



An
Bord
Pleanála

Inspector's Report 07.LS.0028

Application for Leave to Apply for Substitute Consent

Board Reference	07.LS.0028
Planning Authority	Galway County Council.
Applicant	Mr. Ben Bontinck, Brockstraat 93 Bus 5, 9200 Baasrode, Belgium.
Development	Basic accommodation for temporary holiday use with ancillary jetty. Lands at Stoney Island, Portumna, County Galway.
Date of Site Inspection	1 February, 2017.
Inspector	Brendan Wyse.

1.0 Introduction

- 1.1. This is an application for leave to apply for Substitute Consent under section 177C(2)(G) of the Act. In the first instance the applicant contends that there is no requirement for EIA or AA in respect of the subject development. The Board, therefore, is requested to refuse leave to apply for substitute consent so that an application for retention can be lodged to the planning authority. However, if the Board considers AA to be required, then it is submitted that exceptional circumstances exist such as to enable an application for substitute consent to be made.

2.0 Site Location and Description

- 2.1. The site is located on the northern shore of Lough Derg, approximately 4.5 kilometres west of Portumna. It has an area of approximately 0.2 hectares and comprises a rectangular plot extending from a private road to the shoreline of the lake.
- 2.2. The site is substantially covered in mixed broadleaf woodland and is generally enclosed with timber post and wire fencing with small amounts of sod/stone wall. The lakeshore includes reed swamp. Vehicular/pedestrian access from the road is via a timber gateway and grass track. There are a number of structures on the site as follows:

1. **Cabin**

This is a timber structure with a corrugated iron roof. Stated floor area 16.5 square metres. It is located centrally within the site. Some informal paving has been laid to the front. The cabin is used for sleeping purposes and appears to be able to accommodate c.4 persons. There is a small solar panel on the roof and a stainless steel flue projects from one side.

2. Toilet

This is a partly enclosed timber structure attached to the cabin. Stated area 5.0 square metres. The toilet is a basic (home-made) dry compost facility.

3. Wash-up/Dining Area

This is a timber structure with a corrugated perspex roof. Stated area 9 square metres. It is located towards the western end of the site.

4. Store

This is a timber structure with a corrugated iron roof, adjacent to the wash-up area. Stated floor area 4 square metres.

5. Jetty

This is a timber structure on the lake shoreline. I estimate the surface area at about 4 square metres. It is stated to be suspended over rocks and constructed on a concrete capping with concrete debris foundation.

- 2.3. There are a number of residential properties to the north and south of the site. The property to the north has extensive timber decking to the shoreline off an expansive cleared lawn. The road has a carriageway width of approximately 3 metres and terminates a short distance to the south towards the end of the Stoney Island peninsula. Access from the public road network is via a gateway located approx.0.75kms to the north.

3.0 The Application

- 3.1. The application is submitted by David Mulcahy Planning Consultants Limited on behalf of Mr. Ben Bontinck.
- 3.2. The application includes the following documentation.
- Cover Letter/Planning Report.
 - Documentation submitted to Galway County Council in relation to a recent application for retention permission – P.A. Ref. 16/375. This includes:
 - Drawings (now also submitted with the subject application).
 - Planning Report.

- AA Screening Report.

3.3. Cover Letter/Planning Report

3.3.1. Includes:

- The subject development for which leave to apply for substitute consent is described as comprising:
 - Jetty, wash-up area, store and cabin (with 4 no. bedspaces only).
 - vehicular entrance;
 - associated works;
 - the use of the structures for temporary holiday accommodation for a maximum of 20 days per year;
 - permission for replacement of the existing covered compost toilet adjoining the cabin with a 'Sun-Mar' non-electric compost toilet (with compost to be deposited on site).
- Works involved are minor and the development is low impact.
- The site has been used for camping and fishing purposes by 3 generations of the same family.
- Two applications for retention permission have been returned to the applicants on the basis that Stage II AA is required (P.A. Refs. 14/344 and 16/375).
- It is submitted that there is no requirement for EIA or AA – the latter is founded on the AA Screening Report (referred to above) and which concludes that a Stage II AA is not required.
- In the event that the Board does consider that a Stage II AA is required then it is submitted that exceptional circumstances apply.
- Some details in relation to applications P.A. Refs. 14/344 and 16/375.
- Details, including photographs, of the replacement jetty following flooding during the winter 2015/2016. The jetty appears to be a smaller structure than the previous one and is stated to have utilised pre-existing supports. This is the jetty currently in place.

- It is stated that the flooding event only affected the edge of the site at the lake front and did not impact the remainder where the accommodation/compost toilet are located.
- The Board is referred to cases Refs. LS0005 and LS0008, previous Refusals of leave to apply for substitute consent on the basis that there was no requirement for AA.
- In relation to the exceptional circumstances tests under Section 177O(2) of the Act the following is submitted:
 - (a) Neither EIA nor AA is required.
 - (b) The applicant is not familiar with the Irish Planning System, the works are of a minor nature and once he became aware of the need for planning permission he sought retention.
 - (c) The ability to carry out EIA or AA, including public participation, has not been impaired.
 - (d) In terms of actual or likely significant/adverse effects the key issue would appear to be the potential for effluent pollution of the lake. Use for camp style accommodation for 20 days per year is minimal by any yardstick.

The proposed compost toilet uses a predominantly aerobic processing system that treats excreta, typically with no water or small volumes of flush water, via composting or managed aerobic decomposition. The human excrement is normally mixed with sawdust or peat moss to support aerobic processing, absorb liquids and to reduce odours. The decomposition process is generally faster than that used in wet sewage treatment systems such as septic tanks. There is no hole in the ground involved with the toilet. The toilet is suspended above the ground. The foul contents are left in the toilet container and naturally decompose over the course of the year. The resulting compost can then be used as fertiliser.

The Flood Information submitted under P.A. Ref. 16/375 (and submitted with this application) shows that there is no material flood risk.

Therefore, there is no material threat to European protected habitats in the adjoining SAC.

- (e) Remediation does not apply as there is no evidence of any significant effects on the environment.
- (f) In relation to previous compliance the applicant has not carried out any works requiring planning permission other than those on the subject site.

3.4. P.A. Ref. 16/375 – Planning Report

3.4.1. Includes:

- The lake shore has been altered over time in the general vicinity due to the creation of harbours at neighbouring properties.
- As there is no guarantee as to the operational performance of the current self-made compost toilet the applicant is proposing to install a replacement 'Sun Mar' non-electric compost toilet certified to NSF, industry standards, which require, inter alia, that there is no odour, even during overload testing, and that compost produced has extremely low levels of faecal coliforms. The resulting compost will be deposited on a compost heap only during favourable weather conditions and at the western end of the site, as far from the lake edge as possible. Technical details included as Appendix A.
- In relation to the use of compost toilets the Board is referred to permissions ABP Ref. 03.245364 and Wexford County Council P.A. Ref. 20082401. Eco Village Developments in Counties Donegal and Meath are also cited.
- In relation to the wash-up/dining area drinking water is imported in water containers from local shops and other water is sourced from the tap at the harbour in Portumna.
- The local access road carries very little traffic and clear sightlines are available at the site entrance.
- A tent has been removed from the site. The intention is that the tent is erected under exempted development upon visiting the site. Class 1, Part 3, Schedule 2 of the Regulations refers – noted that this also exempts the temporary mooring of any vessel.
- The maximum number of people on the site at any one time is 8.

- Appendix D contains signed testimonials from the applicant and his extended family who have visited the site over the last 40 years.
- The site was originally acquired in 1969. The current cabin appears to date from 2010, having replaced a previous structure. The toilet, storeroom and washroom were provided at some earlier time. Originally mooring was undertaken using rocks at the shore as there was no requirement for a jetty at the time.
- The existing toilet is a homemade outdoor toilet. Composted waste is deposited at the site once per year.
- The structures on site are not visible from the public road. While the jetty is visible from the lake it is unobtrusive due to its small size. The cabin structure is only partially visible from close to the shoreline.

3.5. P.A. Ref. 16/375 – Appropriate Assessment Screening Report

3.5.1. The report is stated to respond to the issues raised by the DAHG on the earlier retention planning application PA Ref 14/344. It includes:

- No significant effects are expected on the qualifying interests or conservation objectives of the Lough Derg, North East Shore cSAC and Lough Derg (Shannon) SPA as a result of the proposed development in question.
- The site is located partly within the Lough Derg, North East Shore cSAC and Lough Derg (Shannon) SPA.
- The majority of the site comprises mixed broadleaved woodland (WDI), with a mixture of native and non-native species, and so the loss of small areas of this habitat has not resulted in a significant impact.
- The jetty construction results in some encroachment of the lake shore resulting in the loss of a small area of swamp, which is a 'wetland' and, therefore, a qualifying interest of the Lough Derg (Shannon) SPA, but does not correspond to any of the qualifying habitats of the Lough Derg, North East Shore SAC, or any other EU Annex I habitat. It may, therefore, have resulted in the loss of a small amount of feeding/nesting habitat for wintering/breeding birds and some temporary disturbance to these species. Due to its small scale the 'in-combination' effects of the jetty are not considered significant.

- A small, self-made compost toilet was in use at the site up until recently, with human waste being deposited at the site once a year. As there is no guarantee as to the operational standards of this toilet the client agreed to install a manufactured unit certified to NSF standards (industry standard for compost toilets – details in Appendix C). It is considered that this system will adequately treat the small amount of waste to be generated on site. Resulting compost is to be deposited on a compost heap at the western end of the site as far from the lake edge as possible and during favourable weather conditions. Provided the system is installed and maintained properly, it is not expected that emissions arising will result in any significant adverse effects on the Natura 2000 sites.

3.5.2. Appendix D to the Screening Report contains a Flood Report, by JA Gorman, Consulting Engineers, indicating that latest Draft Flood Maps for the Portumna Catchment (published 16th December, 2014) suggest no risk to the site with the relevant flood extents (1:100 and 1:1000) just clipping the eastern lake shoreline.

4.0 Planning History

4.1. PA Refs 14/344 and 16/375

These are the two recent (2014 and 2016) invalidated applications referred to in the applicant's documentation – details in file pouch.

The reasons for invalidating the applications referred to section 34(12) of the Act and specifically that the development in question was considered to require AA.

4.2. PA Ref 12/1638

This is an earlier (2012/13) application for retention of a timber jetty, subsequently withdrawn. Details in file pouch.

4.3. PA Refs 8937 and 25465

These appear to relate to much earlier applications for a chalet (granted 1971) and a house (refused 1977) on the site. Details in file pouch.

4.4. PA Refs 08/2133, ABP Ref 231137

This is a 2009 permission for part retention/part extension/alterations to the existing house on the adjacent site to the north. The development included; an upgraded

septic tank system; a replacement wooden jetty at the lakeshore; and a raised lawn level to above winter high water table. File attached.

5.0 Planning Authority Submission

None received.

6.0 Policy Context

6.1. Development Plan

Galway County Development Plan 2015-2021

The site is located in an area designated as Landscape Sensitivity Class 4 (where Class 1 is the least sensitive and Class 5 is the most sensitive).

6.2. Natural Heritage Designations

The site is located partly within the Lough Derg North Shore cSac [Site Code 002241] and the Lough Derg (Shannon) SPA [Site Code 004058].

It is also partly within the Lough Derg pNHA [Site Code 000011].

7.0 The Assessment

7.1. Introduction

7.1.1. Scope of Application

It is noted that the application as described in this instance (see Section 3.3.1 above) includes a permission element, the proposed replacement compost toilet, in addition to the various retention elements as set out. As an application for substitute consent can only be made in respect of development that has already been carried out the Board's determination in this case, whether or not to grant leave make such an application, must be confined solely to the retention elements of the development.

7.1.2. **Tests for Leave**

7.1.3. Section 177D(1) of the 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.

7.1.4. 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.

7.2. **Qualifying Development**

Environmental Impact Assessment (EIA)

7.2.1. There is no question in this instance, given the very minor scale and temporary/intermittent nature of the development that has taken place, and as

described in Sections 2.2 and 3.3.1 above, that there is any requirement for either a determination in relation to EIA or for EIA. In this I am relying, in particular, on article 109(2), Planning and Development Regulations 2001, as amended, in that I consider that the likelihood of significant effects on the environment can be excluded for the purposes of EIA. I have also had regard to the possible relevant classes of development specified in Schedule 5 to these Regulations [in particular Part 2, Class 10, infrastructure Projects, and Class 12, Tourism and Leisure] and to Schedule 7 of the Regulations [Criteria for determining whether a development would or would not be likely to have significant effects on the environment].

Appropriate Assessment (AA)

7.2.2. As indicated the applicant is placing reliance in this regard on the AA Screening Report submitted to the planning authority under application PA Ref 16/375. The main conclusions of this report are summarised at Section 3.5 above. In this assessment I have also had regard, in particular, to the planning authority's Planners Report and the submission of the DAHG (NPWS) in relation to that application.

7.2.3. As clarified above the first point to note here is that the development properly the subject of this assessment is confined to the retention elements of the development only. For clarity these comprise:

- The timber cabin (4no. bedspaces) and associated informal paving.
- The existing (home-made) compost toilet.
- The wash-up/dining area.
- The store.
- The jetty.
- The timber vehicular entrance gates and grass track.
- Use for temporary holiday accommodation for 20 days per year.

7.2.4. The Screening Report correctly identifies that the development site is partly within the following Natura 2000 sites:

Lough Derg North East Shore SAC [Site Code 002241]

Lough Derg (Shannon) SPA [Site Code 004058]

Of particular note is that the shoreline area of the site is within the SAC and the SPA [See Fig 2.1 of the Screening Report but ignoring the blue hatched area as this refers to the pNHA].

- 7.2.5. Copies of the Conservation Objectives, Standard Data Forms and Site Synopsis Forms for these sites are in the file pouch.

The Conservation Objectives for the sites are generic and relate to the habitats/species and birds that the sites were selected for as follows:

SAC

Juniper Scrub

Cladium Fens (priority habitat)

Alkaline Fens

Limestone Pavement (priority habitat)

Alluvial Forests (priority habitat)

Yew Woodlands (priority habitat)

SPA

Cormorant

Tufted Duck

Goldeneye

Common Tern

Wetland Habitat

- 7.2.6. The Screening Report identifies the bulk of the site as comprising mixed broadleaf woodland. While some of the tree species present are identified as being associated with Alluvial Forests it is noted that a characteristic feature of this habitat type is periodic inundation and that only one indicator species for this occurs on the site occasionally close to the lake edge. I would note that this appears to be consistent with the applicants account of the flood event that necessitated replacement of the jetty and which was stated to have affected only the lake edge of the site and the evidence from the Flood Report, appended to the Screening Report, that indicates no historic record of fluvial flooding at Stoney Island and flood extents affecting only

the lake edge. It is concluded, therefore, that the woodland on site does not correspond to any of the selected habitats and I consider this to be reasonable.

- 7.2.7. The lakeshore of the site is identified as comprising Reed and Large Sedge Swamp. This does not correspond to any of the selected interests for the SAC but is considered a wetland, a selected interest for the SPA, being of value to breeding/wintering birds. I consider this to be a reasonable conclusion.
- 7.2.8. The main focus, therefore, in this assessment is on the likely significant effects arising from the development on the SPA in relation to the lakeshore wetland habitat and associated bird species.
- 7.2.9. The construction of the various facilities on the site appears to have occurred incrementally over several years. Given the small scale and rudimentary nature of the works carried out, I am satisfied that no significant disturbance to bird species would have resulted.
- 7.2.10. As acknowledged in the Screening Report the construction of the timber jetty would have had the potential to result in the loss of some wetland habitat at the lakeshore. However, even allowing for the earlier, somewhat larger structure (stated to have been 13.2 square metres in area – see Photo No.5 Jetty, Planning Report under PA Ref 16/375) since replaced by a smaller structure (c.4 square metres in area), and taking account of the rudimentary construction, including suspension over rocks and concrete debris, I am satisfied that the jetty is unlikely to have given rise to any significant wetland habitat loss.
- 7.2.11. In relation to the operational phase (use) of the development the main issues, in my view, focus on:
- Human Activity/Disturbance.
 - Foul Waste Disposal
- 7.2.12. In terms of use generally this is confined to temporary/intermittent holiday use for a maximum of 20 days per year. The cabin can sleep 4 and it appears some camping may also occur. The applicants indicate that the maximum number of people on site at any one time is 8. As such I do not consider that any significant disturbance to bird species is likely to arise.

- 7.2.13. In terms of foul waste disposal there are, in my view, two aspects that need to be considered, namely, the compost toilet and the wash-up/dining area.
- 7.2.14. In relation to the compost toilet this is stated to be a self-made facility with composted waste being deposited on the site once per year as fertiliser. The applicants agree that there is no guarantee as to its operational performance and, hence, propose to replace it with a certified installation to industry standard. This, in my view, creates a difficulty. While it is accepted that the amounts of waste are likely to have been small, given the scale and short duration of occupation, there is a clear potential for pollution to the lake to have arisen from this source, with knock-on impacts to the wetland habitat and associated bird species, and which cannot be discounted at this screening stage of assessment.
- 7.2.15. In relation to the wash-up/dining area it is indicated that drinking water is sourced from local shops and brought to the site in containers and that other water is sourced from the tap at the harbour in Portumna, and presumably also brought to the site in containers. In relation to the latter there is no information as to how wash water is disposed of. Clearly, if it is disposed to ground, or to the lake, this is a further potential source of pollution to the lake. On the other hand if it is removed off site for disposal then no such impacts arise. However, in the absence of information, it is not possible to discount these potential effects at this screening stage of assessment.
- 7.2.16. The Screening Report also considers the matter of 'in-combination' effects. Again, while acknowledging the small scale and temporary/intermittent nature of the development, it follows from the above conclusion that it is not possible to discount such potential effects at this screening stage of assessment.
- 7.2.17. Finally, it should be noted that these potential pollution events might or might not also give rise to likely significant effects on some of the water dependent habitats the subject of conservation objectives in the SAC, and located elsewhere within it, such as Cladium Fens, Alkaline Fens or Alluvial Woodlands. For similar reasons as before this cannot be discounted at this screening stage of assessment.
- 7.2.18. I conclude, therefore, that AA is required as it cannot be excluded, on the basis of objective information, that the development would have had or would have a likely significant effect on the Lough Derg (Shannon) SPA [Site Code 004058] or the

Lough Derg North East Shore SAC [Site Code 002241], having regard to the Conservation Objectives for these sites.

7.2.19. The development, therefore, does qualify for consideration for leave to apply for substitute consent being a development in respect of which AA is required.

7.3. **Exceptional Circumstances**

7.3.1. Taking each of the tests set down in section 177D(2) in turn I would comment as follows.

7.3.2. **Would regularisation of the development concerned circumvent the purposes and objectives of the EIA Directive or the Habitats Directive?**

As EIA was and is not required no issue arises in relation to the EIA Directive.

Given the lengthy history of use of the site that predates the Habitats Directive, the small scale of the works carried out and the ongoing limited/temporary holiday use I do not consider that regularisation would circumvent the purposes or objectives of the Directive.

7.3.3. **Whether the applicant has or could reasonably have had a belief that the development was not unauthorised.**

Given the minor nature of the works and the lengthy history of use of the site I am satisfied that the applicant could reasonably have had the belief that the development was not unauthorised.

7.3.4. **Whether the ability to carry out EIA or AA and to provide for public participation in such an assessment has been substantially impaired.**

As EIA was and is not required no issues arise in relation to this matter.

I do not consider that there is any impairment to carrying out AA, including providing for public participation.

7.3.5. **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.**

As EIA was and is not required no issues arise in relation to this matter.

The only possible adverse effects on the integrity of a European site relate to those that might arise from foul waste disposal and which could give rise to pollution affecting habitat and associated bird species that are the subject of Conservation Objectives for the Lough Derg (Shannon) SPA (Site Code 004058). However, with the implementation of appropriate mitigation measures, including facilities to properly dispose of foul waste, it is not anticipated that such adverse effects would arise. Furthermore, there is no evidence to suggest that any such adverse effects have arisen to date.

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

As EIA was and is not require no issues arise in relation to this matter.

In relation to AA there are no indicators to suggest that remediation is required.

7.3.7. Whether the applicant has complied with previous permissions granted or has previously carried out unauthorised development.

There is no evidence to suggest that the applicant has any difficulties in relation to these matters.

7.3.8. Such other matters as the Board considers relevant.

Nothing occurs under this heading.

7.3.9. It is my conclusion that exceptional circumstances do exist in this case. In this I place particular emphasis on; the fact that regularisation of the development would not circumvent the purposes or objectives of the Habitats Directive; that the applicant could reasonably have had a belief that the development was not unauthorised; that the ability to carry out AA and provide of public participation has not been substantially impaired; and the limited nature of any actual or likely effects on a European site resulting from the development.

8.0 Recommendation

8.1. I recommend that leave to apply for substitute consent be granted for the following reasons and considerations.

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:

- (a) the development is one where an appropriate assessment is required, and
- (b) that exceptional circumstances exist by reference, in particular, to the following:
 - the fact that the regularisation of the development would not circumvent the purpose or objectives of the Habitats Directive;
 - that the applicant could reasonably have had a belief that the development was not unauthorised;
 - that the ability to carry out AA and provide for public participation has not been substantially impaired;
 - and the limited nature of the actual/likely significant effects on a European site resulting from the development.

The Notice to the applicants advising of the decision should also direct that:

- (a) the application be made within 12 weeks of the giving of the notice or such longer period as the Board may, on request, consider appropriate, and
- (b) The application includes a remedial NIS. This may include reference to proposed mitigation measures where appropriate.

Brendan Wyse,
Assistant Director of Planning.

16 March, 2017.