



An
Bord
Pleanála

Inspector's Report 07.LS.0031

Application for Leave to Apply for Substitute Consent

Board Reference	07.LS.0031
Planning Authority	Galway County Council
Applicant	Stiofan Seoige
Development	Agricultural structure
Date of Site Inspection	26 th October 2016
Inspector	Karla Mc Bride

1.0 Introduction

- 1.1. This is an application for leave to apply for Substitute Consent under section 177C(2)(C) of the Act. The Board is requested to grant leave to apply for substitute consent so that an application can be lodged to the Board. The Applicant submits that exceptional circumstances exist such as to enable such an application to be made. The application was accompanied by a Natura Impact Statement (NIS) which included Stage 1 Appropriate Assessment Screening report.

2.0 Site Location and Description

- 2.1. The site is located on the island of Inis Oirr in County Galway, to the SE of the Village and to the W of Lough Mor. The site forms part of an agricultural landholding and it is located within an elevated, open and exposed rural landscape that is characterised by limestone pavements and dry stones walls. The site is occupied by an agricultural structure which is the subject of this application for leave to apply for substitute consent. The existing c.127. 8sq.m structure is c.8.53m high and it occupies a 0.319ha site which is set back from the local road and accessed via a narrow lane, and the site boundaries are defined by dry stone walls.

3.0 The Application

- 3.1. The application is submitted by O'Flynn Architects on behalf of Mr. Stiofan Seoige

- 3.2. The application includes the following documentation.

- Cover Letter/Planning report.
- Correspondence from Galway County Council
- Maps and drawings
- Natura Impact Statement

3.3. Cover Letter/Planning Report

Includes:

- The subject development for which leave to apply for substitute consent is described as comprising a 127.8sq.m agricultural structure on a 0.319ha site that is 8.530m high and used as a dry goods store for agricultural purposes.
- A summary of the Section 5 Referral to Galway County Council and the Board in relation to whether or not the modified agricultural structure is development and is or is not exempted development.
- A statement that this application is being made in the light of:
 - The Board's decision in relation to the referral under PL07.RL3496 that the retention of the modified building is development and is not exempted development, and
 - The Council's position in relation to the enforcement case under EN16-030 that it is not possible for the applicant to submit an application for retention due to the fact that AA was required prior to construction.
- A submission that exceptional circumstances exist with regard to Section 177D(1)(b) which would enable the Board to permit the opportunity for regularisation of the development by permitting an application for substitute consent with respect to the decision issued under PL07.RL3496.
- A submission that the development complies with the criteria set out under Section 177D (2) with respect to exceptional circumstances:
 - The structure has not created any pollution, nuisances or other form of amenity difficulties so as to circumvent the aims and objectives of domestic or international legislation; it is a modest structure which marginally exceeds the threshold for exempted development.
 - The applicant, as a farmer, was unfamiliar with the detailed provisions of planning law and was not aware that the rural exemptions did not apply to Inis Oirr, and was of the view that planning permission was not required.
 - In the event that the application is allowed, the NIS and application documentation will be subject to full public participation.
 - The accompanying NIS deals with the likely significant effects on the environment and adverse effects on the integrity of the European site:

- No significant effects that require remediation
- No loss of sensitive habitat, or impact on watercourses.
- Works conducted in a functioning agricultural area.
- The works and continued existence of the building have not and do not adversely affect the integrity of any European site.
- No record of any previous planning permission on the site.
- Request that the applicant be given the opportunity to regularise the status of the structure and that the Board grant leave to apply for substitute consent.

3.4. **Correspondence from Galway County Council**

Includes:

- A reference to the Board's Direction 07. RL3496 which states that an AA would have been required prior to the construction of the subject development
- The conclusion that it is not possible for the applicant to submit an application for retention due to the fact that AA was required prior to construction.
- Details of the available options:
 - Comply with the requirements of EN16-030 (Enforcement Notice).
 - Apply to the Board leave to apply for Substitute Consent.

3.5. **Maps and drawings**

Includes:

- Site Location Map
- Plans, elevations and sections
- Map showing location of Site Notices.

3.6. **Natura Impact Statement (NIS)**

- **Stage 1 Screening exercise:**
 - Identified 6 European sites located within a 15km radius of the site.
 - Screened out 5 sites from further assessment because of the localised scale of the works and the absence of a direct link to the sites.

- Screened in Inis Oirr Island SAC (Site Code 001275)
- Listed the 6 Qualifying Interests for this SAC.
- Screened out 5 of the QIs from further assessment because of non-proximity to habitat type and the absence of a direct link (Coastal Lagoons, Reefs, European dry heaths and Lowland hay meadows) and the negligible amount of habitat lost (Semi-natural dry grasslands).
- Screened in Limestone Pavement (Priority habitat) as a portion of this habitat was permanently lost as a result of the construction works.
- **Stage 2 Appropriate Assessment exercise:**
 - Assessed the impacts on the Limestone pavement as a result of the construction works and retention, and outlined mitigation measures.
 - Further loss of habitat - as a result of future works, and none should be permitted to ensure protection of Conservation Objectives.
 - Cumulative impacts - sparse pattern of development, future works will require AA to ensure protection of Conservation Objectives.
 - Pollution event - structure will house small animals with no slurry tanks or slatted floors, manure will be spread on lands in line with traditional farming practices and there are no watercourses or wells in the vicinity.
 - Alteration of hydrological regime – no hard surfaces around the shed.
 - All other potential impacts can be mitigated for to ensure the integrity of the European site.
 - As no mitigation will remedy the loss of the Limestone Pavement as a result of the construction works, the AA will proceed to Stage 3.
- **Stage 3 Assessment of Alternative Solutions:**
 - Zero option is not considered a viable option (abandonment of project).
 - The development is already constructed and demolition will not reverse the loss and degradation of Limestone Pavement.
 - Retain the development and ensure implementation of the mitigation measures to prevent further loss of habitat.

- **Appropriate Assessment conclusion:**

The development and associated groundworks have resulted in the loss of c.378sq.m. of Limestone Pavement and demolition will not reverse or remedy this habitat loss.

4.0 Planning History

EN.16/030: The County Council's Enforcement section issued a Warning Letter on 17th February 2016 in relation to the unauthorised construction of a new building and enforcement proceedings were initiated on 25th April 2016.

Ref ED16/25:

Stiofan Seoige made a formal request for a Section 5 Declaration to the planning authority on 24th April 2016 in relation to the alleged unauthorised activity carried out on the landholding at Formina Village, Inis Oirr. The referrer asked whether an agricultural development, comprising of the alteration of an existing structure, involving a reduction in its height and the retention of the modified building, is development and/ or is exempted development. The Planning Authority issued a Declaration on 29th June 2016 which stated that the works are not exempted development.

ABP Ref RL3496:

Stiofan Seoige made a similar referral to the Board which was received on 18th July 2016, it posed the same question and was accompanied by maps, drawings and photographs. The Board identified the relevant statutory provisions, had regard to previous referrals cases, identified the relevant European site (Inis Oirr SAC) and its Qualifying Interests, and summarised the main Development Plan provisions.

The Board carried out a Stage 1 Screening for Appropriate Assessment which identified that three of the Qualifying Interests for the Inis Oirr SAC could have been impacted by the works, and in particular the Limestone Pavement on which the structure is situated. The Screening exercise concluded that it could not be satisfied that the development, individually, or in combination with other plans and or projects

would not be likely to have a significant effect on this European site, in view of the site's Conservation Objectives, and that an Appropriate Assessment was required.

The Board had further regard to Article 9 (1) (a) (viiB) of the Planning and Development Regulations 2001, as amended. This states that development shall not be exempted development if the carrying out of such works would comprise development in relation to which a planning authority or An Bord Pleanála as the competent authority in relation to appropriate assessment, and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site.

The Board concluded that the works were not exempted development, by reason of non-compliance with: - Section 4 (4) of the Planning and Development Act, 2000 (as amended); Article 6(3) and Article 9 (1) (a) (viiB), (viiC) and (vii) of the Planning and Development Regulations 2001-2015; and condition and limitation no.3 as specified in Column 2 of Class 6 of Part 3 of Schedule 2 of the Planning and Development Regulations 2001-2015.

The Board concurred with the conclusion of the Stage 1 Appropriate Assessment Screening and was satisfied that the subject development, individually or in combination with other plans and projects, would be likely to have had a significant effect on the Inis Oirr SAC (Site code: 001275), in view of the sites conservation objectives and qualifying interests, and that therefore the development would have required an appropriate assessment before it was carried out.

5.0 Planning Authority Submission

No comment.

6.0 Policy Context

6.1. Development Plan

The site at Formina Village, Inis Oirr is located within an area covered by the Galway County Development Plan 2015-2021.

The site is located within the Inisheer Island SAC (Site code: 001275).

Objective NHB 1 (Protected Habitats and Species) seeks to:

Support the protection of habitats and species listed in the Annexes to and/or covered by the EU Habitats Directive (92/43/EEC) (as amended) and the Birds Directive (2009/147/EC), and regularly occurring-migratory birds and their habitats and species protected under the Wildlife Acts 1976-2000 and the Flora Protection Order.

The site is located within the Inishheer Island pNHA (Site code: 001275).

Policy NHB 1 (Natural Heritage and Biodiversity) seeks to:

Support the protection, conservation and enhancement of natural heritage and biodiversity, including the protection of the integrity of European sites, that form part of the Natura 2000 network, the protection of Natural Heritage Areas, proposed Natural Heritage Areas Ramsar Sites, Nature Reserves, Wild Fowl Sanctuaries and Connemara National Park.

The site is located within a Class 1 (Unique) Sensitive Landscape.

Objective LCM1 (Landscape Sensitivity Classification) states:

The Planning Authority shall have regard to the landscape sensitivity classification of sites in the consideration of any significant development proposals and, where necessary, require a Landscape/Visual Impact Assessment to accompany such proposals.

Objective LCM 2 (Landscape Sensitivity Ratings) states:

Consideration of landscape sensitivity ratings shall be an important factor in determining development uses in areas of the County. In areas of high landscape sensitivity, the design and the choice of location of proposed development in the landscape will also be critical considerations.

6.2. Natural Heritage Designations

The site is located within the Inis Oirr Island SAC (Site code: 001275) which is designated for the following Annex 1 & 2 habitats and species:

- Coastal lagoons (priority habitat)
- Reefs
- European dry heaths
- Semi-natural dry grasslands and scrubland facies on calcareous substrates (Festuco Brometalia) (important orchid sites & priority habitat)
- Lowland hay meadows
- Limestone pavements (priority habitat)

7.0 The Assessment

7.1. Introduction

7.1.1. Scope of Application

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 will be whether or not to grant leave to make such an application.

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. Having regard to the scale and nature of the development that has taken place, and as described in Sections 2.1 and 3.3 above, there is no requirement for either a determination in relation to EIA or for EIA with respect to Article 109(2), Planning and Development Regulations 2001, as amended, and the likelihood of significant effects on the environment can be excluded for the purposes of EIA. Regard is also had to the possible relevant classes of development specified in Schedule 5 to these Regulations (in particular Part 2, Class 1, Agriculture Projects) 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. The applicant submitted a Natura Impact Statement (NIS) with this application which contained a Stage 1 Appropriate Assessment (AA) Screening report, and the main conclusions are summarised at Section 3.6 above.

7.2.3. The AA Screening report correctly identifies that the development site is located within c.15km of the following Natura 2000 sites:

- Inis Oirr SAC (Site Code: 001275)
- Inishmaan SAC (Site Code: 000212)
- Inishmore SAC (Site Code: 000213)
- Inishmore SPA (Site Code: 004152)
- Black Head Complex SAC (Site Code: 000020)
- Cliffs of Moher SPA (Site Code: 004005)

7.2.4. The AA Screening report correctly identifies that the development site is fully located within the following Natura 2000 site:

- Inis Oirr SAC (Site Code: 001275)

7.2.5. The AA Screening report correctly identifies the following Qualifying Interests for which the Inis Oirr SAC was designated:

- Coastal lagoons (priority habitat)
- Reefs
- European dry heaths
- Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco Brometalia*) (important orchid sites & priority habitats)
- Lowland hay meadows
- Limestone pavements (priority habitat)

7.2.6. The site is located within or in close proximity to an area covered by a number of the Qualifying Interests for the Inis Oirr SAC as indicated on Map No. 5 of the NPWS Conservation Objectives document.

7.2.7. The Stage 1 AA screening exercise previously carried out by the Board under 07. RL3496 screened out all but one of the European sites and all but three of the Qualifying Interests, which is reflected in the applicant's NIS report.

7.2.8. The Conservation Objectives for each of these Qualifying Interests seeks to maintain their favourable conservation condition, which is defined by a list of site specific attributes and targets.

7.2.9. The three Qualifying Interests that occur on or in the vicinity of the Inis Oirr site are listed below:

- Limestone pavements
- Lowland hay meadows
- Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco Brometalia*) (important orchid sites & priority habitats)

- 7.2.10. The site is located within an area that is identified in Map no.5 of the NPWS Conservation Objectives document as comprising potential Limestone Pavements including associated habitats. The agricultural structure has been erected directly on Limestone Pavement and it is likely that the construction works resulted in the loss of, or damage to the Limestone Pavement.
- 7.2.11. The Conservation Objective for Limestone Pavements seeks “To maintain the favourable conservation condition of Limestone Pavements in Inis Oirr Island SAC.” This is defined by a list of attributes and targets related to habitat area, distribution and vegetation composition.
- 7.2.12. The target for the distribution attribute states that there should be no decline in the occurrence of Limestone Pavement. Therefore, there is potential for likely, significant, direct effects on the Conservation Objectives for this European site and an Appropriate Assessment would be required.
- 7.2.13. The site is also located within or close to an area that is identified in Map no.5 as containing two other Qualifying Interests for the SAC. These comprise Semi Natural Grassland including Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco-Brometea*) (*important orchid sites) and Lowland hay meadows (*Alopecurus pratensis*, *Sanguisorba officinalis*). Although, there does not appear to be a direct connection between these Qualifying Interests for the SAC and the subject site, this issue would require further investigation.
- 7.2.14. The main focus, therefore, in this assessment is on the likely significant effects arising from the development on the SAC in relation to the Limestone Pavement.
- 7.2.15. In relation to the operational phase of the development the main issues focus on:
- Animal waste disposal
 - Human activity and disturbance
- 7.2.16. The structure would be used to house small farm animals along with the storage of dry agricultural foodstuff. The applicant has confirmed that the development does not include a slurry tank or slatted floors and that animal manure will be spread over the surrounding agricultural fields in accordance with long established island farming practices. As such I do not consider that any significant disturbance to Limestone Pavements, Semi Natural Grassland or Lowland Hay Meadows, is likely to arise.

- 7.2.17. The level of human activity on the site is limited to the works associated with the agricultural use of the site and the structure, and significant disturbance to Limestone Pavements, Semi Natural Grassland or Lowland Hay Meadows, is likely to arise
- 7.2.18. The NIS Report also considers the matter of 'in-combination' effects, and concludes that there would be none, having regard to the sparsely developed character of the area. However, given that there are several houses and agricultural sheds in the vicinity, it is not possible to discount potential effects at this stage of the assessment.
- 7.2.19. In conclusion, 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 Inis Oirr SAC (Site code: 001275), having regard to the Conservation Objectives for this site.
- 7.2.20. 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 modest scale of the works carried out 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 agricultural nature of the works within a rural area, 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 have arisen from the loss of, or damage to the Limestone Pavement. The continuation of the use of the agricultural structure would not give rise to any further adverse effects on the integrity of a European site. However, it is possible that any future removal of the structure could cause further damage to the Limestone Pavement which is a Qualifying Interest for the Inis Oirr SAC.

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, any loss of, or damage to the Limestone Pavement is likely to be permanent and irreversible and could not be remediated for. However, any further loss of, or damage to the Limestone Pavement could be remediated by either retaining the structure in situ or by removing the bulk and height of the structure to within a short distance of the Limestone Pavement.

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. The current Enforcement case under EN.16/030 is still ongoing.

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 as the 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 and its continued use.

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.

Karla Mc Bride

Senior Planning Inspector

14th December 2017