

An Bord Pleanála



Inspector's Report

PL15.LS.0026

DEVELOPMENT:- Application for Leave to Apply for Substitute Consent under the provisions of S.177C(2)(b) of the Planning and Development Act 2000 (as amended).

Nature of Development:- End of Life Vehicle Recovery Facility.

Address:- Skyhill, Drumbilla, Hackballs Cross, County Louth.

PLANNING APPLICATION

Planning Authority: Louth County Council

Planning Authority Reg. No: n/a

Applicant: Anthony Meegan

Application Type: Application for Leave to Apply for Substitute Consent

Planning Authority Decision: n/a

Observers: None

Date of Site Inspection: 9th August, 2016.

INSPECTOR: Paul Caprani

1.0 INTRODUCTION

LS.15.LS0026 relates to a request to seek Leave to Apply for Substitute Consent under the provisions of Part XA of the Planning and Development Act, 2000 (as amended) and specifically under the provisions of Section 177C(2)(b). 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. The development in this instance relates to a vehicle recovery facility in the townland of Drumbilla north of Hackballs Cross near the Louth/Armagh Border.

2.0 SITE LOCATION AND DESCRIPTION

The vehicle recovery facility which is currently operating on site is located on a rectangular plot of land covering approximately 3.3 hectares and forms part of a larger landholding under the ownership of the applicant. The subject site is rectangular in shape and is located on the north-eastern side of a staggered crossroads approximately 4 kilometres north of Hackballs Cross and 7 kilometres west of the town of Dundalk. The lands surrounding the site are predominantly agricultural in nature. According to the information contained on file the nearest dwellinghouse to the immediate east of the site is under the ownership of the applicant.

A small stream runs in an easterly direction approximately 100 metres from the northern boundary of the site. This stream feeds into the Cully River which runs towards Dundalk Bay a designated Natura 2000 site (both SPA and SAC).

The site itself accommodates an old single storey derelict building at its south-western corner. A larger concrete apron separates this structure from three large agricultural type commercial sheds adjacent to the southern boundary of the site. These sheds are currently in commercial use for the breaking up and dismantling of motor vehicles. There are a number of portacabin type structures located centrally within the site to the immediate north of the single storey stone derelict building in the south-western corner of the site.

The entire northern portion of the site is given over to a hardstanding area on which end of life vehicles are stored in orderly rows as the photo attached indicates. This hardstanding area is surrounded by an

earthen berm. The roadside frontage comprises of c.2 metre high sheet metal fencing. Access to the site is provided near the south-western corner.

3.0 PLANNING HISTORY

Details of the planning history associated with the site is set out in the application to apply for substitute consent and the detailed planning report submitted with the application. It is summarised below.

Under **Reg. Ref. 91/611** planning permission was granted to Tony Meegan on 8th January, 1992 for a change of use of agricultural shed to a commercial store to store agricultural supplies, fencing material, silage covers and fancy goods such as toys etc. Condition No. 4 of this grant of planning permission stated that the building shall be used for the wholesale storage of goods outlined by the developer and shall not be used for any retail sales or other use without acquiring the benefit of planning permission.

Under **Reg. Ref. 92/536** planning permission was granted in 1993 for change of use of agricultural shed to commercial store together with an 18 metre long weighbridge. Condition No. 2 of this permission states that building shall be used for the storage of primary agricultural foods such as grain and potatoes.

Under **Reg. Ref. 11/611** permission was refused for the upgrading of the existing commercial yard and buildings to a vehicle salvaging and motor factor depot. Permission was refused by the Planning Authority for five reasons relating to:

1. Material contravention of the zoning provisions of the County Development Plan.
2. Material contravention of the stated policies of the development plan.
3. Lack of information regarding wastewater treatment on site or wells in the vicinity.
4. The application has been lodged in the absence of an Appropriate Assessment or an NIS and it is considered that the impact on Natura 2000 sites in the vicinity are deemed to be uncertain.

5. The applicant has failed to demonstrate adequate sight visibility lines in either direction.

This decision was dated 20th December, 2012.

Under **Reg. Ref. 14/246** retention of planning permission was sought for the storage and wholesaling of agricultural goods (car parts) in existing commercial stores and open storage of motor vehicles in associated yards and associated works. The application was accompanied by a Natura Impact Statement. Louth County Council refused planning permission for four reasons relating to:

1. Contravention of the zoning provisions set out in the development plan.
2. Contravention of various policy statements contained in the development plan including policy statement RD40 and policy statement RD41.
3. It has not been adequately demonstrated that the proposal would not have an adverse impact on Natura 2000 sites.
4. Inadequate sight visibility lines.

This decision was subject to a **first party appeal** to An Bord Pleanála under **Reg. Ref. PL15.243854**. This file is attached. An Bord Pleanála concurred with the recommendation of the planning inspector and upheld the decision of Louth County Council and refused planning permission for four similar reasons.

Under **Reg. Ref. 15/256** the applicant sought to address the reasons for refusal under Reg. Ref. 14/246 and PL15. 243854 and the applicant also sought planning permission for:

- A proposed depollution facility with four storage tanks within the existing sheds.
- A new vehicular access to serve the facility which included the closing off of the existing accesses.
- All associated site works.

Louth County Council again refused planning permission for reasons relating to:

- The development not being resourced based and location specific.
- The site history allows for agricultural and not commercial use.
- The NIS submitted does not consider any information contained in the hydrological report submitted with the application.

The Board will note that details of this application are not contained on file but are summarised in the application submitted for leave for substitute consent.

It appears from the information contained on file, and the submission from Louth County Council in respect of this application for leave for substitute consent, that enforcement proceedings are currently underway in respect of the facility.

4.0 THE APPLICANT'S CASE FOR LEAVE FOR SUBSTITUTE CONSENT

The applicant's case for seeking leave for substitute consent is set out in a submission by David Mulcahy, Planning Consultant under the provisions of Section 177C(2)(b) of the Act. The submission sets out the planning background including the planning history associated with the site prior to elaborating on the exceptional circumstances that relate to the subject site. The planning history as it relates to the site is set out in detail in the report and is summarised above for the Board's information.

The submission notes that a pre-planning meeting (November, 2015) sought to address the reasons for refusal issued in respect of previous applications by preparing the following:

- A revised Natura Impact Statement.
- A Depollution Report.
- A Site Characterisation Report in support of the proposed new foul drainage and treatment arrangements.
- Associated drawings.

All these documents are included as separate enclosures in a pouch to the rear of the file as part of the application for leave for substitute consent. The submission also makes reference to two applications in County Monaghan where retention of permission was granted for two end of life vehicle facilities. Details of Monaghan County Council's decisions are contained within the planning report on file.

The applicant has decided to seek leave to apply for substitute consent from An Bord Pleanála given the majority of the development involves retention and the fact that a Natura Impact Statement has been prepared in respect of the operations being undertaken on site. The proposed elements of the development are designed in order to ensure that the end of life facility will not materially impact on the environment.

The application for leave then goes on to evaluate the development in question in the context of exceptional circumstances provided for in Section 177D(2) of the Act. (See legislative provisions set out in the section below).

In commenting on whether or not the regularisation of the development concerned would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive, the submission notes that the site is only 3.3 hectares and therefore is below the statutory limit for EIA. In relation to previous applications to Louth County Council and the Board, it is noted that an NIS was required. An NIS was submitted with the 2014 application and this was subsequently revised to address concerns raised in the reasons for refusal under Reg. Ref. 15/256.

With regard to whether or not the applicant could have reasonably had the belief that the development was not unauthorised, the applicant believed he had established a commercial use on site for the storage of commercial goods. The current use necessitated the construction of no new buildings.

In relation to the third criteria set out under Section 177D(2) the applicant states that he is not aware of any reason as to why the ability to carry out an assessment of the environmental impacts of the development for the purposes of EIA or AA including public participation has been substantially impaired in any way.

The submission goes on to argue that investigations were carried out and it was found that there was no 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.

Furthermore, as there is no significant effects on the environment, or on the integrity of a European site, there is no need for any site remediation.

With regard to compliance with previous permissions, it is stated that the applicant has on two occasions been granted planning permission for commercial type development on site in the early 1990s. It is contended that the applicant did not contravene the conditions of the first permission in that he sought and obtained permission to store commercial goods. It is acknowledged that the existing development on site does not conform with the second permission and the applicant is trying to address this unauthorised development through the current application.

By way of conclusion it is stated that the current application differs significantly from that applied for and refused by the Board in 2014 and that the current application is augmented by a number of expert reports that address planning, natura impacts, hydrology, water testing, traffic, visual impact as well as physical differences to the site layout and the inclusion of appropriate mitigation measures. A number of documents are attached these include:

1. A detailed planning report.
2. A hydrological and hydrogeological risk assessment report.
3. An engineering report.
4. A pre-planning submission.
5. A Natura Impact Statement.
6. Proposed site operations and ELV depollution report.
7. A site characterisation form.

5.0 PLANNING AUTHORITY SUBMISSION

A submission from Louth County Council did not directly address the issues raised in the application for leave for substitute consent. It merely submitted details of enforcement proceedings and court proceedings in relation to the current operations on site. It is not proposed to detail this correspondence for the purposes of determining the current application before the Board.

6.0 LEGISLATIVE PROVISIONS

The European Court of Justice (ECJ) decision in the case of C-215/06 resulted in the removal of the facility to apply for retention of planning permission for development which require EIA. Thus under the amended Section 34(12) of the 2000 Act, a retention application cannot be accepted by the Planning Authority for a development which would

have required EIA (screening for EIA) or Appropriate Assessment under the Habitats Directive.

the provisions of 177C of the Act permits an application for leave to apply for substitute consent where a Court has found that there was procedural error in the original consent or where the Board grants leave to a developer to apply for substitute consent in other exceptional circumstances.

Under Section 177D(2) in considering whether exceptional circumstances exist the Board shall regard to the following matters:

- (a) Whether the regularisation of the development concerned would circumvent the purpose of 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 purposes 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 unauthorised development.
- (g) Such other matters as the Board considers relevant.

7.0 ASSESSMENT

The first question which arises in respect of the application for leave for substitute consent is whether or not the application for retention, is an application for which an EIA or screening for EIA is necessary. The site measures 3.3 hectares which is below the statutory threshold for EIA as set out in Part 11(E) of Schedule 5 of Part 2 of the 2001 Planning and Development Regulations as amended. This section relates to the 'storage of scrap metal' including scrap vehicles in which the site area would be greater than 5 hectares. There are no specific circumstances in my opinion which would warrant a determination for a sub-threshold EIS in light of the potential adverse impacts on the environment.

In relation to an assessment under the Habitats Directive, a critical question in my view is whether or not a Stage 2 Appropriate Assessment would be required in respect of the development in question. It is clear in this instance that an NIS was prepared and submitted in respect of previous applications for retention. Having regard to the provisions of Section 34(12) of the Act, it may have been pertinent of the Planning Authority and the Board in the case of PL15.243854 to refuse to consider an application to retain unauthorised development which involved Appropriate Assessment. The original NIS was submitted under Reg. Ref. 14/246. The screening exercise undertaken at Stage 1, concluded that the proposed development may have a significant impact on one or more Natura 2000 sites. The subsequent NIS which was prepared on foot of this screening determination, was deemed to be deficient in terms of the hydrological assessment carried out, and Louth County Council referenced this in its reason for refusal. It appears that both the planning inspector and An Bord Pleanála concurred with this view and the deficiency in the NIS was referenced in the grounds for refusal under appeal PL15.243854.

I note that a further application under Reg. Ref. 15/256 was submitted to Louth County Council and this application (which was very similar to the previous applications, albeit with modifications) was also refused planning permission and again one of the reasons cited in Louth County Council's reason for refusal was that the NIS did not include the information contained in the hydrological report. The Board will note that a revised NIS has also been submitted with the current application for leave for substitute consent (see booklet no. 5 in the pouch to the rear of the file).

For the purposes of determining the current application before the Board, it is not necessary or indeed appropriate to evaluate the contents of the current NIS and other documentation submitted as part of the application. The Board in this instance is merely required to determine whether or not sufficient exceptional circumstances exist in order to permit an application to apply for substitute consent in accordance with the provisions of the Act. If the Board accept that exceptional circumstances do exist, it can evaluate the planning merits of the case in any subsequent application for substitute consent.

A very important consideration which relates to the specifics of the current application is the fact that the application in question has been assessed already in the context of an accompanying NIS. It seems rather curious in my opinion that the Board would consider granting leave to apply for substitute consent on the grounds that an NIS may have been required in respect of the operations undertaken, having regard to the fact that it refused retention of planning permission for ostensibly the same operations on the subject site where an NIS had already been submitted with the application. While the applicant acknowledges that the NIS was deficient and the current application aims to address these deficiencies through a detailed hydrological report, I do not consider that the Board should entertain an application for leave for substitute consent on foot of repeated applications for retention of permission where the development has previously been refused and these applications for retention were accompanied by Natura Impact Statements.

Having regard to the planning history of the site and the fact that the applicant has already been refused retention of planning permission for applications involving the submission of an NIS, I do not consider in the first instance that there is any material change in the current application so as to warrant a grant for leave to apply for substitute consent.

Thus it is my considered opinion that the application should fail in the first instance having regard to the extensive planning history associated with the site and that the exceptional circumstances set out under Section 177D(2) are not specifically relevant to the application before the Board.

If the Board reject the arguments set out above and consider it appropriate to proceed to the tests set out in Section 177D(2) I would briefly comment as follows:

- (a) *Whether the regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or Habitats Directive.*

I do not consider that the regularisation of the development concerned would circumvent the purpose and objectives of either the EIA Directive or the Habitats Directive in that the applicant has prepared a Natura Impact Statement in accordance with the Habitats Directive and this statement would be evaluated and determined on its merits in any subsequent substitute consent application.

- (b) *Whether the applicant had or could have reasonably had the belief that the development was not authorised.*

Having regard to the planning history associated with the site, including numerous applications for retention of planning permission and the nature and extent of commercial use subsequently developed on site, I do not consider that 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 environmental impacts of development for the purposes of an environmental impact assessment or appropriate assessment and to provide for public participation in such an assessment has been substantially impaired.*

Again having regard to the planning history of the site and the fact that the applicant has applied for retention of planning permission on numerous occasions under which third party observations could have been submitted, I do not consider that the provision for public participation in such an assessment has been substantially impaired.

- (d) *The actual or likely effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of development.*

I am not in a position to determine the likelihood of actual or likely effects on the environment in the absence of a detailed and robust assessment of the potential and likely anticipated impacts and the mitigation measures proposed to address these impacts. However having regard to the fact previous decisions made reference to the lack of an assessment on the potential impact on Natura 2000 sites and that an NIS was prepared in subsequent applications suggests

that adverse effects on the integrity of a European site could not be ruled out at an initial stage.

- (e) *The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.*

Likewise it is not possible to assess the extent to which adverse effects on the integrity of a European site can be remediated without a comprehensive and robust assessment of the NIS submitted with the application. I reiterate that it is not the purpose of the current assessment to evaluate the planning and environmental merits of the application. The current application is restricted to deliberating on whether or not there is sufficient merit in granting leave to apply for substitute consent.

- (f) *Whether the applicant has complied with previous planning permissions granted or has previously carried out unauthorised development.*

Again it is clear from the history relating to the site that the applicant has contravened conditions in respect of previous planning permissions and by extension carried out unauthorised development.

- (g) *Such other matters as the Board considers relevant.*

Again I refer the Board to the first part of this assessment and the fact that the applicant has applied and been refused retention of planning permission by both the Planning Authority and An Bord Pleanála. These applications have been accompanied by Natura Impact Statements. It is my opinion that the applicant has exhausted the avenues for retrospective consent through the normal provisions of the Planning Acts and is seeking to regularise the development through the substitute consent process under the provisions of S.177. However I do not consider that exceptional circumstances have been presented by the applicant to warrant a grant of leave for substitute consent in this instance.

8.0 CONCLUSIONS AND RECOMMENDATIONS

Having regard to my assessment above I consider that An Bord Pleanála should decide to refuse leave to apply for substitute consent under Section 177D(4) of the Planning and Development Act 2000, based on the reasons and considerations set out below.

Having regard to Section 177D of the Planning and Development Act 2000, as inserted by Section 57 of the Planning and Development (Amendment) Act 2010, the Board considered that an appropriate assessment is required in respect of the development concerned and that previous applications for retention of planning permission which were accompanied by an appropriate assessment were refused by both Louth County Council and An Bord Pleanála. The Board furthermore examined whether or not exceptional circumstances exist such that it would be appropriate to permit the regularisation of the development by permitting leave to make an application for substitute consent. In this regard the Board did not consider that the applicant could reasonably have had a belief that the development was not unauthorised and that the applicant has not complied with previous planning permissions granted and has previously carried out unauthorised development.

The Board concluded that exceptional circumstances do not exist such that it would be appropriate to permit the regularisation of the development by permitting leave for substitute consent and decided to refuse leave to make an application for substitute consent.

**Paul Caprani,
Senior Planning Inspector.**

9th September, 2016.

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