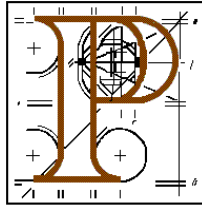


An Bord Pleanála



Inspector's Report

APPLICATION FOR LEAVE TO APPLY FOR SUBSTITUTE CONSENT FOR SEA DEFENCE WALL AT FLAGGY SHORE, COUNTY CLARE

Board Reference: LS03.0020

Planning Authority: Clare County Council

Applicant: Michael Harty

Site Inspection: 17th November 2015

Inspector: **Kevin Moore**

1.0 INTRODUCTION

- 1.1 This is an application for leave to apply for substitute consent pursuant to section 177C of the Planning and Development Act, 2000, as inserted by Section 57 Planning and Development (Amendment) Act 2010.

2.0 THE APPLICATION

The applicant's submission may be synthesised as follows:

2.1 Background

- 2.1.1 The applicant submits that a sea wall defence was in place adjacent to his house for many years prior to it being destroyed by storm surges during the winter of 2013/2014. The wall provided protection to the applicant's home and public road. It needed to be replaced urgently and the applicant undertook the work himself having sought remedial action from Clare County Council. As the works constituted repair/replacement, the applicant was unaware they required permission until an enforcement notice was issued. He now wishes to regularise the planning status of the wall.

- 2.1.2 Having consulted Clare County Council and the National Parks and Wildlife Service, it is the opinion of these authorities that the works carried out are likely to have required an Appropriate Assessment, meaning that an application to retain the wall would require to be made directly to the Board under the Substitute Consent process. The applicant now seeks leave to apply for substitute consent.

2.2 Exceptional Circumstances

- 2.2.1 ***“Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive”***

The defence wall did not, and has not, created any pollution, nuisances or other significant environmental effects. It was merely replacing an existing wall at the exact location of the previous wall.

According to Schedule 5 Part 2 Class 10(K) of the Planning and Development Regulations 2001, an EIS is only required for coastal works that exceed 1km in length. The wall length is 115m and an EIS is unlikely to have been required.

With regard to the Habitats Directive, an exercise to consider the potential impact on Natura 2000 sites arising from the development has been completed. An accompanying remedial NIS has found that the reinstatement of the wall has not adversely affected the integrity of any European site.

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

The applicant took urgent action to re-build the wall similar, but slightly more substantial, to its predecessor, following severe storms and the lack of response from the Council after correspondence. He was unaware he required permission for the remedial works as he viewed them as replacing the existing wall. He also viewed them as a means to protecting his home as a matter of urgency. Having spent a large amount of money and having limited funds to remove the wall, the applicant has no option but to seek an application for substitute consent. This is submitted as an exceptional circumstance.

2.2.4 “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.”

In the event that a substitute consent application is allowed, the rNIS and application documentation will be subject to full public participation. Thus,

there would be no impairment of public consultation in the assessment process.

2.2.5 ***“The likely significant effects on the environment or adverse effects on the integrity of the European Site”***

An accompanying remedial NIS has found that the reinstatement of the wall has not adversely affected the integrity of any European site.

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

There are no significant effects that require remediation. There was no loss of sensitive faunal or floral habitat or impact on watercourses. Works were conducted in an area that was severely damaged by storm events. The works and continued existence of the wall have not adversely affected the integrity of any European site.

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

The applicant’s agent is unaware of any previous planning permissions granted to the applicant or of any unauthorised development previously carried out.

2.3. **Supplementary Information**

2.3.1 The applicant has a report entitled “Ecological Impact Assessment and Natura Impact Assessment”. The following is noted from this submission:

- The report was prepared to determine whether the works are likely to have any significant or indeterminate impacts on Natura 2000 sites in the surrounding area, in particular the Galway Bay Complex SAC (Site Code: 000268).
- The report details the works undertaken, presents analysis of desk study and field study results, assesses impacts on the ecology of the area, and

then focuses on potential impacts on Natura 2000 sites and their conservation objectives.

- None of the habitats on the site of the sea wall reinstatement are of high ecological significance or are listed on Annex I of the Habitats Directive. Annex I habitats occur in the wider landscape. The potential for surface water runoff and tidal water pathways between the wall and habitats of qualifying interest for Galway Bay SAC, including Large Shallow Inlets and Bays and Reefs adjacent to the wall, are acknowledged.
- Great Northern Diver (an Annex I bird species) and Black-headed Gull (BoCCI red-listed) were recorded at the time of the site inspection undertaken for the purposes of the report.
- There is no evidence of disturbance, pollution, damage or alteration to habitats outside the works area. The sea wall is stable and there is no evidence of damage to faunal habitat or loss of sensitive floral habitat. No operational impacts arising from the reinstatement were anticipated.
- An Appropriate Assessment Screening exercise deemed Galway Bay Complex SAC (Site Code: 000268) and Inner Galway Bay SPA (Site Code 004031) required further assessment in relation to potential impacts resulting from the works.
- The qualifying interests and potential pathways for impacts on protected habitats and species in each of the European sites were examined.
- It was concluded that the project has not adversely affected the integrity of any European site and that no pathways for potential significant impacts on the Qualifying Interests and Special Conservation Interests of the Natura 2000 sites were identified. Thus, the reinstatement has not resulted in direct impacts to any Annex I habitats of the SAC nor has its operation the potential to indirectly impact on Annex I habitats for the SAC or supporting wetland habitat of the SPA.

3.0 PLANNING HISTORY

3.1 There is no record of any planning permission relating to the wall at this location.

P.A. Ref. UD14-013 relates to the enforcement correspondence and proceedings by the planning authority applying to the works at this location. The details of same form part of the application file for leave for substitute consent.

4.0 PLANNING AUTHORITY SUBMISSION

4.1 The planning authority notes that the works carried out constitute unauthorised development and that an enforcement notice was issued. The authority has concerns with respect to the impact on the adjoining Natura 2000 site, impact on visual amenity, and compliance with policies and objectives of the Clare County Development Plan. It is concluded that the authority has no objection to the application for leave for substitute consent.

5.0 THE SITE AND SEA DEFENCE WALL

5.1 The site of the sea defence wall lies immediately to the north of the applicant's residential property at New Quay, in north County Clare. It is a wall separating the shoreline at Ballyvaughan Bay from the local road. The coastline at this location (inclusive of the site of the sea wall) forms part of Galway Bay Complex SAC and Inner Galway Bay SPA.

5.2 The wall is stated by the applicant to be located at the exact location of a previous wall. The wall is approximately 0.5m in height, some 2.0m in width. It is approximately 115m in length and runs parallel to the public road. It

comprises mainly of stones and boulders held together using gravel, stone and concrete.

6.0 ASSESSMENT

6.1 Introduction

6.1.1 Section 177D(1)(b) of the Planning and Development Act specifies that the Board can only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment was or is required in respect of the development concerned and where it is further satisfied that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

6.1.2 Section 177D(2) provides that in considering whether exceptional circumstances exist the Board must have regard to the following:

- (a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- (b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- (c) 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;

- (d) 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;
- (e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- (f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;
- (g) such other matters as the Board considers relevant.

6.2 The Question of a 'Replacement Wall'

6.2.1 The applicant submits that a sea wall defence was in place adjacent to his house for many years prior to it being destroyed by storm surges during the winter of 2013/2014. I have attempted to gauge an understanding of the nature and extent of the sea defence at this location prior to the construction of the wall in question. To this end, photographic evidence available from publicly accessible websites suggest that there was in recent years a grass margin on the opposite side of the public road from the applicant's house adjoining the road edge and beyond this the rocky coastal edge ran down to the shoreline. I further note the existence of this margin and shore arrangement remains either side of the constructed wall. From this observation I consider that it is reasonable to conclude that a visually identifiable sea defence wall was not likely to have been in place opposite the applicant's house immediately prior to the storms of 2013/2014.

6.2.2 Any application that would follow, in the event of the applicant being permitted to make such a substitute consent application, would be for the retention of the construction of a sea defence wall, with no reference to any replacement structure or reinstatement as is so suggested in the applicant's description of development in the application now before the Board.

Note: I acknowledge that the planning authority has determined that the subject lands on which the wall is placed are not within the foreshore and are above the line of high water of ordinary or medium tides at this location.

6.3 Clarification of Legal Interest

6.3.1 I wish to draw the attention of the Board to the understanding relating to the applicant's legal interest in the site on which the wall the subject of the application now before the Board is erected. The applicant seeking leave for substitute consent does not own this land. The planning authority appears not to own the land also. It is understood that the land is not registered. The question then arises does the applicant have sufficient legal interest to make any planning application which seeks to retain the wall on these lands. I acknowledge this current situation may, or may not, be resolved prior to the making of any application if the Board was so disposed to allow the leave for substitute consent.

6.3.2 In addition to the above, I note that the making of a planning application, and any subsequent permission that may issue as a result, does not bestow on any applicant the legal entitlement to carry out any development on lands for which they have insufficient legal interest.

Acknowledging the above observations, I propose to consider the application for leave to apply for substitute consent, with due regard to the requirements to be considered under the Act.

6.4 Qualifying Development

6.4.1 The application is being made to the Board in accordance with section 177C (2)(b) of the Planning and Development Act, whereby development has been carried out where an appropriate assessment was required and in respect of which the applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

6.4.2 With due regard to the provisions of the Act, the Board must first be satisfied that the development in question should be or should have been subject to Appropriate Assessment (AA). I draw the Board's attention first to the site being within the Galway Bay Complex SAC and the Inner Galway Bay SPA, i.e. Natura 2000 / European sites. The development on this site relates to a development that has been carried out where AA was required due to the potential significant direct effects on the European sites from the works associated with the development.

6.4.3 Having regard to the nature of the works, their scale, and the potential consequential direct impact on the European sites, it is considered reasonable to conclude that the carrying out of the development could potentially have had significant effects on the European sites in view of the sites' conservation objectives and that appropriate assessment (AA) was required.

6.5 Exceptional Circumstances

My considerations on these matters are as follows:

6.5.1 *Whether the regularisation of the development concerned would circumvent the purposes and objectives of the Environmental Impact Assessment Directive or the Habitats Directive*

Schedule 5 of the Planning and Development Regulations 2001, as amended, refers to development for the purposes of Part 10, i.e. development for which Environmental Impact Assessment is required. I note the provisions of Class 10(K) of Part 2 in that Schedule, which reads as follows:

(k) Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dikes, moles, jetties and other sea defence works, where the length of coastline on which works would take place would exceed 1 kilometre, but excluding the maintenance and reconstruction of such works or works required for emergency purposes.

It is my submission to the Board that the wall, 115 metres in length, is significantly below the threshold of 1 kilometre. To this end, and having regard to its limited form and scale and its composition, it is reasonable to conclude that the preparation of an Environmental Impact Statement and the undertaking of an Environmental Impact Assessment by the competent authority would be most unlikely to be required in this instance arising from the lack of any likelihood of any potentially significant adverse environmental impacts.

I note that the development before the Board is a development to which the provisions of the Habitats Directive apply. The purpose and objectives of the Habitats Directive (which recognises, *inter alia*, the need to have regard to economic, social, cultural and regional requirements) relate to the preservation, protection, and improvement of the quality of the environment, and to promoting the maintenance of biodiversity. The Directive seeks to restore or maintain natural habitats and species at favourable conservation status, and for this reason, it has designated certain European sites. The sites in respect of the subject application are Galway Bay Complex SAC and Inner Galway Bay SPA. The site of the development is located within both.

I refer to the information available from the National Parks and Wildlife Service (NPWS), notably to the 'Features of Interest' and the 'Conservation Objectives' of these Natura 2000 sites. The Galway Bay Complex is an SAC selected for 13 habitats and 2 species listed on Annex I / II of the EU Habitats Directive. The habitats include Large Shallow Inlets and Bays (1160) and Reefs (1170) and the species are Otter (*Lutra lutra*) and Common (Harbour) Seal (*Phoca vitulina*). The Conservation Objective for each of the aforementioned is as follows:

Large Shallow Inlets and Bays - "To maintain the favourable conservation condition of Large shallow inlets and bays";

Reefs - "To maintain the favourable conservation condition of Reefs";

Otter – "To restore the favourable conservation condition of Otter"; and

Harbour Seal – "To maintain the favourable conservation condition of Harbour Seal".

The species associated with the Inner Galway Bay SPA include the Annex I species Great Northern Diver (*Gavia immer*), Golden Plover (*Pluvialis apricaria*), Dunlin (*Calidris alpina*), Bar-tailed Godwit (*Limosa lapponica*), Sandwich Tern (*Sterna sandvicensis*) and Common Tern (*Sterna hirundo*). The Conservation Objective for this SAC is: "To maintain or restore the favourable conservation condition of the Special Conservation Interest in Inner Galway Bay SPA, which is defined by a specific list of attributes and targets."+

I note that the wall construction works would have potentially included floral habitat loss by way of possible verge removal. I must also acknowledge that loss of such habitat could likely have occurred during the severe storms of 2013/2014. The other, and most notable, likely potential impact would be the effects of runoff from the development into the bay and the consequent potential for pollution.

Having regard to the development being located within the SAC and SPA, the habitats prevalent at this location, inclusive of habitat for which the European site is selected, the likely prevalence of protected species in the environs, and the nature and extent of the works undertaken, inclusive of clearance, infill, and wall construction, it may be considered that the undertaking of such works clearly eliminated the potential for prior assessment of such works to the extent that the purpose and objectives of the Habitat Directive were potentially circumvented. I consider that the circumstances under which the works occurred must be taken into consideration in this instance prior to concluding that leave to appeal should be refused on this point. It is acknowledged that this area was under severe threat from storm surges at the time of the wall construction. There is reason to accept the position that emergency works were necessary to prevent the loss of the applicant's property or severe damage thereto.

6.5.2 Whether the applicant had or could reasonably have had a belief that the development was not unauthorised

I note again that the constructed wall is on land not in the applicant's ownership. One would have anticipated that the applicant would have understood that he required authorisation to carry out the works undertaken. I note the stated efforts to engage the local authority at this time. The applicant may have reasonably, in the circumstances, determined the works to be an emergency measure at a time when the local authority was fully engaged in emergency coastal works elsewhere arising from a particularly challenging period of adverse weather that is known to have caused extensive damage to the county's coastal environment.

On balance, it is conceivable that the applicant could reasonably have had the belief that the development was permissible as an emergency response, comprising works adjoining a public road edge from which there is public

access to a shoreline. Refusing leave to appeal on this matter would appear unreasonable in my opinion.

6.5.3 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

It is my submission that the provision of information to allow the competent authority to undertake an assessment of the environmental impacts of the development for the purposes of an appropriate assessment has not been substantially impaired. I acknowledge the ecological assessment presented with this application for leave to apply for substitute consent. I consider that the submission of an application that includes the relevant level of information to allow the Board to undertake appropriate assessment can so be provided to determine whether there were effects on the integrity of the European sites at this location. Furthermore, I am satisfied that the making of an application for substitute consent will permit public participation in the assessment process. It is further notable that the planning authority has no objection to the making of such an application.

6.5.4 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 my opinion, the first point of interest in relation to the development must be the circumstances in which the development itself was undertaken. This was at a period of extreme weather conditions and the storm surges were causing significant damage to the coastal environment, inclusive of shoreline damage, destruction of roads, land, properties, etc. There was severe damage

occurring to the environment in which the applicant's house is located. Placing the works in the context of this environmental damage arising from natural events would suggest that the impacts of the applicant's emergency response works could not be construed as being 'likely significant' in relative terms. However, one now has the procedural mechanism that places the applicant in a position that requires him to regularise a sea defence wall that was not subject to any formal assessment procedure or application process.

It is my submission, firstly, that the continuation of the development as a wall is likely to have no known actual or potentially significant effects on the environment at this location that could have adverse impacts on the integrity of any European site at or adjoining this site. There is no known potential for the wall itself, any runoff arising therefrom, deleterious matter, etc. culminating in adverse effects.

In relation to the impacts that resulted from the carrying out of the development on the European sites, I again acknowledge the Ecological Impact Assessment document submitted with the current application and the finding that the wall has not adversely affected the integrity of any European site. I am satisfied to conclude that the making of an application for substitute consent would allow for adequate detail to be submitted as part of that application to allow the public to be informed of the likely effects to have arisen, to allow comment thereon, and for the Board to be in a position to adequately address the likely impacts that may have resulted and, arising therefrom, to undertake an Appropriate Assessment. At this time, there is no reason to conclude that the building of the wall caused actual or likely significant effects on the environment or adverse effects on the integrity of a European site.

6.5.5 *The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated*

There is no understanding that the construction of the wall during the period of adverse weather conditions caused disturbance, disruption or damage to the habitats and/or species for which the European sites at this location have been designated or caused notable effects on the environment. With regard to this observation, the potential for 'significant' effects having occurred are not regarded as likely to have arisen. The need for specific remediation is not reasonably quantifiable at this time in light of the information at hand which suggests that there has been no effect on the integrity of any European site. Evidently, the making of any application for substitute consent would examine the need for any such remediation.

6.5.6 *Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development*

There are no known previous planning applications associated with the land on which the wall has been constructed. There are no other unauthorised developments which the applicant is known to have carried out. The exceptional circumstances in which the wall was constructed have already been referred to, as has the applicant's attempts to correspond with the local authority. There is no suggestion that the applicant did not correspond with the local authority prior to undertaking the works.

6.5.7 *Such other matters as the Board considers relevant*

The final matter which I consider should be acknowledged is the planning authority's position in relation to the application. In its submission to the

Board, the planning authority noted: “... *the works took place during the Winter of 2014 in response to extreme weather conditions, in order for the applicant to protect his property.*” The planning authority has stated that it has concerns with respect to the impact on the adjoining Natura 2000 site, visual amenity, and compliance with the policies and objectives of the Clare County Development Plan. Notwithstanding this, the planning authority concluded in its submission to the Board:

“... at present, the Planning Authority has no objection to this application for leave for substitute consent.”

It is, thus, clear that the planning authority is satisfied that an application for substitute consent can allow the assessment of such impacts and it could reasonably be inferred that it considers that exceptional circumstances existed in the context of the development.

7.0 RECOMMENDATION

I must first acknowledge that the description of the development presented to the Board in this application for which leave to apply for substitute consent is sought is potentially inaccurate as one cannot be assured that a sea defence wall existed at this location prior to the wall constructed by the applicant. The development would, therefore, constitute the retention of a new wall, not a replacement or reinstated wall. In addition to this, matters are complicated further by the knowledge that the applicant does not have any legal interest in the land on which the wall is constructed. It could, therefore, be so determined that the applicant is in no position to apply for substitute consent in relation to the reinstatement of a sea defence wall, as is described in this application now before the Board, because such a wall was not a reinstatement and particularly because the applicant had, and has, no legal interest in the land on which he carried out the works. I would question the validity of any such

future application that may present itself to the Board if these circumstances prevail.

I acknowledge that the Board may take such matters into account in making their decision in this application. In the event that the Board proceeds to deciding to address the development with due regard to the provisions under section 177D of the Act, my recommendation is as follows:

Having regard to Section 177 D(1)(b), which provides that the Board shall only grant leave to apply for substitute consent where it is satisfied that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of development by permitting an application for substitute consent, I am satisfied that such exceptional circumstances exist in the instant case, and therefore recommend that consent for leave to apply for substitute consent be permitted in accordance with the following:

DECISION

GRANT leave to apply for substitute consent under section 177D (4) of the Planning and Development Act, 2000, as inserted by section 57 of the Planning and Development (Amendment) Act 2010 based on the reasons and considerations set out below.

MATTERS CONSIDERED

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

REASONS AND CONSIDERATIONS

Having regard to Section 177D, Planning and Development Act, 2000, as inserted by Section 57, Planning and Development (Amendment) Act, 2010, the Board is satisfied that an appropriate assessment is required, and the Board concluded such that exceptional circumstances exist by reference, in particular, to the following:

- the fact that the regularisation of the development would not circumvent the purpose and objectives of the Habitats Directive,
- the applicant could reasonably have had a belief that the development was not unauthorised,
- the nature and limited scale of the development,
- that the ability to carry out an Appropriate Assessment and provide for public participation has not been substantially impaired,
- the limited nature of the actual/likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the development, and
- the extent to which such significant effects, if any, on the environment can be remediated,

and, therefore, concluded that it would be appropriate to consider an application for the regularisation of the development by means of an application for substitute consent.

Kevin Moore

Senior Planning Inspector

November, 2015.