



An
Bord
Pleanála

Inspector's Report 03.RL3506

Question

Whether the reconstruction and extension of an existing railway cottage is or is not exempted development.

Location

Gurraun, Kilkee, Co. Clare.

Declaration

Planning Authority

Clare County Council

Planning Authority Reg. Ref.

R16-63

Applicant for Declaration

Dr Tom Nolan.

Planning Authority Decision

Is development and is not exempted development.

Referral

Referred by

Dr Tom Nolan

Owner/ Occupier

Dr Tom Nolan

Observer(s)

Mary O'Dowd

Date of Site Inspection

4th January, 2017

Inspector

Stephen Kay

1.0 Site Location and Description

- 1.1. The site of this referral is located on lands adjoining the Shannon Estuary at Garraun Co. Clare. The site is accessed via a narrow laneway off the N67 Kilrush to Kilkee road. The section of laneway closest to the N67 is hard surfaced however that closest to the site is not surfaced. The total length of the access laneway is approximately 500 metres.
- 1.2. The site is located adjoining the shoreline at this location and Poulnasherry Bay is located immediately to the south of the site. The site also adjoins the line of the former west Clare railway which ran along the northern boundary of the site. The eastern, northern and southern site boundaries comprise mature field or plot boundaries with low level earthen banks and vegetation above. The eastern boundary is also characterised by a small stream that flows to the south into Poulnasherry Bay.
- 1.3. The southern boundary of the site comprises an earthen embankment that separates the site from the saltmarsh habitat immediately to the south of the site in Poulnasherry Bay and the level of the embankment is significantly higher than the level of the adjoining lands to the south.
- 1.4. An existing cottage is located on the site and this was constructed in connection with the railway. The cottage on site has been recently refurbished and has been the subject of works including the addition of an extension to the rear, the construction of a replacement porch structure and the re-roofing of the structure including addition of a rooflight in the front roofslope. The exact floor area of the structure is not cited in the information submitted.
- 1.5. There is currently no on site effluent treatment system on the site. The site is stated to be connected to a group water supply.

2.0 The Question

- 2.1. The question as determined by the Planning Authority and referred to the Board for consideration is as follows:

Whether the re construction and extension of the existing railway cottage at Garraun Kilkee, Co. Clare is or is not development and is or is not exempted development.

In the interest of clarity, and having regard to the fact that in order for the existing railway cottage to be habitable it requires that the site would be served by an effluent treatment system and that the documentation submitted by the referrer to the Planning Authority included a Site Suitability Assessment and Site Plan showing the layout of a proposed treatment system, the reconstruction and extension works are taken to include the installation of an onsite effluent treatment system.

It is therefore suggested that the question be reworded as follows:

Whether the re construction and extension of the existing railway cottage including the provision of an onsite effluent treatment system at Garraun Kilkee, Co. Clare is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority issued a declaration which stated that the said works constitute development which is not exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

A planner's report dated 6th September, 2016 considered the request for a declaration made by Mr Nolan under s.5(3)(a) of the Planning and Development Acts. The main points of note in this report can be summarised as follows:

- Concludes that having reviewed photographs of the original cottage on the enforcement file that there have been substantial alterations made to the eaves level and the roof profile. Considered that these works materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and that the works are not exempted having regard to s.4(1)(h) of the Planning and Development Acts (as amended).
- Noted that the raising of the eaves and the roof profile changes mean that the proposed extension does not meet the requirements of Class 1 of Part 1 of the Second Schedule and specifically Limitations Nos. 4(a) regarding the height of the extension not being higher than the height of the rear wall of the house and 4(c) that the height of the roof of any extension would not exceed the height of the roof of the dwelling.
- In the context of Article 9 of the Planning and Development Regulations, 2001 (as amended), it is considered that the development would not interfere with the character of the landscape or views (iv). Noted that an AA screening was submitted with the application for a declaration which concludes that there would be no negative impacts on the qualifying interests of any Natura 2000 site within 15km of the site and that this conclusion contradicts that of the council's Heritage Officer (2012) who concluded that an appropriate assessment is required. Planning Officer report concludes that there would be likely significant effects on a Natura 2000 site (AA Screening Assessment attached to report.). Therefore, considered that the works cannot be exempt under the provisions of the planning and development regulations.
- That the works do not impact on any right of way.
- Report of the Planning Officer concludes that having regard to:

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000 (as amended),
- (b) Articles 6 and 9 of the Planning and Development Regulations 2001 (as amended),
- (c) Class 1 of Part 1 of the Second schedule of the Planning and Development Regulations 2001 (as amended),
- (d) The works as indicated in submitted documents from the referrer,
- (e) The fact that the residential use of the building has been abandoned.

That

- the subject of the referral comprises works which come within scope of 2(1) of the Act,
- that these works comprise development,
- that the reconstruction and extension of the existing cottage is not exempted development having regard to the s.4(1)(h) of the Act as the alterations to the roof profile and eaves level materially affect the external appearance of the structure so as to render it inconsistent with the character of the structure.
- That, based on the information available to the planning authority, that the reconstruction and extension of the cottage is not exempted development having regard to Article 9(vi) and (vii) (b) and (c) of the Planning and Development Regulations, 2001 (as amended) as the works would be likely to have significant effects on natura 2000 sites and would therefore be contrary to Development Plan Objective CDP17.3.

Concluded therefore that the reconstruction and extension of the existing railway cottage is development and is not exempted development.

3.2.2. Other Technical Reports

Prior to the consideration of the request for a declaration under s.5(3) of the Act the planning authority prepared a number of other reports relating to the site. These are as follows:

Enforcement Report dated 27th July, 2012 – Report sets out history of the enforcement case on the site and the location of the site relative to natura 2000 sites. Noted that some of the third party photos submitted indicate that the house was derelict however statement submitted by relative of person who occupied house until the 1980s. Reference to Wicklow County Council v Jessop and Anor (2011) referred to in previous enforcement reports is noted and the high threshold set for abandonment of a residential use in that case. Stated that given that previous enforcement officer reports do not consider that the house had been abandoned that in the interests of consistency it is not recommended that this issue is pursued. Noted that eaves height has been raised to get accommodation at attic level. Porch and rear extension are noted and stated that while the porch would appear to have been rebuilt larger than the original that no proof in the form of the original plans are available and that therefore this item should not be pursued. Noted that construction works ongoing, that the extension to the eastern elevation was [partially completed at that date, that there was building equipment on site and that ground works had taken place. Attached AA screening concludes that the possibility of significant impacts on the Natura 2000 sites cannot be ruled out. Recommends the issuing of a warning letter.

Enforcement Report dated 6th September, 2012 – Contents very similar to the above report dated 27th July, 2012. Notes the provisions of Article 9 (1) of the Regulations and specifically (viiB) which de exempts development in circumstances where the development would be likely to have a significant effect on the integrity of a European site. Report concludes that an appropriate assessment is required in this case and also notes the fact that representative of the NPWS and the previous enforcement office met in August, 2011 at which the NPWS representative advised that the movement of sand / fill onto a priority habitat (saltmarsh) has taken place.

Enforcement Report dated 25th August, 2011 – Report notes the location of the site relative to the boundary of the SAC and SPA (traverse the site). Refers to the

Wicklow County Council vs Jessup and Anor (2011) (IEHC 81) and quotes from the judgement. Stated that it is considered that the circumstances of the Jessup case are very similar to the current case. Concludes that while the cottage has been empty for significant periods and may have been derelict that a case that the structure as a residential unit had been abandoned cannot be supported. Report also refers to the Jessup case as it relates to changes to character of the dwelling resulting from changes to the shape, colour, design and ornamental features which the judge determined meant that they did not meet s.4(1)(h). Having regard to this it is considered that the raising of the eaves height and alterations to roof pitch plus the addition of a window in the northern gable and enlargement of a window in the southern gable are not exempted development. Rear extension is stated to be ordinarily exempted development however not in this case as is an extension to an unauthorised structure.

Warning letter issued on 16th March, 2011 referring to unauthorised development namely

- The renovation and extension of a derelict cottage,
- The installation of a waste water treatment system
- The importation and extraction of fill.

An enforcement notice was served on 9th September, 2011 relating to the following unauthorised development:

- The raising of eaves of structure,
- Inclusion of a window in the northern gable of the structure,
- Enlargement of window in the southern gable of structure,
- Development of an extension to the rear of subject structure,
- Placing of fill / soil onto a priority habitat area, i.e. saltmarsh surrounding the subject structure.

4.0 Planning History

There is no planning history relating to the site. The site has been the subject of a number of enforcement case reports and warning letters as follows:

- Clare County Council Ref. UD11-020 – Ongoing enforcement case against the first party. See above summary of Enforcement Officer reports.

The following previous Board decisions are of relevance to this case:

- ABP Ref. 25K.RL.2340 – Determined that the provision of a septic tank on land constitutes development and that these works do not come within the scope of s.4(1) of the Planning and Development Acts or the second schedule of the planning and development regulations.
- ABP Ref. 91.RL.3352 – Determined that works comprising the increase in the height of the walls of a building, raising the ridge height and re-roofing including the removal of a chimney and installation of rooflights comprised development that materially affected its appearance so as to render it inconsistent with the character of the structure. The works do not therefore come within s.4(1)(h) and that given that there is no evidence of any residential use of the derelict house in over 20 years or evidence of intent to resume such use that the residential use of the site has been abandoned.
- ABP Ref. 17.RL.3314 – Determined that the original cottage on site had been demolished to such an extent that the building had effectively been replaced by a new dwelling with minimal retention of original fabric and that there is no provision in the Act or regulations whereby the construction of a replacement dwelling would constitute exempted development.

5.0 Policy Context

5.1. Development Plan

The site is located outside of any identified settlement.

The site is located within an area that is identified in the development plan as being a heritage landscape.

The existing building on the site is not included on the record of protected structures.

Part of the site is within fluvial and tidal zones A and B.

Objective CDP5.12 states that It is an objective of the development plan:....

b) To support and facilitate the development of the West Clare Railway Greenway and necessary supporting infrastructure;

Objective CDP8.13 states that It is an objective of the development plan:....

b) To safeguard, where feasible, the route of the old West Clare Railway which has not been affected by existing development and to encourage its use for recreational purposes and/or as part of an operational railway tourist attraction. Exceptions to this shall include short sections within the curtilage of residential or commercial property.

5.2. Natural Heritage Designations

The site is located such that, as per the online mapping from the NPWS, the western side, southern fringe and south east corner of the site overlaps with the Lower River Shannon SAC (site code 002165). A narrow strip along the southern side of the site also overlaps with the River Shannon and River Fergus SPA (site code 004077).

It should be noted that the location of these Natura 2000 sites relative to the subject site is disputed by the referrer (see referrers case at 6.0 below) and this issue will be addressed in the assessment at 8.0 below.

6.0 The Referral

6.1. Referrer's Case

The following is a summary of the main points raised in the referral submission:

- That it is not accepted that the re construction and extension of the existing cottage constitute '*works*' within the scope of s.2(1) of the Act or '*development*' within the scope of s.3(1). The re construction works are in keeping with the original in terms of design scope and ridge height.
- That the rear extension is exempt under class 1 of Part 1 of the Second Schedule of the Regulations.
- That the re construction did not alter the eaves or the roof height of the cottage and did not therefore affect the external appearance of the structure.
- That the re construction has been the subject of a screening assessment for AA by a registered ecologist (Faith Wilson) and this screening assessment clearly indicates that the development will have no negative impacts on the adjoining Natura 2000 sites. A copy of this screening assessment was submitted to the local authority as part of the s.5 referral application and is on file.
- It is not accepted that the use of the cottage for residential purposes was abandoned at any time. The cottage was always in a habitable condition prior to the present re construction works. It is not understood how a change of use can be verified as its use has always been residential.
- That the application was accompanied by a Site Suitability Assessment Report that indicates that the site is suitable for the onsite treatment and disposal of effluent and complies with EPA standards. A copy of this assessment was submitted to the local authority as part of the s.5 referral application and is on file.
- That the property has established rights to the use of the access roadway serving the site.

- Additional background documentation, photographs and other information also submitted the most significant of which can be summarised as follows:
 - Cottage built in 1890s and sold by CIE in 1962. The owner died in 1984 and other family members used the house intermittently, particularly during the summers, until the 1990s. The current owner (referrer Mr Nolan) purchased the house in February, 2000.
 - The slates were stolen from the roof and other damage caused between 2000 and 2007.
 - A water connection was put in place from the Moyasta GWS in 2003 and electricity in 2009.
 - The site is not served by a waste water treatment system but a Site Suitability Assessment has been undertaken (submitted to the planning authority and on file) and the results incorporated into the Natura Screening Report.
 - The use of the house as a dwelling predated the planning and development acts and also the designation of Poulnasherry bay as part of the Natura 2000 network.
 - That the property comes within the definition of a habitable house as contained in the Planning and Development Regulations. It is submitted that a derelict or run down building previously used as a habitable house is still a habitable house.
 - That contrary to the statement of the Planning Officer report the site is not located within the Lower River Shannon SAC. Letter and map from the NPWS confirming that the site does not encroach on the SAC submitted, (Item 4 attached to submission).
 - Stated that the repair works commenced in 2007 and with greater intensification from May, 2009. Stated that works concluded in summer of 2012 with the roofing of the extension.
 - That Article 9 (vi) and (vii) (b) and (c) of the Planning and development Regulations, 2001 which de exempt development which the competent authority determine require appropriate assessment as they are

considered likely to the significant effects on a European site only came into effect on the 8th September, 2011 after the original cottage had been restored / reroofed and the extension largely completed.

- That references to changes in ground level within the SAC are not relevant as the site is not within the SAC.
- That the presence of *Spartina Anglica* (common cordgrass) in the area of the SAC close to the site means that its habitat has been modified.
- A number of examples of other works that impacted on the SAC at locations in the vicinity of the site are highlighted.
- That the site location at Gurraun falls within Flood Zone A. It should be noted however that this flood zone definition is based on an undefended scenario and that there is a significant embankment that protects the site. There is no risk of overtopping at this site and there is no record on the OPW flood mapping of any flood events in this location.
- A number of photographs of the cottage are submitted at Item 7 attached to the submission including a photograph of it after it was vandalised, its original condition.
- That the window in the northern elevation was closed in accordance with the enforcement notice issued.
- That the reference in initial warning letters to the structure being derelict was dropped by the council.
- That references in the planners report to alteration in the roof profile was never raised in previous enforcement correspondence. The reference to photographic evidence of the changes to the roof profile is not supported by photographs that have been made available.
- That the scale and roof of the subject building is similar to that of other railway cottages in the area (Item 12 a and b and 14 attached to submission indicate other cottages in the area).

- Submitted that the cottage has been restored to a form totally consistent with the building vernacular. No raising of the eaves has occurred other than required for the incorporation of a ring beam.
- The renovation and extension does not impact on the character of the landscape of a view or prospect.
- Item 8 attached is a statement from a building contractor which describes how the original boundary of the site on the southern side was a gradual slope to the shoreline and that in July 2011 this was altered by the creation of a defined boundary and a reduction in the area of the site by 2-3 metres.
- Item 10 is a statement from a person who was raised in the cottage and who states that their family lived there until 1984 and that the cottage is restored substantially as it was, not least in the height of the eaves and the south facing window. Stated that there was originally an outhouse for toilet facilities to the eastern aspect of the cottage.

6.2. Observer to Referral

6.2.1. An observation has been received from Ms Mary O'Dowd. The following is a summary of the main points raised in this submission:

- That the reports of the Enforcement Officers conclude that the house had been abandoned and it is not recommended that the issue is pursued.
- A photograph of the house taken in 1988 is submitted with a statement from the daughter of the resident of the house at that time.
- That record of meetings with the council indicate that the issue of eaves height relies on photographs and therefore cannot be resolved. Similarly, with the porch, it is not clear that the new porch is larger than what previously existed.
- It is doubtful from the Clare county council documentation whether any part of the site is located within the SAC. At the time of the making of the decision on the declaration the council was not in a position to decide on the extent of the SAC and SPA sites.

- That the regulation under which Art 9 was revised to make provision to de exempt development on the basis that there would be a likely significant impact on a Natura 2000 site came into effect in September, 2011 and do not apply retrospectively.
- That the AA screening report submitted by the first party concluded that a detailed (stage 2) appropriate assessment is not required.
- This submission is accompanied by a number of attachments comprising the following:
 - Copy of declaration issued by Clare County Council dated 7th September, 2016.
 - Enforcement Officer reports dated 27/7/2012, 6/9/2012 and 25/8/2011.
 - Record of meeting held with council officials and referrer dated 11th October, 2012.
 - Photograph of the cottage and statement from woman whose parents lived in the cottage until the 1980s.
 - Internal Clare county council memo from Assistant planner to Staff Officer regarding NPWS mapping dated 16.5.2012.
 - Copy of AA Screening Report prepared by Faith Wilson.

6.3. Planning Authority Response

There is no response on file to the referral request received by the Board.

The Planning Authority have already issued a declaration on the question the subject of this referral.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1)

In this Act, except where the context otherwise requires –

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal

“structure” as any building, structure, excavation or other thing constructed or made on, in or under any land, or part of a structure so defined, and-

(a) where the context so admits, includes the land on, in or under which the structure is situate

“use”, in relation to land, does not include the use of the land by the carrying out of any works thereon

Section 3(1)

In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land.

Section 4(1)

The following shall be exempted developments for the purposes of this Act -

(h) development consisting of the use of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;

Section 4(4) states that:

Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

Section 4(4) was inserted (on 21.09.2011) by Environment (Miscellaneous Provisions) Act 2011 (20/2011), s. 17(a)(i) and (b), S.I. No. 474 of 2011, subject to transitional provision in s. 17(2).

These transitional provisions provided for in s.17(2) of the Environment (Miscellaneous Provisions) Act, 2011 are as follows:

(2) The amendment to section 4 of the Act of 2000 effected by subsection (1) shall not apply as respects development—

(a) begun prior to the commencement of this section, and

(b) completed not later than 12 months after such commencement, unless, immediately before such commencement, the development was being carried on in contravention of the Act of 2000 or regulations under that Act.

7.2. **Planning and Development Regulations, 2001**

Schedule 2, Part 1 deals with Exempted Development- General

Article 6(1)

Subject to Article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 2.

Class 1

The extension of a house, by the construction or erection of an extension (including a conservatory) to the rear of the house or by the conversion for use as part of the house of any garage, store, shed or other similar structure attached to the rear or to the side of the house.

Relevant Conditions and Limitations

1. (a) Where the house has not been extended previously, the floor area of any such extension shall not exceed 40 square metres.

(c) Subject to paragraph (a), where the house is detached, the floor area of any extension above ground level shall not exceed 20 square metres.

2. (a) Where the house has been extended previously, the floor area of any such extension, taken together with the floor area of any previous extension or extensions constructed or erected after 1 October 1964, including those for which planning permission has been obtained, shall not exceed 40 square metres.

4. (a) Where the rear wall of the house does not include a gable, the height of the walls of any such extension shall not exceed the height of the rear wall of the house.

(c) The height of the highest part of the roof of any such extension shall not exceed, in the case of a flat roofed extension, the height of the eaves or parapet, as may be appropriate, or, in any other case, shall not exceed the height of the highest part of the roof of the dwelling.

5. The construction or erection of any such extension to the rear of the house shall not reduce the area of private open space, reserved exclusively for the use of the occupants of the house, to the rear of the house to less than 25 square metres.

6. (a) Any window proposed at ground level in any such extension shall not be less than 1 metre from the boundary it faces.

(b) Any window proposed above ground level in any such extension shall not be less than 11 metres from the boundary it faces.

Class 7

The construction or erection of a porch outside any external door of a house

Conditions and Limitations

1. Any such structure shall be situated not less than 2 metres from any road
2. The floor area of any such structure shall not exceed 2 square metres
3. The height of any such structure shall not exceed, in the case of a structure with a tiled or slated pitched roof, 4 metres or, in any other case, 3 metres

Article 9 - Restriction on Exemptions Under Article 6(1)

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the

variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan,

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is 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,

(viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,

8.0 Assessment

8.1. Introduction – The Question

- 8.1.1. As set out at section 2.0 above, having regard to the fact that in order for the existing railway cottage to be habitable it requires that the site would be served by an effluent treatment system and that the documentation submitted by the referrer to the Planning Authority included a Site Suitability Assessment and Site Plan showing the layout of a proposed treatment system, the reconstruction and extension works are taken to include the installation of an onsite effluent treatment system. It is therefore proposed that the question be reworded as follows:

Whether the re construction and extension of the existing railway cottage including the provision of an onsite effluent treatment system at Garraun Kilkee, Co. Clare is or is not development and is or is not exempted development.

8.2. Is or is not development

- 8.2.1. Under s.2(1) of the Planning and Development Acts, 2000 (as amended) "works" includes any act or operation of construction, excavation, demolition, extension,

alteration, repair or renewal. Section 3(1) of the Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land.

- 8.2.2. The original condition of the dwelling on site is illustrated in Item Ref 7 A&B attached with the submission of the Referrer and indicates the extent of removal of the roof structure and walls that had occurred. In my opinion, the subject of this referral involves construction works in the form of works to the walls and new roof and porch, installation of effluent treatment system and extension to the rear as well as general repair and renewal. It is therefore my opinion that the subject of this referral constitutes 'works' within the meaning of the Act and that 'development has therefore occurred.

8.3. Screening for Appropriate Assessment

- 8.3.1. The site of this referral is located immediately adjacent to two Natura 2000 sites as follows:

- Lower River Shannon SAC, (site code 002165) and,
- River Shannon and River Fergus SPA (site code 004077)

I note the information submitted by the referrer as part of the submission to the Board with regard to the correct boundary of the SAC and SPA sites relative to the boundary of the subject site. In particular, I note the correspondence and revised hard copy maps produced by the NPWS (see Item Ref.4 in the submission of the referrer) and the fact that the site does not have a direct impact on the SAC or SPA sites.

On the basis of the information presented it is my opinion that the development undertaken and proposed to be undertaken (installation of an onsite effluent treatment system) has the potential to impact on the following Natura 2000 sites.

- Lower River Shannon SAC, (site code 002165) and,
- River Shannon and River Fergus SPA (site code 004077)

8.3.2. Lower River Shannon SAC (site code 002165)

Features of interest for the Lower River Shannon SA site are as follows:

- Sandbanks which are slightly covered by sea water all the time [1110]
- Estuaries [1130]
- Mudflats and sandflats not covered by seawater at low tide [1140]
- Coastal lagoons [1150]
- Large shallow inlets and bays [1160]
- Reefs [1170]
- Perennial vegetation of stony banks [1220]
- Vegetated sea cliffs of the Atlantic and Baltic coasts [1230]
- Salicornia and other annuals colonising mud and sand [1310]
- Atlantic salt meadows (*Glauco-Puccinellietalia maritimae*) [1330]
- Mediterranean salt meadows (*Juncetalia maritimi*) [1410]
- Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitriche-Batrachion* vegetation [3260]
- *Molinia* meadows on calcareous, peaty or clayey-silt-laden soils (*Molinion caeruleae*)
- Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*) [91E0]
- *Margaritifera margaritifera* (Freshwater Pearl Mussel) [1029]
- *Petromyzon marinus* (Sea Lamprey) [1095]
- *Lampetra planeri* (Brook Lamprey) [1096]
- *Lampetra fluviatilis* (River Lamprey) [1099]
- *Salmo salar* (Salmon) [1106]
- *Tursiops truncatus* (Common Bottlenose Dolphin) [1349]
- *Lutra lutra* (Otter) [1355]

The conservation objectives for these features and species of interest are set out in a site specific conservation objectives for the SAC site which is attached with this report. The general conservation objective is to restore the species / habitats to favourable conservation status with a number of specific targets and measures set out for attributes for each feature of interest.

Potential Impacts Arising and Pathways

The potential impacts arising from the development undertaken on site and that proposed (specifically the installation of the onsite waste water treatment system) are in my opinion as follows:

- Potential contamination of ground and surface waters from the installation of the onsite effluent treatment system. With regard to this system, it is noted that a site suitability assessment has been submitted and that an indicative layout has been included at the end of this report which indicates the proposed layout of the system. The assessment concludes that on the basis of a R1 groundwater protection response (which appears to be correct based on a locally important aquifer of moderate vulnerability) the site is suitable for onsite treatment and disposal of effluent. I note however that the layout submitted is such that the treatment system and percolation area would not appear to meet the minimum separation distance of 50 metres from a lake or foreshore as set out in Table 6.1 of the EPA Code of Practice for single houses. I also note the fact that the site is located such that at least part of it is located within Flood Zone A where there is the highest risk of flooding. I acknowledge that this designation is on the basis of no defences being in place.
- Potential impact on the SAC / SPA sites arising from construction works on site. I note that the description provided by the referrer regarding the works undertaken on site includes at Item Ref. 8 a statement of a building contractor who worked on the site who states that earth and grass on the site was used to level the southern side of the site up to Poulnasherry bay and also that southern boundary of the site with Poulnasherry bay was retracted by 2-3 metres to create a defined boundary between the dwelling site and the bay. The actual construction activity on the dwelling and the presence and use of

materials and equipment on site may also have had an impact on the SAC / SPA sites.

- There is a surface watercourse that runs along the eastern boundary of the subject site and connects directly to the Natura 2000 SAC site to the south.

Likely Significant Effects

Of the features of interest for the Lower River Shannon SAC outlined above, having regard to the conservation objectives for the SAC site produced by NPWS and associated mapping, it is considered that the following are located such that they could potentially be impacted:

- Estuaries [1130]. It is noted however that Poulnasherry Bay is not within the estuary area as identified on map 4.
- Mudflats and sandflats not covered by seawater at low tide [1140]. The Poulnasherry Bay area is included in this area as per Map 5 of the conservation objectives. One of the targets for conservation objectives is the conservation of intertidal communities in a natural condition. It would therefore appear that the construction of a new wastewater treatment system and works to the dwelling would have the potential to impact on the achievement of this conservation objective due to potential water pollution.
- Large shallow inlets and bays [1160]. Similar to mudflats and sandflats, the whole of Poulnasherry bay is located within the area identified on Map 7 of the conservation objectives and water pollution that may potentially arise would have the potential to impact negatively on intertidal communities.
- Perennial vegetation of stony banks [1220]. There is no such habitat in the general vicinity of the subject site.
- Salicornia and other annuals colonising mud and sand [1310]. There are no recorded locations of this habitat in the general vicinity of the subject site.
- Atlantic salt meadows (*Glauco-Puccinellietalia maritimae*) [1330]. As per Map 12 of the conservation objectives there are no recorded sites in the vicinity of the subject site. There is however saltmarsh habitat located in the vicinity of the embankment at the southern side of the site.

- Mediterranean salt meadows (Juncetalia maritimi) [1410]. As per Map 12 of the conservation objectives there are no recorded sites in the vicinity of the subject site. There is however saltmarsh habitat located in the vicinity of the embankment at the southern side of the site.
- Molinia meadows on calcareous, peaty or clayey-silt-laden soils (Molinion caeruleae). Habitat not currently known in the vicinity of the subject site as per conservation objectives.
- Margaritifera margaritifera (Freshwater Pearl Mussel) [1029]. Not located in vicinity of site.
- Petromyzon marinus (Sea Lamprey) [1095]. Spawn in clean gravels which are not located in the vicinity of the site.
- Lampetra planeri (Brook Lamprey) [1096]. Not likely in the vicinity of the site.
- Lampetra fluviatilis (River Lamprey) [1099]. Not likely in the vicinity of the site.
- Salmo salar (Salmon) [1106]. Not likely in the vicinity of the site.
- Tursiops truncatus (Common Bottlenose Dolphin) [1349]. Not in margins of Poulnasherry Bay in the vicinity of the site.
- Lutra lutra (Otter) [1355]. Note that Poulnasherry Bay is identified in the Conservation Objectives as potential otter habitat. Also note that the submitted screening assessment states that an examination of the vicinity of the site was undertaken and that no couches, holts or spraint was recorded. Would therefore appear that the potential for direct impact arising from the development is limited.

Conclusion

In conclusion the potential impacts identified relate to the potential for contamination of surface and groundwaters to impact on intertidal habitat within Poulnasherry Bay. I note however the fact that the site is located such that a significant area in the immediate vicinity of the site has been populated with *Spartina Anglica* ((common cordgrass). Notwithstanding this, having regard to the fact that the proposed treatment system would not in my opinion constitute exempted development (see 8.4 below), to the scale of the development and to the potential impacts arising from the uncertainty regard the installation of a treatment system in compliance with the EPA

Code of Practice and the fact that the site is located within Flood Risk Zone A, it is my opinion that having regard to the precautionary principle it cannot be concluded that development proposed at the subject site would not be likely to have a significant effect on a European site (Lower River Shannon SAC) and that a Stage 2 Appropriate Assessment is therefore required.

8.3.3. River Shannon and River Fergus SPA (site code 004077).

Features of interest for the Lower River Shannon SA site are as follows:

- Cormorant (*Phalacrocorax carbo*) [A017]
- Whooper Swan (*Cygnus cygnus*) [A038]
- Light-bellied Brent Goose (*Branta bernicla hrota*) [A046]
- Shelduck (*Tadorna tadorna*) [A048]
- Wigeon (*Anas penelope*) [A050]
- Teal (*Anas crecca*) [A052]
- Pintail (*Anas acuta*) [A054]
- Shoveler (*Anas clypeata*) [A056]
- Scaup (*Aythya marila*) [A062]
- Ringed Plover (*Charadrius hiaticula*) [A137]
- Golden Plover (*Pluvialis apricaria*) [A140]
- Grey Plover (*Pluvialis squatarola*) [A141]
- Lapwing (*Vanellus vanellus*) [A142]
- Knot (*Calidris canutus*) [A143]
- Dunlin (*Calidris alpina*) [A149]
- Black-tailed Godwit (*Limosa limosa*) [A156]
- Bar-tailed Godwit (*Limosa lapponica*) [A157]
- Curlew (*Numenius arquata*) [A160]

- Redshank (*Tringa totanus*) [A162]
- Greenshank (*Tringa nebularia*) [A164]
- Black-headed Gull (*Chroicocephalus ridibundus*) [A179]
- Wetland and Waterbirds [A999]

The conservation objectives for these features and species of interest are set out in a site specific conservation objectives for the SPA site which is attached with this report. The general conservation objective is to restore the species to favourable conservation status with a number of specific targets and measures set out for attributes for each feature of interest.

Potential Impacts Arising and Pathways

The potential impacts arising from the development undertaken on site and that proposed are, in my opinion, as follows:

- Potential contamination of ground and surface waters from the installation of the onsite effluent treatment system. I note that the layout submitted is such that the treatment system and percolation area would not appear to meet the minimum separation distance of 50 metres from a lake or foreshore as set out in Table 6.1 of the EPA Code of Practice for single houses. I also note the fact that the site is located such that at least part of it is located within Flood Zone A where there is the highest risk of flooding. I acknowledge that this designation is on the basis of no defences being in place.
- Potential impact on the SPA site arising from construction works on site, including works described in Item 8 attached to the submission of the Referrer regarding the movement of earth and grass on the site which was used to level the southern side of the site up to Poulnasherry bay and also that southern boundary of the site with Poulnasherry Bay was retracted by 2-3 metres to create a defined boundary between the dwelling site and the bay. The actual construction activity on the dwelling and the presence and use of materials and equipment on site may also have had an impact on the SPA site.

- Potential disturbance arising from the use of the site as a dwelling and place of residence.

Likely Significant Effects

The fact that the area in proximity to the embankment at the southern side of the site is characterised by a significant extent of *Spartina Anglica* (common Cord grass) which significantly limits the suitability of this habitat for foraging. The screening assessment submitted by the referrer notes the fact that the area in the vicinity of the site does not form part of the core habitat for any of the species listed as qualifying interests for the SPA. I would also note the fact that the embankment at the southern side of the site would have the effect of significantly screening activity on site from the SPA site.

Conclusion

In conclusion the existing and proposed development the subject of this referral are not in my opinion likely to have significant effects on the River Shannon and river Fergus SPA site in the light of its conservation objectives.

8.3.4. Appropriate Assessment Screening Conclusion and s.4(4) of the Planning and Development Act

8.3.4.1 Section 4(4) of the Planning and Development Act, 2000 (as amended) provides that Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required. Given the conclusion reached at 8.3.2 above regarding the potential significant effect on the Lower River Shannon SAC site any development on the site would not be exempted development for the purposes of either the Act or the regulations and would therefore not be exempted development.

8.3.4.2 The referrer notes the content of s.4(4) of the Act and makes the point that as the extension and refurbishment of the house on the site was undertaken prior to the coming into effect of this section that it does not apply in this case. The referrer correctly states that Section 4(4) was inserted (on 21.09.2011) by Environment (Miscellaneous Provisions) Act 2011 (20/2011), S.I. No. 474 of 2011. My reading of

this Act however is that the introduction of s.4(4) was subject to transitional provision in s. 17(2) which are as follows:

(2) The amendment to section 4 of the Act of 2000 effected by subsection (1) shall not apply as respects development—

(a) begun prior to the commencement of this section, and

(b) completed not later than 12 months after such commencement, unless, immediately before such commencement, the development was being carried on in contravention of the Act of 2000 or regulations under that Act.

On the basis of the information provided by the referrer works on the cottage indicates that some initial work was undertaken by digger in Oct / Nov 2008 and that the footings for the extension were dug in 2010. It is then stated that the roof of the extension was roofed in the summer of 2012. It therefore appears that the development on the subject site was not completed within one year of commencement as required and it is therefore my opinion that the provisions of s.4(4) have been met and that the development is not exempted development.

8.3.5. In the event that the Board do not agree with this interpretation or do not consider that the conclusion that the development is likely to have a significant effect on any natura 2000 site, the following sections address the exempted development status of the individual elements of the development undertaken on the site.

8.4. Is or is not exempted development

8.4.1. Having regard to the issues raised in the determination issued by the Planning Authority, the submission of the referrer and observer to the referral and my inspection of the site, in my opinion, the elements of the development undertaken on the site which require an assessment of the exempted development status are as follows:

- Abandonment of residential use of the site,
- Works to the original cottage including raising of the eaves height, alterations to the roof and other external alterations (removal of chimney etc.),
- Construction of front porch.

- Construction of rear extension,
- Proposed installation of on site waste water treatment system.
- Alterations to ground levels on the site

8.5. Abandonment of Residential Use

- 8.5.1. The declaration issued by the Planning Authority states at (e) that the original use of the building had become derelict, that the structure had not been used for residential purposes for a significant period of time and that therefore residential use of the site has been abandoned and that the resumption of habitable use would constitute a change of use.
- 8.5.2. The referrer has set out the timeline for the use of the site with it being sold by CIE in 1963 and subsequently being used for residential purposes. The last permanent occupant dies in late 1984 and the house was subsequently used for periodic / holiday use until the 1990s. The house was purchased (transaction completed) in 2000 and was not in a position to undertake refurbishments immediately. Removal of roofing materials by third parties followed and photographs submitted show the condition of the house in the early 2000s (Ref 7B attached to referrers submission). It is stated that works for the connection to the group water scheme was undertaken in 2003 (documentation submitted) and also that a gate was erected at the entrance to the site. Clearing out works and work on reinstating the cottage did not begin until 2007. The photograph in Ref. 7B does indicate that the roof was gone from the building and that there was damage to the external walls. I also note however that there is no indication that the referrer did not intend to reinstate the building and this is evidenced by the water connection in 2003. It is also not the case that the structure or site was used for any alternative purpose. The exact period between the last use of the site for some form of residential occupancy in the late 1990s to the commencement of restoration works is not clear, however it would appear to be c. 10 years.

- 8.5.3. In note that in the case of Ref. 91.RL.3352, the Board determined that a change of use had taken place due to the fact that the original residential use had been abandoned. In this case however the structure had not been in residential use for over 20 years and there was no evidence available to the Board that there was an intent to resume such use over that 20 year period. The circumstances of the subject site are different in that the period of non occupancy is significantly shorter, the structure, while damaged, has not been completely rebuilt and the referrer purchased the property when it was in habitable condition.
- 8.5.4. Having regard to the above, I do not consider that there is sufficient basis to contend that the residential use of the structure had been abandoned such that the reconstruction and occupancy of the structure for residential purposes would constitute a change of use.

8.6. Works to Original Cottage Structure Including Raising of Eaves Height and Alterations to Roof

- 8.6.1. The determination of the planning authority makes reference to the fact that the eaves height have been increased and that alterations have been made to the height of the roof and that such alterations make the structure contrary to s.4(1)(h) of the Planning and Development Act, 2000 (as amended) as the works materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure. This is refuted by the referrer who states that the eaves height has not been altered and that the overall height of the roof is the same as original. With regard to the character of the structure, the referrer has submitted photographs of other former railway cottages and demonstrated how the floorplan proportions are roughly similar and that the number of courses of slates to the roof also similar to the structure on the subject site.
- 8.6.2. The evidence of the original structures appearance on file is limited, however it is illustrated in attachment 7A to the referrers submission and also that contained in the submission from the observer. These photos can be compared with ref. 15 from the referrer and my photographs attached with this report. No before and after drawings are available for comparison purposes.

- 8.6.3. The referrer does concede that the addition of a ring beam may result in some slight alteration in the eaves height. From a review of the available photographic information, it is my opinion that the primary issue relates to the eaves height relative to the height of the top of the window opens in the front elevation. It would appear clear to me that the distance between the top of the windows and the eaves is greater in the as completed condition than the original. In addition, while not conclusive, an examination of the brickwork at the upper levels of the walls would indicate to me that there is a difference in the stone and the mortar from the lower levels. The extent to which this is additional height or works connected with the reconstruction of the walls and new roof is not possible to determine conclusively. Similarly, with the roof pitch and overall height, it is difficult to get a clear comparison as the original photographs of the house do not show the view gable end on but rather from an angle. From the images available, however it would appear to me that the roof pitch of the existing structure is higher than that shown in the original images.
- 8.6.4. The referrer contends that there is no clear evidence that the walls have been raised and the eaves height increased or roof height altered. As there are no original plans this is correct however the onus in this matter is on the referrer. On the basis of the information available I consider that the height of the eaves has been raised and it would also appear that the roof pitch has been altered and that, together with the changes in eaves height, that the overall scale of the cottage has been increased from the original. In addition, I note that the original structure had a central chimney feature that has been removed. A large rooflight has been added to the front roofslope. The loss of the chimney and the addition of the rooflight are not in my opinion features which contribute to the new structure being consistent with the character of the structure or of neighbouring structures. Taken in conjunction with the raising of the eaves height and the alterations to the roof, including the continuation of the roofslope on the same plane over the porch, it is my opinion that the removal of the chimney and the addition of the rooflight to the front elevation results in a development that does not meet the requirements of s.4(1)(h) of the Planning and Development Act, 2000 (as amended).

8.7. Construction of Front Porch.

- 8.7.1. The determination of the planning authority does not make any specific reference to the front porch constructed or to the rear extension. Given that the works to the original building are not in my opinion consistent with s.4(1)(h), it is my opinion that the porch extension is not authorised.
- 8.7.2. Notwithstanding the above, under Class 7 of Part 1 of the Second Schedule of the Planning and Development Regulations, 2001 (as amended), the construction or erection of a porch outside any external door of a house is exempt subject to a number of limitations.
- 8.7.3. A comparison of the existing and original photographs of the site indicate that the width of the porch structure is such that it is now significantly closer to the two front windows than was originally the case. As stated previously, no original plans are available, however on the basis of the photographic information available the dimensions of the porch as now exists is not the same as the original, extending in width to be significantly closer to the windows in the front elevation than was originally the case.
- 8.7.4. The measurement of the dimensions of the porch as constructed gives an approximate external measurement of 2.0 metres by 2.75 metres. The Conditions and Limitations attaching to Class 7 require that the floor area of any such structure shall not exceed 2 square metres and the porch as constructed does not meet this requirement and would not therefore constitute exempted development.

8.8. Construction of Rear Extension,

- 8.8.1. To the rear of the cottage an extension of stated floor area 39 sq. metres has been constructed. I did not gain access to the property to measure this extension internally and I am taking the floor area as stated and as indicated on the submitted plans. Under the provisions of Class 1 of Part 1 of the Second Schedule of the Planning and Development Regulations, 2001 (as amended) a single storey extension to the rear of an existing dwelling constitutes exempted development subject to a number of limitations as detailed at 7.2 above.

8.8.2. From an inspection of the site, it is my opinion that the rear extension as constructed meets the above conditions and limitations and would therefore be considered to constitute exempted development were it constructed to the rear of an authorised residential dwelling.

8.9. **Proposed Installation of Onsite Waste Water Treatment System.**

8.9.1. As highlighted at section 2.0 above, the information submitted with the referral includes a Site Suitability Report and details of the proposed installation of an onsite effluent treatment system. Given that a treatment system is a requirement for a habitable property and the inclusion of the details of the proposed system were submitted by the referrer, the question has been amended to specifically include the installation of the onsite treatment system.

8.9.2. The exempted development status of the proposed on site treatment system has not been directly addressed either by the referrer or by the Planning Authority in their submissions.

8.9.3. ABP Ref. 25K.RL.2340 addressed the issue of the installation of a septic tank and percolation area to an existing cottage and it was concluded that the installation of such a structure constituted development which did not come within the scope of s.4(1) of the Planning and Development Acts (as amended) or Classes 1 to 8 of Part 1 of the Second Schedule of the Planning and Development regulations, 2001 (as amended).

8.9.4. As set out in Ref. 25KRL.2340, there is no specific exemption for the installation of an onsite effluent treatment system to a dwelling provided for under Article 6 of the Planning and Development Regulations, 2001 (as amended) or the exemptions set out in the Second Schedule on foot of Article 9.

8.9.5. One potential exemption is under s.4(1) of the Planning and Development Act, 2000 (as amended). Ref. 25K.RL.2340 considered that the installation of a septic tank did not come within the scope of s.4(1)(j) '*development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such*' on the basis that there is specific reference in this section to 'use' of a structure or other land. I would agree with this interpretation.

8.9.6. Section 4(1)(h) of the Act provides that '*development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures*' shall be exempted development. I do not consider that the installation of a waste water treatment system can reasonably be considered to constitute improvement works and that therefore the proposed installation of a treatment system is not exempted development within the meaning of s.4(1)(h) of the Act.

8.10. Alterations to Ground Levels on the Site

8.10.1. I note that the submission of the referrer includes at Item 8 a statement from a building contractor which describes how the original boundary of the site on the southern side was a gradual slope to the shoreline and that in July 2011 this was altered by the creation of a defined boundary and a reduction in the area of the site by 2-3 metres. The southern boundary of the site is now characterised by a low bank or berm that separates the site from Poulnasherry bay and good photographs of this area are included in the Ecologists report submitted by the referrer.

8.10.2. The exact extent by which ground levels in the southern part of the site have been modified is not clear from the information available and it is not therefore possible to determine whether any such alterations in levels would or would not be exempted development.

9.0 Recommendation

9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the re construction and extension of the existing railway cottage including the provision of an onsite effluent treatment system at Garraun Kilkee, Co. Clare is or is not development and is or is not exempted development.

AND WHEREAS Dr Tom Nolan c/o Project Design Building Consultants Ltd. requested a declaration on this question from Clare Council and the Council issued a declaration on the 7th day of September, 2016 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 4th day of October, 2016:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(h), 4(1)(j) and 4(4) of the Planning and Development Act, 2000, as amended,
- (d) Section 17(2) of the Environment (Miscellaneous Provisions) Act, 2011,
- (e) Article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (f) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, and,
- (g) The submission and attachments including photographic material submitted by the referrer,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) That the reconstruction and extension including the installation of a new waste water treatment system constitute 'works' which come within the meaning of section 2(1) of the Planning and Development Act, 2000 (as amended),

- (b) That said works that are the subject of this referral constitute 'development' within the meaning of section 3 of the Planning and development Act, 2000 (as amended),
- (c) That this development would not be exempted development having regard to s.4(4) of the Planning and Development Act, 2000 (as amended) and s.17 of the Environment (Miscellaneous Provisions) Act, 2011 as the works are considered to have a likely significant effect on a European Site (the Lower River Shannon SAC) and, based on the information presented by the referrer, the works undertaken were not completed within one year of commencement.
- (d) That on the basis of the information presented, the works to the original cottage incorporate a raising of the height of the eaves of the cottage, alterations to the roof profile including the removal of the original chimney feature and continuation of the roofslope over the front porch structure. These works are considered to materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and does not therefore come within the scope of s.4(1)(h) of the Planning and Development Act, 2000 (as amended),
- (e) That the reconstructed porch is of a larger scale than that which was originally present on site and such that it is considered to be materially different to the original structure such as to render the appearance inconsistent with the character of the structure and does not therefore come within the scope of s.4(1)(h) of the Planning and Development Act, 2000 (as amended),
- (f) That the replacement porch structure fails to comply with Class 7 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended) not being within the size limits set out within this class, and
- (g) The proposed installation of an effluent treatment system on site

constitutes works within the meaning of Section 2(1) and development within the meaning of Section 3(1) of the Planning and development Act, 2000 (as amended) and that such development would not come within the scope of any exemption under Section 4(1) of the Planning and Development Act, 2000 (as amended) or any regulations made under Section 4(4A) of the same Act.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the re construction and extension of the existing railway cottage including the provision of an onsite effluent treatment system at Garraun, County Clare is development and is not exempted development.

Stephen Kay
Planning Inspector

1st March, 2017