



An
Bord
Pleanála

Inspector's Report LS03.LS0029

Development

Application for Leave to Apply for Substitute Consent under the provisions of Section 177C (2)(b) of the Planning and Development Act, as amended.

Nature of Development

Road widening at the R478 and the removal of waste and holding of waste on adjacent lands.

Location

Liscannor. Co Clare.

Planning Authority

Clare County Council.

Planning Authority Reg. Ref.

N/A

Applicant(s)

Clare County Council.

Type of Application

Application for Leave to Apply for Substitute Consent.

Observer(s)

None

Site Inspection

May 9th, 2017

Inspector

Breda Gannon

1.0 Introduction

- 1.1. Clare County Council seeks Leave to Apply for Substitute Consent under the provisions of section 177(2)(b) of the Planning and Development Act, 2000, as amended. 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 case relates to widening of the R478, the removal of waste therefrom and holding of waste on adjacent lands, the proposed retrieval of waste and completion of the road works and ancillary development.

2.0 Site Location and Description

- 2.1. The site is located in the townland of Ballyellery between the towns of Liscannor and Lehinch Co. Clare. It lies on the northern side of the R478 regional road between the bridge over the Inagh River at Lahinch and Kilmacrehy Graveyard at Liscannor. The site has a frontage of c.0.9km to the regional road. It comprises a flat low lying area approximately 13ha in extent and is in agricultural use. There is evidence of deposited material on the site. A number of drains traverse the site that discharge into Laghvally Stream, which flows into the Inagh Estuary. Works have been undertaken along the site frontage including the construction of a wall and a footpath which remain to be completed.
- 2.2. To the south of the regional road there is a pitch and putt course backed by sand dunes. The Inagh River Estuary SAC lies further south and Liscannor Bay lies beyond the estuary.

3.0 Planning History

RL.03.RL3359 – An Tasice referred a question to the Board in accordance with Section 5 of the Planning and Development Act, 2000, in respect of these lands. The Board concluded that the infilling/reclamation of land adjacent to the R478 between Lahinch and Liscannor, Co Clare (and adjacent to the Inagh River Estuary Special Area of Conservation Site Code 000036) is development and is not exempted development.

4.0 Applicant's case for Leave for Substitute Consent.

Clare County Council's case for seeking leave for substitute consent is set out in their submission dated November 8th, 2016 and is summarised as follows.

As Road's Authority, Clare Co Council proposed to straighten a section of the R478 road between the bridge over the Inagh River at Lahinch and Kilmacreehy Graveyard, Liscannor. The road was considered deficient in terms of width and alignment, was in poor condition and dangerous. It is an important part of the Wild Atlantic Way and carries a disproportionate amount of bus traffic, particularly during the tourist season. Following the severe winter of 2009 the road deteriorated dramatically. The road structure failed and this resulted in further narrowing of the carriageway, severe potholing and an uneven and slippery surface. It became clear that this section of roadway constituted a traffic hazard and needed to be addressed immediately.

Clare Co Council entered into an agreement with a landowner, Mr Ronan Slattery, by way of Land Acquisition Agreement dated 17th October 2013, whereby the landowner consented to the removal of a portion of land measuring 0.782 acres inside his boundary wall for the purpose of widening the R478. It was also agreed that Clare Co Council would raise the level of the field with spoil from the road development being deposited in that location, and that the area would be stripped of top soil, filled, top soil replaced and reseeded. The parties agreed that the area would be used as a temporary store for the Council's materials.

In November 2013, Clare Co Council began a road restoration scheme to eliminate a number of traffic hazards. An issue arose as to whether there was unauthorised development on the lands and whether some or all of the land used for, or in

connection with the road improvement scheme was a wetland. The Area Engineer stated that the area in question was not a wetland. He referred to the Clare Co Council commissioned wetland survey, which did not identify the Ballyellery area as a wetland. The Council concluded that the works were exempted development.

An Taisce subsequently argued that the development was not exempted development on the basis that the infill land was a wetland, the infill material included soil and C&D waste and that the Area Engineer was incorrect in stating that the infill material came from the road widening works. It also argued that the infill area was well in excess of the 2 hectares for mandatory EIA and that the development should have been the subject of an 'appropriate assessment'.

An Taisce referred the matter to An Bord Pleanála who concluded that the works were development and not exempted development. In reaching its decision the Board concluded that the site was located within a coastal and fluvial floodplain and that the Laghvally Stream, which runs through the subject lands and connects directly to the Inagh River Estuary SAC, is tidal in its easternmost section within the lands. It concluded that the likelihood of significant effects could not be excluded and that it could not be concluded that the works undertaken, and which are ongoing did not significant effects on a European site. The development required both EIA and AA for the development and this removes the exemptions that normally available to the local authority for such road improvements.

The Section 5 referral primarily dealt with the infill on the land adjoining the road. The Council did not subject the works to the Part 8 process on the basis that the road improvements were exempted development not requiring approval under Part 8. The determination made by An Bord Pleanála on the Section 5 referral was that the works carried out on the lands in question are wetlands and that the works carried out both by Clare Co Council and the landowner is development and not exempted development. Clare Co Council considers it prudent to include in this application for leave to apply for substitute consent, roadworks carried out to date, which are almost completed and the outstanding works which are yet to be completed (to include the completion of the construction of the wall and surfacing of the footpath, adjacent to the widened roadway).

The current position is that the works have been held in abeyance and Clare Co Council has confirmed that the volume of material imported and deposited on the lands, did not come from adjacent roadworks. The total quantity is 425m³ (850 tonnes) which equates to approximately 40 truckloads. Approximately 300m³ was taken from Liscannor Harbour following storms in early 2014. The remainder is storm debris removed from the adjacent public road, with a small quantity of stone from licensed quarries.

The material was used to facilitate development of a temporary compound in area A in connection with the roadworks. There was no C&D waste imported by Clare Co Council and it did not import any material to areas B, C, or D. Approximately 1,880m³ of topsoil and subsoil were excavated and approximately two thirds of this material was deposited in areas A, C and D and the remainder was used in the road widening zone. Apart from these activities, Clare Co Council carried out some re-contouring works in area C involving the lowering of a hill.

The submission refers to the exceptional circumstances as they relate to the subject development. It is supported by 15 no. appendices including details of declarations, referral to the Board etc. Appendix 9 contains a report by Ms Karin Dubsky, marine/estuary ecologist commissioned by An Taisce in connection with their referral to An Bord Pleanála. Appendix 15 contains a report by Dr Patrick Cushell (Wetlands Survey Ireland) entitled 'Assessment of Impacts on Wetland Habitat'.

5.0 Legislative Provisions

Section 177C of the Planning and Development Act 2000 (as amended) permits an application to be made to the Board for leave to apply for Substitute Consent in respect of development which has been carried out, which would have required an Environmental Impact Statement or an Appropriate Assessment.

Section 177D(1) provides that the Board shall 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 a development concerned and whether it is further satisfied that

exceptional circumstances exist such as the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

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

- 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 can be remedied;
- e) Whether the applicant has complied with previous planning permission granted or has previously carried out an unauthorised development;
- f) Such other matters as the Board considers relevant.

6.0 **Assessment**

The first question that arises in respect of this application is whether or not it is in respect to an application for which an EIA or AA is required. I draw the attention of the Board to Reference No 03.RL.3359, where the Board concluded that both EIA and AA were required for the infilling/reclamation of the subject lands, which constitute wetlands. With regard to EIA, it was concluded that mandatory EIA would be required as the area of wetland being reclaimed was in excess of 2 hectares as

provided for under Item 1(c) of Part 2 of Schedule 5 to Article 93 of the Planning and Development Regulations 2001, as amended. With regard to AA, it was noted that the Levally Stream which runs through the site connects directly to the Inagh River Estuary SAC and that significant effects on a European site could not be ruled out. The Board may, therefore, be satisfied as to compliance with the first requirement set out in section 177D (1) on the basis of its previous determination on 03.RL.3359. The question therefore that arises is whether exceptional circumstances now exist that would make it appropriate to permit the opportunity for the regularisation of that application by an application for substitute consent in accordance with the provisions of the Act. .

These matters are considered below;

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

The road improvement works carried out on this section of the R478 included infilling and contouring works. The local authority's submission is supported by a report entitled 'Assessment of Impacts on Wetland Habitat', prepared by Dr Patrick Crushell (Wetland Survey Ireland), contained in Appendix 15. It acknowledges that the infilling/contouring works have resulted in the direct loss of wetland habitat and the presence of unconsolidated material throughout the site presents a risk of continued run-off of sediment or other pollutants in surface water to downstream water bodies. Other potential impacts associated with the works relate to alterations in the local hydrological regime. It is concluded that the loss of wetland habitat is a reversible impact and that it would be possible to restore similar habitat if appropriate remedial works were undertaken i.e. remove the infill. This would also have the effect of reducing the potential for the migration of sediment/pollutants to water courses and into the River Inagh Estuary SAC

The site occurs to the north of the River Inagh Estuary SAC, which is designated for the protection of five habitats listed on Annex 1 of the EU Habitats Directive, which include sand dunes, salt-marshes and inter-tidal mudflats. The works did not result in any direct impacts on its qualifying features and there are no habitats within the site

which correspond to Annex 1 habitats. There is potential for indirect effects due to the hydrological connectivity between the site and the SAC.

The primary purpose of the EIA Directive is to ensure that projects that are likely to have significant effects on the environment are subject to an assessment of their likely impacts. The purpose and objectives of the Habitats Directive relate to the preservation, protection and improvement of the quality of the environment, and to promoting the maintenance of biodiversity.

It is clear from the report prepared by Dr Crushell that subject to restoration works, including the removal of the infill material, it would be possible to restore the site to its original habitat and curtail potential deterioration in water quality. 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. The applicant would be required to prepare an EIA and a NIS, which would be assessed on its merits in any substitute consent application.

b) Whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

The works which took place at this location involved both road widening and infilling/reclamation of adjacent farm lands. With regard to the widening of the regional road, the applicant relied on the exemption provided by Section 4(1)(e) of the Act, which refers to development consisting of the carrying out by a local authority of ‘*any works required for theimprovement of a road*’. With regard to the infilling/reclamation, the applicant relied on Article 8C of the Planning and Development Regulations 2001, as amended which provides that ‘*land reclamation works (other than reclamation of wetlands) consisting of re-contouring of land, infilling of soil (but not waste materials) within a farm holding, shall be exempted development.*’

I accept that the applicant could reasonably have concluded that the development was not unauthorised. Clare Co Council took the view that the development was exempted on the basis of the information before it at the time. Critically, the site was not identified as a wetland in early OSI maps, in CORINE mapping which showed wetlands in Co Clare, or, in the Co Clare Wetlands Survey (2008). The site was confirmed to be a wetland as a result of a specially commissioned report by an

Taisce in support their referral and prepared by a marine/estuarine ecologist (Karin Dubsy).

Having regard to the grounds presented by Clare Co Council in the previous declarations/referral under Section 5 of the Act in respect of the site, I consider that the applicant was firmly of the belief that it was operating within the exempted provisions of the Act and the Regulations and 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;

I accept that the works carried out on to date have altered the site. However, it is acknowledged in the reports prepared by Karin Dubsy and Dr Crushell that the site is capable of restoration. There will be a requirement for both Environmental Impact Assessment and Appropriate Assessment to support an application for Substitute Consent. The application process will provide a medium for active public participation. There is no suggestion in the reports that the ability to carry out these assessments has been compromised by the works carried out to date.

d) The actual or likely significant effects on the environment or adverse effects on the integrity of a European site can be remedied;

It is concluded in the reports prepared by both Dr Crushell and Ms Dubsky that the site can be effectively restored. Ms Dubsky notes that raising of the land by infilling and closing over of drainage channels (which bring water to/from the wetland) have destroyed wetland functions. Flood waters that would normally be accommodated in the wetland would now be displaced elsewhere, which could cause flooding or erosion of soft sediment areas or other damage. She noted that the wetland still has significant flood retention and biodiversity value and that the action needed to preserve and restore the wetland would involve the cessation of infilling and the removal of all infill material both heaped and spread down to previous ground levels.

Dr Crushell also documents the negative impacts on the wetland habitat including destruction of the wetland habitat, possible deterioration in water quality and alterations to the local hydrological regime. Removal of the infill material is recommended as a remediation measure.

On the basis of the expert opinion offered by both Dr Crushell and Ms Dubsky, it appears that the impacts that have occurred as a result of the works are capable of being remedied.

e) Whether the applicant has complied with previous planning permission granted or has previously carried out an unauthorised development;

There is no record of any previous planning permission with respect to the subject site. The applicant's submission states that it seeks to comply with its statutory planning obligations. The Council accepts that its determination that the works involved were exempted development was incorrect. It now proposes by way of this application for leave to apply for Substitute Consent to rectify its non-compliance with the legal requirements for the development, the subject matter of the application.

f) Such other matters as the Board considers relevant.

I am not aware of any other matters which may be of relevance to the Board in its determination of the application.

7.0 Recommendation

I consider that it would be appropriate to consider an application for the regularisation of the development by means of an application for substitute consent. I recommend that the Board grant leave to apply for substitute consent for the development under section 177D of the Planning and Development Act 2000, as amended.

8.0 REASONS AND CONSIDERATIONS

Having regard to section 177D of the Planning and Development Act, 2000, as amended and to the conclusions reached by the Board in its determination of the referral under O3. RL03359, with respect to the development on the site, the Board is satisfied that an Environmental Impact Assessment and Appropriate Assessment would be required in respect of the development concerned. Furthermore, the Board

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

- considered that the regularisation of the development would not circumvent the purpose and objectives of the Environmental Impact Assessment Directive or of the Habitats Directive,
- considered that the applicant could reasonably have had a belief that the development was not unauthorised,
- considered that the ability to carry out an Environmental Impact Assessment and an Appropriate Assessment and for the public to participate in such assessments has not been substantially impaired,
- considers that the actual or likely significant effects on the environment or adverse effects on the integrity of a European site, if any can be remedied;

Taking all of the above into consideration, it is considered that exceptional circumstances do exist such that it would be appropriate to permit the opportunity for the regularisation of the development by permitting an application for substitute consent.

Breda Gannon
Senior Planning Inspector

12th June 2017