



An
Bord
Pleanála

Inspector's Report

APB-318418-23

Development

The development seeking retention permission consists of amendments to the development granted under permission PL.06.D.246501, comprising of retention of stable and agricultural building, retention of dungstead, retention of gallops and retention of associated site works.

Location

Lands at the rear of Kiltiernan Hotel, Aparthotel and Leisure Complex, Enniskerry Road, Kiltiernan and Ballybetagh townlands, Dublin 18

Planning Authority

Dún Laoghaire-Rathdown County Council

Planning Authority Reg. Ref.

D22A/1028

Applicant

Nijinsky Property Company

Type of Application

Retention permission

Planning Authority Decision

To grant permission with conditions

Type of Appeal

First Party

Appellant

Nijinsky Property Company

Observer

Mr Robert Harrison

Date of Site Inspection

28th February 2024

Inspector

Trevor Rue

Contents

| | |
|--|----|
| 1.0 Site Location and Description | 3 |
| 2.0 Proposed Development | 3 |
| 3.0 Planning Authority Decision | 4 |
| 3.1. Decision | 4 |
| 3.2. Planning Authority Reports | 5 |
| 3.3. Third Party Submissions | 6 |
| 4.0 Planning History | 7 |
| 5.0 Policy Context | 8 |
| 5.1. Development Plan | 8 |
| 5.2. National Guidelines..... | 9 |
| 5.3. Natural Heritage Designations | 10 |
| 5.4. EIA Screening | 10 |
| 6.0 The Appeal | 10 |
| 6.1. Grounds of Appeal | 10 |
| 6.2. Planning Authority Response | 12 |
| 6.3. Observations | 12 |
| 7.0 Assessment | 12 |
| 8.0 Recommendation | 15 |
| 9.0 Reasons and Considerations | 15 |

1.0 Site Location and Description

- 1.1. The application site is in the foothills of the Dublin Mountains about 0.6 kilometres to the south of Kiltiernan and 3 kilometres to the north of Enniskerry, Co. Wicklow. With a stated area of 19.15 hectares, it measures about 1.5 kilometres from north to south.

1.2. Towards its northern end, the site has a frontage of about 240 metres to the western side of the R117 Enniskerry Road. After a break of about 120 metres, the site extends in a narrow strip to abut the road again. The strip meets Enniskerry Road almost opposite Kiltiernan Grange, where there is a garden centre known as Grange Growers. The rest of the site occupies a backland position behind an unfinished and derelict hotel and leisure complex owned by the applicant company. To the west of the site, but not directly connected to it, are Ballybetagh Road and the minor Killegar Road.

1.3. The site is being developed as an equine breeding and training facility. Completed works include a stable building, dungstead and exercise tracks (or “gallops”). The longer track starts in the north-western corner of the site and proceeds southwards to the stable building, where it curves to meet a shorter track. That track runs uphill in a north-westerly direction and downhill in a south-easterly direction beyond the southern boundary of the site into adjoining lands in Co. Wicklow which are also in the ownership of the applicant company.

1.4. Ground levels generally rise steeply from north east to south west across the application site, the increase being 105 metres from the highest to the lowest point on the gallops.

2.0 Proposed Development

2.1. Retention permission is sought for amendments to a previous planning permission. The proposed amendments consist of:

- the stable and agricultural building, which has a gross floor space of 5,365 square metres (the approved building comprised 2,453 square metres);
- the 1283.7 square metre dunstead (in lieu of a permitted manure holding area);
- the gallops, realigned with secondary tracks and loops added, within a wider corridor; and
- associated works, including a realigned access road.

3.0 Planning Authority Decision

3.1. Decision

3.3.1. On 13th October 2023, Dún Laoghaire-Rathdown County Council decided to grant permission subject to seven conditions.

3.3.2. Condition 3 reads in part as follows:

“3. a. The northern public right of way marked in purple hash lines and labelled “public right of way through applicant’s lands to be facilitated” on “Site Layout” drawing... shall be maintained free of obstructions except for accessible kissing gates to be provided beside the gallops. It shall be accessible to the public at all times. The way shall be marked at 150 metre intervals through the site. Signage alerting the public to the public right of way through the site shall be placed at both ends of the route where the subject site ends and where the applicant’s ownership ends. The walking surface shall be appropriately maintained in a manner suitable for walkers. Details of the signage, including locations where signs will be located, shall be submitted for the written approval of the Planning Authority within 3 months from the date of the final grant of permission, along with longitudinal sections which demonstrate that the route is suitable for walkers.

b. An additional publically accessible route shall be provided from a point between fields P and T (as shown on [the Applicant’s Lands Suitable for Landspreading] drawing ...) to a point on the public road between fields M and N, such that a continuous, fully open, publically accessible route can be traversed from the public road network at Killegar to the Enniskerry Road, through the applicant’s landholding. This new route shall be provided along the southern boundaries of fields N, O, and P, and where necessary, M.

c. The northern public right of way over and through the gallops and throughout the subject site shall be laid out and maintained, including the gravel footways over the gallops, as shown on the drawing title “Public Rights of Way”

d. The southern public right of way shall be permanently maintained as per the alignment shown on [the Public Rights of Way] Drawing ... shall also be permanently kept free of obstructions with unhindered access.

e. Both the north and south public rights of way shall be fully completed in accordance with the submitted plans and particulars (including the associated signage) within 9 months of this grant.

f. The proposed Kissing Gates either side of the proposed gallops across the existing Grange Growers, Enniskerry Road to Ballybetagh Road public right-of-way

shall be latched self-closing two-way gate systems in accordance with Section 4.8 Obstacles and Barriers of the Irish Wheelchair Association's Great Outdoors Access Guidelines.

Details of these gates shall be submitted for the written approval of the Planning Authority within 3 months from the date of the final grant of permission.

3.1.3 The stated reason for Condition 3 was:

To maintain and enhance the northern public right of way through the site while facilitating the gallops development.

3.2. Planning Authority Reports

Planning Reports

3.2.1. The planner's report and the reasons and considerations therein were adopted generally by the planning authority on 13th October 2023. The report took into account further information submitted by the applicant and included the following comments about public rights of way (PROWs):

- The broad alignment of the gallops, albeit somewhat different to the current layout, was permitted by the Board in 2016 and showed them crossing the PROW towards the centre of the site. To ensure public access was maintained, the Board attached a condition which required details of the "kissing gates" proposed by the applicant to be agreed with the planning authority. General details of the gates have been submitted as part of the current application. However, the applicant's responsibility is not limited to provision of crossing gates but relates to the entirety of the PROWs that extend along its landholding.
- The applicant says that the western part of the designated PROW along the county boundary and the southern site boundary is *in situ* and has not been altered. The section to the south and south east of the stables lies in Co. Wicklow and includes way-marker posts and direction guidance; stretches over boggy ground have been board-walked. The third section of this PROW is to the south of the hotel and inside the Dún Laoghaire-Rathdown boundary. The land uses on the application site do not impede access and the applicant has confirmed willingness to ensure long-term protection of the PROW by condition.

- During a site inspection, it appeared that accessibility on the PROW from Enniskerry Road (opposite Kiltiernan Grange) to Ballybetagh Road via Ballybetagh Wood is compromised. There is an impediment on the tarmac road that runs westwards to Killegar Road along the boundary of the applicant's lands and on lands outside that ownership. The impediment takes the form of a gateway across the road, possibly associated with the residential use of lands to the west of the applicant's landholding. It would not be possible to complete the route unless this impediment is addressed.
- While the legal route of the southern PROW continues to be along the county boundary, the applicant has provided an alternative public access route which makes good on the obligation to provide permeability. A comparable approach could be taken to the northern PROW whereby a bypass of the impediment is provided through the applicant's lands. While this would not be along the alignment of the legal PROW, it would provide a publicly accessible route that would fulfil the objective of the PROW. Such a realignment would be a minor and proportionate disadvantage to the applicant in the context of the significant advantage that would accrue to the applicant by rerouting the southern PROW.

Other Technical Reports

3.2.2. The Council's Environmental Health Officer had no comment.

3.2.3. The Council's Drainage Engineer, Transportation Planning Section and Environmental Enforcement Section had no objection subject to compliance with conditions.

3.3. **Third Party Submissions**

3.3.1. Four third parties made submissions to the planning authority at the initial stage and three of those parties made further submissions in response to the further information provided by the applicant. Among the concerns raised were the following:

- Construction of the gallops began in 2016 but kissing gates have still not been provided. During construction the PROWs were covered over by high mounds of rubble. They are barely visible and no longer can be used.
- It would be acceptable, as a common sense compromise, for the Dublin Mountain Partnership path through the grounds of Kiltiernan Hotel to become a

replacement for the southern PROW. The path does not follow the route of the original PROW but does join it here and there.

- The northern PROW is now blocked at four different locations by steel wire mesh fencing and an old stone stile has been destroyed. Crossing the track is very dangerous.
- An environmental impact assessment (EIA) report must be carried out correctly. All works should be halted immediately and a proper damage assessment and archaeological report carried out to try to salvage anything left.
- Water tanks on the application site serve the Grange Growers property under a wayleave agreement. The planning authority was requested to ensure that any works would not affect their interest in the tanks or the quality of the water.

4.0 Planning History

4.1. **3915:** On 28th May 2015, the planning authority issued a declaration that the erection of an unroofed fenced area for the exercising or training of horses or ponies, together with a drainage bed or soft surface material, to provide an all-weather surface at the present application site did not constitute exempted development. The matter was referred for review to the Board, which decided on 13th April 2016 that the proposal was development and was exempted development (**RL06D.RL3363**).

4.2. **D15A/0453:** On 31st March 2016, the planning authority refused permission for a centre of excellence for horse breeding consisting of a stable building to include 36 self-contained studio/dorm rooms; gallops; a parade circuit; an equine pool; an agricultural shed; and associated works, in the general area of the present application site. On 30th August 2016, the Board granted permission on appeal (**PL06D.246501**) subject to 15 conditions. Condition 6 reads as follows:

6. Details of the proposed “kissing gates”, which are to be provided where the existing public right of way crosses the proposed gallops, shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. These shall be put in place prior to the first use of the gallops.

Reason: In order to ensure that the proposed development does not interfere with the public right of way crossing the site.

- 4.3. **ENF 7419:** By letter dated 25th April 2019, the planning authority drew the present applicants' attention to the fact that two large shed type structures had been erected/constructed on the application site without planning permission.
- 4.4. **D/19A/0355:** On 27th May 2019, the present applicants applied for retention permission for an agricultural building and an adjoining building on the application site. On 13th July 2020, the application was deemed to be withdrawn due to failure to submit requested further information.
- 4.5. **D15A/0453/E:** On 3rd August 2021, the planning authority refused to extend the duration of the permission which had been granted by the Board. On 1st March 2022, the High Court quashed that decision and ordered the planning authority to extend the duration to 7th December 2026.

5.0 Policy Context

5.1. Development Plan

- 5.1.1. Under the Dún Laoghaire-Rathdown County Development Plan 2022-2028, the application site is subject to Objective G, to protect and improve high amenity areas. Agricultural buildings are open for consideration.
- 5.1.2. Policy Objective E21 of the Plan is to support the Government commitment to the horse industry in Ireland and to promote and support and facilitate the development of the equine industry in Dún Laoghaire-Rathdown County in particular and to promote Dún Laoghaire-Rathdown as a centre of excellence for the bloodstock industry.
- 5.1.3. Policy Objective GIB14 of the Plan is to:
- i. preserve, protect, promote, and improve for the common good all existing public rights-of-way which contribute to general amenity.
 - ii. extend or enhance existing rights-of-way either by agreement with landowners or using compulsory powers in the interest of ensuring access to amenities, including the coast, upland areas, riverbanks, heritage sites, geological sites and National Monuments.
 - iii. prohibit development and keep free from obstruction existing rights-of-way, and to take legal action if necessary, to prevent any attempt to close them off.

iv. prohibit development which would prejudice public access to existing rights-of-way, unless the level of amenity is maintained by the right of way, footpath, or bridleway being diverted by the minimum practical distance and the route continues to be segregated from vehicular traffic.

v. consider favourably planning applications which include proposals to improve the condition and appearance of existing rights-of-way.

5.1.4. Paragraph 11.1 in Appendix 11 to the Plan states that it is an objective of the Council to secure the retention of established PROWs including Enniskerry Road (opposite Kiltiernan Grange) to Ballybetagh Road via Ballybetagh Wood; and Scalp Villa, Enniskerry Road to Ballybetagh Road. The locations are shown on Land Use Zoning Map 13. The first of these routes is as shown on the submitted site layout plan; the second runs along the county boundary.

5.2. National Guidelines

5.2.1. Section 7.3 of the Development Management Guidelines for Planning Authorities, issued by the Department of the Environment, Heritage and Local Government in 2007 under Section 28 of the Planning and Development Act 2000, sets out certain basic criteria for the imposition of a planning condition. These include whether the condition is relevant to planning and relevant to the development to be permitted.

5.2.2. Section 7.3.2 of the Guidelines states:

“Unless the requirements of a condition are directly related to the development to be permitted, the condition may be ultra vires and unenforceable. Section 34(4)(a) of the Planning Act gives power to impose a condition regulating the development or use of adjoining etc. land, but such land must be under the control of the applicant and the condition must be ‘expedient for the purposes of or in connection with the development authorised by the permission’. Moreover, where a condition requires the carrying out of works, or regulates the use of land, its requirements must be connected with the development permitted on the land to which the planning application relates.”

5.3. Natural Heritage Designations

5.3.1. There are four Natura 2000 sites within 5 kilometres of the application site:

- Ballyman Glen Special Area of Conservation (SAC), whose qualifying interests are alkaline fens and petrifying springs;
- Knocksink Wood SAC, whose qualifying interest is petrifying springs;
- Wicklow Mountains SAC, whose qualifying interests are wet and dry heaths, acidic oak woodland, calcareous and siliceous rocky slopes, oligotrophic waters, siliceous scree, calaminarian grasslands, natural dystrophic lakes and ponds, Alpine and boreal heaths, species-rich *Nardus* grasslands, and otter; and
- Wicklow Mountains Special Protection Area (SPA), whose qualifying interests are peregrine falcon, merlin and wood warbler.

5.4. EIA Screening

5.4.1. The proposed development is not one to which Schedule 5 of the Planning and Development Regulations 2001, as amended, applies and therefore the requirement for submission of an EIA report and carrying out of an EIA may be set aside at a preliminary stage.

6.0 The Appeal

6.1. Grounds of Appeal

6.6.1. The appeal is against Condition 3b of the planning authority's decision. The grounds are summarised as follows:

- Ground 1. There is an existing PROW via the roadway which runs alongside the southern boundaries of fields M, N, O and P. The PROW is as incorporated in the Dún Laoghaire-Rathdown County Development Plan 2021-2028 and previous development plans. Section 14(7)(b) of the Planning and Development Act states that the inclusion of a PROW in a development plan shall be evidence of the existence of such a right unless the contrary is shown. An additional PROW is not warranted. The appellant requires the affected lands in Fields M to P for agricultural purposes.

- Ground 2. Condition 3b is *ultra vires* in that Section 34 of the Act does not allow for a PROW to be provided outside the development plan process. Section 34(2)(a) states that when making its decision in relation to a planning application under this section, the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to the provisions of the development plan. Section 34(4)(a)(ii) provides that conditions may be attached to planning permissions for the purposes of conserving the amenity of adjoining, abutting or adjacent land, whose effect would not be to burden unduly the person in whose favour the permission operates. Condition 3b would unduly burden the appellant.
- Ground 3. Section 206 of the Act provides for a PROW to be provided over land subject to agreement with the landowner. No agreement exists for the PROW required by Condition 3b.
- Ground 4. Section 207 provides compulsory powers to create a PROW. The provisions of Section 207 have not been invoked by the planning authority.
- Ground 5. Section 208 requires existing PROWs to be maintained by the planning authority. Condition 3b requiring an additional PROW is prejudicial to the existing PROW at this location.

6.2. Planning Authority Response

6.2.1. The planning authority's response to the grounds of appeal is as follows:

- The route required by Condition 3b is not intended to be a new or amended PROW as asserted in Ground 1 but an alternative publicly accessible route. The PROW would remain as per the alignment indicated in the Development Plan. This would be directly comparable to the situation at the southern end of the site, where the statutory PROW continues to be located along the county boundary but an alternative publicly accessible route has been provide by way of a detour to negotiate works undertaken by the appellant.
- There has been no attempt to subvert the development plan process as asserted in Ground 2. The planning authority is satisfied that Condition 3b is in full accordance with Section 34(4)(a)(ii). The land affected by the condition is

adjacent to and outside the land to which the planning application relates but it is under the control of the applicant. The provision of public access, as set out in the Development Plan, constitutes an amenity for the public. The condition would not unduly burden the appellant, given the scale of the development and the fact that two statutory PROWs were in place through the site at the time of its purchase. The southern PROW having been blocked, an alternative route was provided in lieu to the appellant's benefit.

- As regards Grounds 3 and 4, the planning authority is not seeking to create a PROW in this instance, therefore reference to Sections 206 and 207 is moot.
- As regards Ground 5, the planning authority reserves the right to pursue enforcement of the PROW alignment at a later time, should the need arise and resources permit.

6.3. Observations

6.3.1. Mr Robert Harrison, owner of a field across the road from the Grange Growers entrance and immediately to the north of the northern route marked as a PROW on the site layout plan, made observations which may be summarised as follows:

- The secondary race track was built within inches of his property and caused damage to his boundary fence and trees. He wants the track removed because the constant movement of tractors causes sand and dust pollution and violates his enjoyment of his property where he keeps bees.
- He will not allow a PROW to be put on the southern side of his field as there are cedar trees more than 100 feet in height growing there with hawks and birds of prey nesting in them. There are water drains and it is all overgrown. He will not tolerate another of his ditches being interfered with. There is no PROW along this route and has not been for well over 100 years. The appellant owns two fields to the south of his property and can put a PROW there.

7.0 Assessment

7.1. I have inspected the site and considered in detail the documentation on file for this First Party appeal against Condition 3b. I shall focus on the question of whether the

condition is lawful and justified. I shall also consider the impact of the development on adjacent properties and whether an appropriate assessment (AA) is required pursuant to the European Union Habitats Directive.

Condition 3b

- 7.2. I agree with the planning authority that Sections 206 to 208 of the Planning and Development Act have no bearing on this appeal, as the effect of Condition 3b would not be to create a statutory PROW but an alternative publicly accessible route.
- 7.3. The site layout plan and public rights of way drawing submitted by the applicant company as landowner both indicate the existence of an existing PROW from Enniskerry Road (opposite Kiltiernan Grange) towards Ballybetagh Road on the line shown on Zoning Map 13 of the Dún Laoghaire-Rathdown County Development Plan. However, there is no physical manifestation of a public footpath through the site on the route shown. Much of the route is overgrown, there are no kissing gates where it crosses the exercise tracks, and there are no waymarks. The route is unusable.
- 7.4. Although a neighbouring landowner disputes that there is a PROW along this route, its inclusion in the Plan must be taken as evidence of its existence unless the contrary is shown. It seems to me that mere assertion is insufficient to overthrow the presumption in favour of the existence of the PROW set out in Section 14(7)(b) of the Planning and Development Act. Conditions 3a, 3c, 3e and 3f of the planning permission provide for the laying out and maintenance of the northern PROW and its completion within nine months of a final grant.
- 7.5. While Section 34(1) of the Act gives planning authorities a general power to impose conditions on a grant of planning permission, that power is restricted by later provisions. Section 34(2)(a)(ia) states that when making its decision, the authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to any guidelines issued by the Minister under Section 28.
- 7.6. The 2007 Development Management Guidelines state that where a condition regulates the use of land, its requirements must be connected with the development permitted on the land to which the planning application relates. Section 34(4)(a)(i) of the Act provides that conditions may be imposed for regulating the development or use of any

land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant, if the imposition of such conditions appears

to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission.

7.7. The planner's report indicates that Condition 3b is a response to the discovery of an impediment to the northern PROW on lands outside the applicant's ownership. That impediment appears to take the form of a self-locking gate on the laneway from Killegar Road, which I observed in the course of my site visit.

7.8. The planning authority's evidence suggests that the condition was imposed due to a lack of will or resources to pursue enforcement of the PROW alignment at the present time. Nowhere in that evidence is it claimed or demonstrated that the condition is for the purposes of or connected with the development for which retention permission is sought. I conclude that the condition contravenes the 2007 Guidelines and goes beyond what is permitted by Section 34. It is neither lawful nor justified.

Impact of the Development on Adjacent Properties

7.9. In the course of my site inspection, I saw some evidence to suggest damage to boundary trees where a secondary exercise track comes close to a neighbouring field but I am unable to judge how any damage occurred or who may have been responsible. I saw no evidence of sand or dust pollution. It seems to me that these issues would be best resolved between the parties concerned.

7.10. It is my opinion that any adverse effects on the water tanks which serve the Grange Growers property or the quality of the water would be a civil matter between the parties to the wayleave agreement rather than a development management issue.

Appropriate Assessment

7.11. I am content with, and endorse, the findings of the applicant's AA screening report. Having regard to the nature, size and location of the proposed development and possible impacts arising from the construction works, the conservation objectives of the Natura 2000 sites and the potential for in-combination effects arising from other plans and projects, and applying the precautionary principle, it is concluded on the

basis of objective information that the possibility may be excluded that the development would have a significant effect on any Natura 2000 site.

8.0 Recommendation

8.1. I am satisfied, having regard to the nature of Condition 3b, that the determination by the Board of this planning application as if it had been made to it in the first instance would not be warranted. I therefore recommend the Board, pursuant to its power under Section 139 of the Planning and Development Act 2000, to direct the planning authority to remove Condition 3b from the grant of planning permission.

9.0 Reasons and Considerations

9.1. Having regard to Section 34 of the Planning and Development Act 2000, as amended, and the Development Management Guidelines for Planning Authorities issued by the Department of the Environment, Heritage and Local Government in 2007 under Section 28 of the Act, it is considered that the requirements of Condition 3b are not expedient for the purposes of or in connection with the development authorised by the permission and that the condition is therefore *ultra vires* and unenforceable.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.



TREVOR A RUE

Planning Inspector

14th March 2024