Applicants clearly detail the development will rely on the access granted under 05/3082.

- 8.3.3. The Planning Authority accepted this submission and granted permission subject to a number of conditions. Condition 10 specifically requires vehicular access to the site via the access roadway granted under Planning Register No. 05/2032 and that the house shall not be occupied until the site development works permitted under 05/2032 have been completed to the satisfaction of the council. The Appellant argues that this condition and permission cannot be complied with as the road is not built as per 05/2032.
- 8.3.4. The main issues at hand here relates to the Applicants legal right to use and the planning status of the access road. I note the Applicants have submitted maps with the application in which they outline the site in red and lands within the Applicants landholding in blue, which includes the access road. A wayleave across part of the access road is also shown in yellow.
- 8.3.5. The Appellant has submitted a solicitor's letter with land registry mapping which appears to challenge the Applicant's landholding as outlined in blue. They also submit a map showing the access road permitted under 05/2032 and as built. Based on this map the as built road would appear to be located within the Appellants landholding. While I acknowledge there may be a matter of unauthorised development as regards to the siting of the access road, the Board are reminded that enforcement matters fall within the jurisdiction of the Planning Authority. In this context, I am satisfied the substantive issue at play is a legal matter and this is not one for resolution through the planning system. Section 5.13 of the Development Management Guidelines 2007 details that-

The planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution in the Courts. In this regard, it should be noted that, as section 34(13) of the Planning Act states, a person is not be entitled solely by reason of a permission to carry out any development.

- 8.3.6. Based on the information on file I cannot say with any certainty that the Applicants have the legal right to traverse the existing access route to implement the development if permitted. This needs resolution in the Courts. Accordingly and having regard to section 34(13) of the Act, it is clear the Board is not precluded from granting permission for this development on this basis.

8.3.7. However, it would be inappropriate to grant permission for a development which appears to rely on an unauthorised development i.e. the location of the existing access road. In this regard, I tend to agree with the Planning Authority and a condition similar to that of their condition 10 should be imposed. I recommend the condition should detail that the permitted development should rely on the access road as per 05/2032, or as otherwise permitted through a subsequent planning application i.e. should the planning status of the access road be regularised in situ. This would provide flexibility whereby 05/2032 is likely expired and condition 10 as stated by the Planning Authority could be considered difficult to implement, unreasonable and therefore unenforceable.

8.4. **Matter of Unauthorised Development**

8.4.1. I acknowledge the Appellants concerns in relation to the alleged unauthorised access road to the site and the Applicants legal entitlement to use same. Notwithstanding the matters as set out in section 8.3 above, I have given consideration to section 35 of the Planning and Development Acts 200 (as amended) i.e. 'Refusal of planning permission for past failures to comply'.

8.4.2. Section 35 requires the Planning Authority to be satisfied that a person to whom this section would apply, is not in compliance with a previous permission or with a condition to which the previous permission is subject, has carried out a substantial unauthorised development, or has been convicted of an offence under this Act.

8.4.3. In this context the Planning Authority needs to form the opinion—

“that there is a real and substantial risk that the development in respect of which permission is sought would not be completed in accordance with such permission if granted or with a condition to which such permission if granted would be subject, and Planning and Development Acts”

and therefore permission should not be granted to the Applicant concerned in respect of that development.

8.4.4. Based on the information submitted with the application, the appeal and on file I cannot form an opinion with any degree of confidence that the Applicant under 05/2032 has any involvement with the subject application. Furthermore, the proposed development is for the demolition and replacement of a house only with a

clearly defined red line. In this regard I do not consider there to be a real and substantial risk that the development as applied for would not be completed in accordance with the permission i.e. this is one house only.

- 8.4.5. Finally, while I see no record of an open enforcement file pertaining to the alleged unauthorised development on the file before me, I note that matter relating to enforcement falls under the jurisdiction of the Planning Authority.

8.5. The Proposed Development

- 8.5.1. The proposed development is for the demolition of the existing shell of an incomplete dwelling on the site and its replacement with a 142 sq.m detached two storey dwelling, 8 metres high with a standard pitch roof and two protruding gable features to the front elevation. The design of the house is entirely consistent with the existing houses and those under development in the Lighthouse View estate.

- 8.5.2. I am satisfied the development as proposed will not negatively impact upon the character of the area or upon the visual and residential amenities of the area.

8.6. Other Matters

- 8.6.1. The Appellant raises concerns he was not afforded an opportunity to comment on the Applicant's response to the request for Further Information. I have considered this in the context of the Applicant's submission. I am satisfied that a significant further information response was not submitted i.e. a response which generally includes significant changes to the application. In this case, readvertising the development to the public was not warranted.

- 8.6.2. I note condition 12 imposed by the Planning Authority in relation to boundary treatment to the west side of the site. I am satisfied the contents of same are satisfactorily included for in the FI submission dated the 17th of November 2021 and therefore there is no requirement to restate this condition.

8.7. Appropriate Assessment

- 8.7.1. Having regard to the nature of the proposed development replacing an incomplete house that forms part of a larger scale housing estate and its separation distance to

European sites it is considered that no Appropriate Assessment issues arise and the proposed development would not be likely to have a significant effect individually or in combination with other plans or projects on any designated European site.

9.0 Recommendation

9.1. I recommend that permission is granted subject to the following conditions-

10.0 Reasons and Considerations

Having regard to the provisions of the Kerry County Council Development Plan 2015-2021, the pattern of development in the area and the nature and scale of the proposed development, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the amenities of the area, would not result in a traffic hazard and would not be prejudicial to public health and would, therefore, be in accordance with the proper planning and sustainable development of the area.

11.0 Conditions

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application as amended by the further plans and particulars submitted on the 04th day of November, 2021 and the 17th day of November 2021, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the Planning Authority, the developer shall agree such details in writing with the Planning Authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interest of clarity.

2. Vehicular access to the site shall be located via the access roadway granted under Planning Register No. 05/2032 or as otherwise permitted through a subsequent planning application. The house shall not be occupied until the

site development works permitted under 05/2032 have been completed to the satisfaction of the council.

Reason: In the interest of proper planning and orderly development.

3. The use of the house shall be as permanent all year round private residence. The house shall not be used as a holiday home or second home.

Reason: In the interest of proper planning and sustainable development.

4.

- a) The proposed dwelling, when completed, shall be first occupied as a place of permanent residence by the initial occupant and shall remain so 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 belong to the same category of housing need as the initial occupant. Prior to commencement of development, the initial occupant shall enter into a written agreement with the Planning Authority under section 47 of the Planning and Development Act, 2000 to this effect.
- b) Within two months of the occupation of the proposed dwelling, the initial occupant shall submit to the Planning Authority a written statement of confirmation of the first occupation of the dwelling in accordance with paragraph (a) and the date of such occupation.

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

Reason: To ensure that the proposed house is used to meet the initial occupants housing needs and that development in this rural area is appropriately restricted in the interest of the proper planning and sustainable development of the area.

5. Details of the materials, colours and textures of all the external finishes to the proposed house shall be submitted to, and agreed in writing with, the Planning Authority prior to commencement of development

Reason: In the interest of visual amenity.

6. All public service cables for the development, including electrical and telecommunications cables, shall be located underground throughout the site.

Reason: In the interest of visual amenity.

7. Prior to commencement of development, the developer shall enter into water and/or wastewater connection agreement(s) with Irish Water.

Reason: In the interest of public health.

8. Water supply and drainage arrangements, including the disposal of surface water which shall provide for appropriate Sustainable Urban Drainage Systems (SuDS), shall comply with the requirements of the Planning Authority for such works.

Reason: To ensure adequate servicing of the development, and to prevent pollution.

9. Site development and building works shall be carried out only between the hours of 0800 to 1900 Mondays to Fridays inclusive, between 0800 to 1400 hours on Saturdays and not at all on Sundays and public holidays. Deviation from these times will only be allowed in exceptional circumstances where prior written approval has been received from the Planning Authority.

Reason: In order to safeguard the residential amenities of property in the vicinity.

10. Construction and demolition waste shall be managed in accordance with a construction waste and demolition management plan, which shall be

submitted to, and agreed in writing with, the Planning Authority prior to commencement of development. This plan shall be prepared in accordance with the “Best Practice Guidelines on the Preparation of Waste Management Plans for Construction and Demolition Projects”, published by the Department of the Environment, Heritage and Local Government in July 2006.

Reason: In the interest of sustainable waste management.

11. The developer shall pay to the Planning Authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the Planning Authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to the commencement of development or in such phased payments as the Planning Authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the Planning Authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme.

Reason: It is a requirement of the Planning and Development Act 2000, as amended that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.

Adrian Ormsby
Planning Inspector

3rd May 2022