



An Bord Pleanála,
64 Marlborough Street,
Dublin 1

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27 JUL 2021	
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Our Ref: 191023-a
Your Ref: 307823-20

26th July 2021

Re: ABP-307823-20: Application for Substitute Consent for a Residential Dwelling House and all associated site development works at An Formna, Inis Oírr, Aran Islands, Co. Galway

Dear Sir/Madam,

On behalf of our Client, **Ms. Olive Faherty** ('the Applicant'), MKO wish to respond to the correspondence received from An Bord Pleanála ('the Board') dated 6th July 2021 (6.07.2021) in relation to the current application for substitute consent (SU07.307823) for the constructed 4 no. bedroom residential dwelling (ridge height of c. 7.9m and gross floor space of 244m²), which represents a change of house type/design from that previously granted permission under Galway County Council Planning Register Reference Number 15/1313, and all associated site development works at An Formna (Furmina), Inis Oírr (Inisheer), Oileáin Árann (Aran Islands), Chontae na Gaillimhe (County Galway).

The Planning and Development, and Residential Tenancies, Act 2020 introduced a number of alterations to the Planning and Development Act 2000 (as amended) ('the Act') in relation to the substitute consent process, and in particular, the consideration of exceptional circumstances as part of the overall decision making process. Section 177K(1A) of the Act now states:

- "(1A) (a) The Board shall not grant substitute consent (whether subject to conditions or not) unless it is satisfied that exceptional circumstances exist that would justify the grant of such consent by the Board.*
- (b) When deciding whether or not to grant substitute consent, the Board shall not—*
- (i) be bound by,*
 - (ii) take account of, or*
 - (iii) otherwise have regard to,*
- any decision of the Board under section 177D as to the existence of exceptional circumstances in relation to an application under section 177C.*
- (c) A member (including the chairperson) of the Board who participated in the making of a decision by the Board under section 177D to grant leave to apply for substitute consent shall not participate in the consideration of, or the making of a decision under this section in relation to, an application under section 177E made pursuant to the grant of leave concerned."*

This submission is being made in response to the Board's correspondence issued under Section 177K (1C)(a) of the Act, as per below, inviting the applicant to submit to the Board such information



considered material for the purposes of the Board satisfying itself that exceptional circumstances exist that justify the grant of substitute consent in the current case.

“(1C)(a) The Board shall, in relation to an application referred to in paragraph (b) of subsection (1B), invite the applicant concerned to give to the Board such information as the applicant considers material for the purposes of the Board’s satisfying itself as to the matter referred to in paragraph (a) of subsection (1A), and any such information shall be given to the Board by the applicant within such period as is specified in the invitation concerned.”

While acknowledging that the Board will be the final arbiters of this matter and any forthcoming decision will be made independent of any previous assessment undertaken at the Leave for Substitute Consent phase, it is our opinion that exceptional circumstances clearly exist in the case of our Client’s constructed residential dwelling. In order to clearly demonstrate this for the Board’s consideration, the background of the development and the particulars of this exceptionality are set out below.

Development Background

The constructed dwelling house is the current and sole residence of the Applicant and their family. The Applicant, born and reared on Inis Oírr, applied for permission to construct a new dwelling house in order to relocate back to the island permanently from Australia and to allow her children to attend school on the island, and subsequently, strengthen familial bonds. The Applicant is the sole provider for their family and is employed as the principal of the local primary school. Native to Inis Oírr and having family land on the island, Galway County Council (the Planning Authority) positively regarded the Applicant as meeting the necessary thresholds for housing need on the island.

The Applicant submitted a planning application (PI Ref. 15/1313) to Galway County Council on the 28th October 2015 for (a) *Proposed new 4 bedroom house* (b) *Envirocare mechanical aeration system or similar approved system and percolation area* (c) *All associated site development works. Gross floor space of proposed works: 136.64sqm.* A Natura Impact Statement (NIS), as part of the planning package lodged to the Planning Authority, identified and assessed several potential impacts on the Inisheer Island Special Area of Conservation (SAC) (Site Code 001275). Mitigation measures were outlined within the report in order to eliminate potential significant effects. The report concluded that there would not be any significant effects on the SAC as a result of the construction of the proposed development, either individually or in combination with other projects. The Applicant submitted an updated NIS to the Planning Authority on the 16th of June 2016, following a Request for Further Information (RFI) from the Planning Authority (dated 21st December 2015), which addressed both concerns on habitats and species and potential groundwater connections between the proposed development site and Lough Mor. The Planning Authority accepted the findings of this report, and furthermore, deemed the provision of a dwelling house at this location to be appropriate, subject to the implementation of the mitigation measures (set out within the NIS) and conditions attached to the grant of planning permission under PI Ref. 15/1313. The Planning Authority issued a final grant of permission for the development on the 15th August 2016.

During construction, the dwelling design was altered by the incorporation of new design and structural elements which did not form part of the original permission, as briefly summarised below:

- **Height:** An increase in height (+1.33m) from the consented 6.55m to 7.89m;



- **Scale:** An increase in gross floor space (+108m²) from the consented 136m² to 244m²; however, most of this additional floor space is located within the enlarged attic and structural areas which would have contained a void; and
- **Fenestration:** Alteration of fenestration on the ground floor level and the inclusion of the 3 no. dormer

When the Applicant first became aware that the amendments to the permitted house design could not be considered as exempted development or non-material amendments to the permission, they moved to regularise the works and applied for planning permission to retain the constructed dwelling under **PI Ref. 17/1265** (lodged on the 22nd August 2017). The application was supported by the updated NIS submitted as part of PI Ref. 15/1313 and an ecological letter by Deborah Tiernan, Consultant Ecologist, which provided a screening opinion of the unauthorised works in the context of the Habitats Directive. The Planning Authority agreed in principle with the Appropriate Assessment conclusions; however, permission was refused by the Planning Authority on the 15th January 2018 on design and structural grounds. It is important to reference, in the background context of this case, that the Planning Authority did not cite any ecological grounds within its refusal of permission.

On the basis of the Planning Authority's refusal in relation to PI Ref. 17/1265, the Applicant lodged a second planning application to Galway County Council on the 17th December 2018 (**PI Ref. 18/1822**) for the *"retention of the change of house type which has been built on this site (which is a different dwelling to the development which was previously granted permission under Planning Register Ref. No. 15/1313) along with the retention of all associated site development works"*. Based on the Planning Authority's assessment on PI Ref. 17/1265, the Applicant did not include any accompanying documentation relating to Appropriate Assessment or ecological reporting as part of this application as it was considered that all parties were in agreement that the subject development would have no impact on receiving ecology, including Natura 2000 sites. The Planning Authority refused to consider the application (decision dated 18th February 2019) on the basis that the works to the dwelling house did not screen out for Appropriate Assessment and required a full Appropriate Assessment.

The Applicant lodged a third planning application to Galway County Council on the 8th August 2019 (**PI Ref. 19/1236**) for the *"retention of the change of house type which has been built on this site (which is a different dwelling to the development which was previously granted permission under planning register reference number 15/1313, along with the retention of all associated site development works"*. The planning application package included the updated NIS submitted under PI Ref. 15/1313 and an updated letter from Deborah Tiernan, Consultant Ecologist, dated 15th July 2019, which reconfirms the conclusions submitted under PI Ref. 17/1265. The Planning Authority determined that it was precluded from considering the application (decision dated 30th September 2019) on the basis that the works to the dwelling house did not screen out for Appropriate Assessment and required a full Appropriate Assessment.

On the basis of the Planning Authority's decision that a full Appropriate Assessment was now required for the subject development, although contrary to their position issued on PI Ref. 17/1265, it was determined that any application to retain the constructed dwelling house requires to be made directly to the Board under the Substitute Consent process as provided for in Section XA of the Act.

Consideration of Exceptional Circumstances

It has been established by the Court of Justice of the European Union in Case C-215/06 (*Commission v. Ireland*) that the substitute consent process is only permitted in exceptional cases. Section 177K (1A) of the Act requires that, in any given case, the Board must be satisfied that exceptional circumstances exist that would justify the grant of a substitute consent application. In considering whether exceptional



circumstances exist, MKO have reviewed the criteria listed under Section 177D(2) of the Act in this regard:

- (a) Whether the regularisation of the development would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.
- (b) Whether the applicant has or could reasonably have had a belief that the development was not unauthorised.
- (c) Whether the ability to carry out an EIA or AA and to provide for public participation in such assessments has been substantially impaired.
- (d) The 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 a European site can be remediated.
- (f) Whether the applicant has complied with previous planning permissions or has previously carried out unauthorised development.
- (g) Such other matters as the Board considers relevant.

Although the provisions of Section 177D(2) refer to the Leave to Apply for Substitute Consent phase and whether granting leave to apply is appropriate, we believe these criteria remain relevant and material to the consideration of exceptionality in the current case, and accordingly, the above elements are discussed further below.

Whether the regularisation of the development would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive

The regularisation of the constructed dwelling would not in any way circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.

Appropriate Screening is the process of determining whether an Appropriate Assessment is required for a plan or project. Under Part XAB of the Act, screening must be carried out by the Competent Authority. As per Section 177U of the Act, *'A screening for appropriate assessment shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that Land use plan or proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site'*. Where it cannot be excluded beyond reasonable scientific doubt at the Screening stage that a proposed plan or project, individually or in combination with other plans and projects, would have a significant effect on the conservation objectives of a European site, an Appropriate Assessment is required.

The Applicant undertook a full Appropriate Assessment and submitted a NIS to the Planning Authority under Pl Ref. 15/1313 (which was later updated in response to the Planning Authority's RFI dated the 21st December 2015). The updated NIS concluded that, as the site does not contain any protected orchid species or any Annex I habitat, amongst other considerations, the subject development will not have any significant effects on the Inisheer Island SAC as a result of construction. The Planning Authority accepted the findings of this report and granted permission for the development. Equally as important in this regard, the Planning Authority, when assessing the initial application for the retention of the revised house type (Pl Ref. 17/1265), stated within their Planning Report that, having regard to the updated NIS (previously submitted under Pl Ref. 15/1313 and the accompanying screening letter (Deborah Tiernan, Consultant Ecologist) and the minor scale of the alterations, the Authority was satisfied that significant impacts on habitats within Natura 2000 sites could be ruled out and that no



further assessment was required in relation to habitats. This position is consistent with that held by ecologist Deborah Tiernan and MKO ecologists.

The Planning Authority's position on this screening conclusion changed when the Planning Authority assessed Pl Ref. 18/1822 and 19/1236 and determined that it was precluded from considering the applications on the basis that the unauthorised works to the dwelling house did not screen out for Appropriate Assessment and required full Appropriate Assessment. It is acknowledged that the subject development was not subject to a full Appropriate Assessment under Pl Refs. 17/1265, 18/1822 and 19/1236. The alterations to the house type consented under Pl Ref. 15/1313 were not considered to represent a significant alteration to the original grant of permission, which was further reinforced by the Planning Authority's assessment set out under Pl Ref. 17/1265. Notwithstanding, MKO prepared a Remedial Natura Impact Statement (rNIS) as part of this substitute consent application.

The rNIS was prepared in accordance with the European Commission guidance and was informed by the NIS submitted in support of Pl Ref. 15/1313 (prepared by John Curtin and James O' Donnell of Planning Consultancy Services in 2014/2015) to ensure an accurate and consistent assessment of the subject development. The submitted rNIS concludes, beyond reasonable scientific doubt, in view of best scientific knowledge, on the basis of objective information and in light of the conservation objectives of the relevant European sites, that the constructed dwelling, individually or in combination with other plans and projects, has not nor will adversely affect the integrity of any European Site.

In summary, the constructed dwelling house has been subject to detailed Appropriate Assessment by the Planning Authority and full public engagement was facilitated throughout the previous planning application processes. The construction of the dwelling was carried out in accordance with the mitigation measures incorporated into the decision that issued from the Planning Authority under Pl Ref. 15/1313. As such, the purpose and objectives of the Habitats Directives (or EIA Directive) have not been circumvented.

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

The Applicant has dutifully engaged with the Planning Authority and statutory planning process beginning in 2007 to obtain permission to construct a new dwelling house in order to relocate themselves and their family back to Inis Oírr from Australia.

On receipt of the final grant of permission for Pl Ref. 15/1313 and the subsequent commencement of construction, the Applicant and their family were still living in Australia preparing for their permanent relocation back to Inis Oírr. Although the Applicant takes full responsibility for the material alteration of the permitted structure and design of the dwelling house, as shown in their continued effort to regularise the development and cooperation with relevant authorities, they were managing the construction process remotely and were also advised that certain amendments could be made to the dwelling as a "de minimis" or non-material change to the permitted dwelling. As such, a combination of significant distance, miscommunication and a lack of oversight during construction became instigating factors in the resulting alteration works to the design and structure of the permitted dwelling.

It is important to emphasise that neither the Applicant, nor their employed architects, believed that the alterations were significant in comparison to what was previously permitted under Pl Ref. 15/1313. As such, the existing dwelling house was not in good conscious believed to be unauthorised. As constructed and following further engagement with the Planning Authority, the Applicant has since become aware that the changes to the design of the dwelling are considered material and could not be considered "de minimis". Upon notification by the Planning Authority that the development was in breach of its



conditions, the Applicant constructively worked with the Planning Authority to regularise its planning status, including 3 no. subsequent applications for retention and a proposal attached to the latter applications (PI Ref. 18/1822 and PI Ref. 19/1236) to change the fenestration on the façade of the house. The Applicant remains determined to work with all relevant authorities in order to conclude these proceedings in a satisfactory manner.

The Applicant is fully aware of, and in agreement with, the need to regularise the current planning status of their dwelling; however, at the time of construction, she did not believe that the alterations would be considered as unauthorised as permission for a dwelling had been granted. The Applicant now has no other option but to seek substitute consent for the constructed dwelling, which in this case, we believe, represents an exceptional circumstance.

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

The permitted dwelling house, consented under PI Ref. 15/1313, was the subject of a planning application, and consequently, public participation was facilitated by way of the statutory planning process. Subsequent applications (PI Refs. 17/1265, 18/1822 and 19/1236) for the retention of the change in house type, including accompanying Natura Impact Statements and supporting documentation, also complied with the statutory regulations designed to facilitate public participation, e.g. public notices and examination. The current substitute consent application, including the lodged rNIS, is also subject to full public participation as provided for in the Act. It is anticipated that further public engagement will be facilitated by the Board allowing further commentary on this submission in relation to consideration of exceptionality.

In summary, there has been no impairment of public consultation in the assessment process.

The 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

The submitted NIS accompanying PI Ref. 15/1313 concluded that the proposed dwelling would not have any significant effects on the Inisheer Island SAC as a result of construction or use. The Planning Authority, following receipt of the updated NIS in response to the issued RFI, accepted the findings of this report and granted permission for the development, as described above under 'Development Background'.

PI Ref. 17/1265 was accompanied by a copy of the previously submitted updated NIS (PI Ref. 15/1313) and an ecological letter (dated the 17th August 2017) by Deborah Tiernan, Consultant Ecologist, who concluded that

"The site size of 0.27ha is very small relative to the Inisheer SAC which totals 551.71ha. At this size, the potential for any negative effects on the SAC are very limited and this is reflected in the 2015 Natura Impact Statement. A walk over of the site on August 8th 2017 concluded that the changes to the dwelling construction in terms of its size and height do not affect the integrity of the site in any way, other than the potential impacts as previously assessed in the 2015 report.

In as much as the construction and operational phases of the development continue to be cognisant of the mitigation measures previously outlined, there is no requirement for a further Natura Impact Statement to be carried out in the site at this time."

In assessing this matter, the Planning Authority agreed in principle with the above conclusions and stated within their Planning Report that:

"Having reviewed the submitted NIS and had regard to the minor scale of the development (retention of change of house type approved under 15/1313) the Planning Authority are satisfied



that significant impacts on habitats within Natura 2000 sites can be ruled out. No further assessment is required in relation to habitats.”

The Planning Authority’s refusal to grant permission under Pl Ref. 17/1265 was not on ecological grounds but referred solely to the design of the dwelling. Pl Ref. 19/1236 included an additional letter from Deborah Tiernan, Consultant Ecologist (dated the 15th July 2019) which reconfirms the conclusions submitted under Pl Ref. 17/1265 (i.e. the documentation that had been considered acceptable and appropriate previously), and includes the additional screening statement:

“I now note that the intended ground level changes to the properties fenestration do not affect the findings of the original Natura Impact Statement and a further ecological survey is not needed at this time.”

The Department of Culture, Heritage and the Gaeltacht (National Parks and Wildlife – NPWS) made a submission on Pl Ref. 19/1236 which notes that the submitted NIS (Pl. Ref. 15/1313) contained a suite of mitigation measures to ensure that the development would not negatively impact the Inisheer Island SAC. As such, the NPWS requested that the Planning Authority ensure the subject development has not or will not negatively impact the SAC. It should be noted that the NPWS did not raise any further issues with either the retention or permission aspect of the application.

The NIS (Pl Ref. 15/1313) and rNIS, which has been submitted with this substitute consent application, clearly show that the Applicant’s residential dwelling has not, nor will, create any pollution, nuisances or other significant adverse effects on the environment or the integrity of any European Site. The construction and use of the residential dwelling has incorporated the mitigation measures set out within the NIS and rNIS submitted. Accordingly, all environmental impacts arising from the construction and continued use of the dwelling have been mitigated against thus ensuring that significant effects have not and will not arise.

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

MKO prepared rNIS to provide the information necessary to allow the competent authority (An Bord Pleanála) to conduct an Appropriate Assessment of the subject development.

The rNIS’s remedial impact assessment found that there is no potential for adverse effects on the identified European sites, their QIs/SCIs and associated targets and attributes. Specifically, all identified pathways for effect have been robustly blocked through measures to avoid impacts and the incorporation of best practice/mitigation measures into the project design (as set out within the NIS lodged under Pl Ref. 15/1313). Taking cognisance of measures to avoid impacts and best practice/mitigation measures incorporated into the project design, the constructed dwelling has not nor will have an adverse effect on the integrity of any European site. The constructed dwelling has not prevented the QIs/SCIs of European Sites from achieving/maintaining favourable conservation status in the future as defined in Article 1 of the EU Habitats Directive.

The rNIS objectively concludes that the subject development, individually or in combination with other plans or projects, has not nor will adversely affect the integrity of any European Site for the reasons summarised below (please refer to the submitted rNIS for complete detail):

- There were no Annex I listed habitats associated with the Inisheer Island SAC identified on-site during the site visit which remains consistent with the previous NIS submitted. Non-native invasive species were not found within the development site boundary during the 2019 site visit;
- The habitats immediately surrounding the dwelling have low conservation value. The dry calcareous and neutral grassland (GS1) habitat, although slightly disturbed immediately behind



the dwelling, has moderate local conservation value. The subject development has not nor will impact on these habitats;

- No evidence of Annex II species associated with any EU sites were recorded within the site boundary;
- No watercourses have been identified within the site boundary or the immediate vicinity of the development;
- The design alternations to the development, including the increase in ridge height, increased floor space and addition of 3 no. dormer window to the dwelling will not impact on the Qualifying Interests of the Inisheer Island SAC. Pollution prevention measures have been included in the project design, including the permitted means of foul drainage as set out in the previous NIS and expanded upon, to robustly block the identified pathway for impacts associated with the construction phase. Therefore, no potential for adverse impact associated with the operational phase of the development exists.

As the project was constructed in accordance with all associated mitigation measures set out within the NIS and/or required by condition under PI Ref. 15/1313, adverse significant effects on the environment and/or on any European sites have been avoided. As indicated above, this is further evidenced in the rNIS that has been submitted and fully informed by the actual construction activities and application of mitigation measures that has occurred. Accordingly, the substitute consent application documentation clearly shows that significant effects on the environment have not arisen and the mitigation measures that have been applied effectively ensure that further remediation is not required.

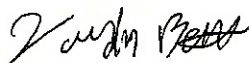
Whether the applicant has complied with previous planning permissions or has previously carried out unauthorised development.

The Applicant has not been granted any previous planning permissions by the Planning Authority apart from the previous on-site planning history set out above nor have they previously carried out any unauthorised development which would be contrary to the proposed planning and sustainable development of the area.

The Applicant wishes to regularise the planning status of their dwelling house in order to maintain their livelihood, well-being and enjoyment of communal and familial connections on Inis Oírr, which cannot be ensured without the regularisation of the dwelling house's current planning status. In this regard, the Applicant has committed to engaging with the Board to undertake the substitute consent process.

This submission sets out the particular circumstances of the Applicant's case, and in MKO's opinion, demonstrates that there are clearly exceptional circumstances underlying this request for substitute consent. We trust that the information provided is sufficient to enable the Board to consider this exceptionality and grant substitute consent for the Applicant's residential dwelling at its earliest convenience.

Yours faithfully,



Jordan Baxter MRTPI
MKO – Planner
jbaxter@mkoireland.ie

