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**The Secretary
An Bord Pleanála
Marlboro St.
Dublin 1.**

29 May 2024

Re: Application for a Substitute Consent.

Development: Provision of fencing for land enclosure at Fenit Within, Fenit, Co. Kerry.

Applicants: Mr Niall O'Sullivan, Mr John Murphy, Mr Liam McCarthy and Mrs Kit McCarthy.

Fee Enclosed: €600.00

Dear Sir/Mdm,

On behalf of the above-named applicants, we wish to apply for substitute consent for the above indicated development as provided for in Section 177E of the Planning and Development Act as amended. As there has been no planning application for this development no notice directing us to apply for Substitute consent has issued from the Planning Authority.

Application form in the approved format is attached as is the requisite fee.

Fee required is that which would apply for a normal planning application (not an application for retention). A number of documents are enclosed in support of our application, and these are listed in appendix format the end of this letter.

Prior to outlining the details of the application and the content of the Application, it is necessary to explain how we have come to the need of lodging a substitute consent application and in order to do this it is first necessary to indicate the planning history of this matter.

1.0. Previous planning history.

The fencing in question was the subject of a third-party Section 5 referral in 2014. (Kerry County Council Reference EX 333). Kerry County Council determined that the development was Exempted Development, but the matter was brought to An Bord Pleanála and under Board order **RL.3219** dated 15 July 2015 (copy attached as **appendix 1**), the Board ruled that the fencing came within the scope of Article 9(1) (a) (x) of the Planning and Development Regulations and was therefore not exempted development. The Board order also indicated that the fencing was not exempted by virtue of the Board's opinion that an Appropriate Assessment was required for the development. Following on this there were protracted dealings between the applicants and Kerry County Council including enforcement action taken by the council which resulted in the Circuit Court decisions mentioned below.

Having taken the advice of learned counsel on the matter, the applicants were of the opinion that the High Court decision in *Dennehy versus On Board Pleanála* of September 2020 established that article 9(1)(a)(x) of the regulations did not apply and did not represent the law on the matter, and on that basis, inter alia, determined to litigate the enforcement proceedings taken against them. Other grounds for contesting the enforcement proceedings were also presented to the court.

2.0. Enforcement.

Enforcement proceedings were taken by Kerry County Council under Circuit Court reference numbers 287/2018, 288/2018 and 289/2018, and these were eventually heard at the Circuit Court on the 26th of January of 2022. The Honorable Court decided that the development was not exempted development, but it made no finding in respect of any requirement to provide for a stage II Natura Impact Statement. Copies of court orders are attached as **Appendix 2.**

3.0. Application for retention.

On receipt of the court's decision, the applicants considered the options of applying for retention or whether they would be required to apply directly to the Board for Substitute Consent.

To satisfy themselves that they were not precluded from applying for retention and given the court's silence on the matter of Appropriate Assessment, the applicants engaged the services of Messrs Ecofact Ltd to carry out a stage I Natura Impact Statement (screening report) to determine if Appropriate Assessment was in fact necessary.

In respect of this issue, it should be noted that there was no evidence that the Board had carried out a stage 1 assessment (Screening Report) prior to their issuing of the decision under **RL.3219** dated 15 July 2015, and indeed the Board's inspector on this file had expressed the opinion that Appropriate Assessment was not required. In the initial assessment of the section 5 referral on this file Kerry County Council had in fact carried out a screening report and concluded that AA was not necessary.

The stage I report carried out by Messrs Ecofact Ltd concluded that an

Appropriate Assessment was not necessary. The applicants then concluded that the determination by the Board in 2015, indicating that AA was necessary despite not having carried out a screening report, was not correct and that they were entitled to seek permission for retention of the development.

In consideration of the option of applying directly to An Bord Pleanála for leave to apply for Substitute Consent, given the results of the report from Messrs Ecofact, it did not seem possible to produce a Remedial Natura Impact Statement which is required in making a Substitute Consent application. It seemed clear to the applicants therefore that application for retention was the most appropriate course of action available to them and that there was no impediment in making such an application.

Two separate applications for retention were then lodged with Kerry County Council Planning Authority, one for each landholding.

The full details of the above considerations were notified to Kerry County Council who duly validated the applications by letters dated 3rd and 7th of June 2022 (Copies attached as **Appendix 3**).

However, by letters dated 17th June 2022, Kerry County Council reversed its decision to validate the applications and determined that it could not accept the applications for reasons including, *inter alia*, the Board's previous decision under RL3219 and the indication in the Board Order on that file that Appropriate Assessment was required. (Letters of invalidation attached as **Appendix 4**).

While the applicants did not agree that the council's decision to invalidate the retention applications was correct, and while they reserved the right to seek legal redress in this matter, the then situation was that they had no alternative in order to regularise the fencing which has been installed on site other than to apply to the Board for leave to apply for Substitute Consent.

The Board will note that the Circuit Court orders issued in January of 2022 sought that the planning situation would be regularised by September of that year.

Despite the findings of the Stage I Natura impact statement carried out on their behalf, the applicants, recognizing that this was an advisory report and recognising that the Board was the competent authority in this matter, were prepared to accept that the council's interpretation on this matter may have been correct for purposes of making the application for leave to apply for Substitute Consent. The application for leave to apply for Substitute consent was made on 11th July 2022 and given case number **ABP-314039-22** by an Bord Pleanála.

This application was made without prejudice to the applicants' contention that article 9(1)(a)(x) does not apply in this instance for the same reasons as indicated under High Court case Dennehy v An Bord Pleanála of September 2020.

While this matter was before the Board, the court agreed to adjourn the matter until such time as the Board had determined whether leave to apply would be granted.

On 8th January 2024 the Board wrote to us advising us of the change in legislation under **S.11 of the Planning and development, Maritime and Valuation (Amendment) Act 2022** which required the application for leave to apply for Substitute consent to be considered as withdrawn and advising us

that we were obliged to apply directly to the Board for Substitute consent in the matter.

We subsequently had an online meeting with your personnel (minutes attached as **Appendix 5**) to clarify the process and **now wish to lodge an application for Substitute consent.**

4.0. Content of application

4.1. Description of works: The works for which substitute consent are applied are those which have been the subject of enforcement by Kerry County council. This is the same fencing which was the subject of the board's determination under **RL.3219** in 2015. It should be noted that there are other fences in situ which are pre-existing and against which the council has not taken enforcement action, and these are not the subject of this application. The fences which are the subject of this application are indicated on the attached drawings and indicated in red on the attached aerial photographs **(Appendix A and B).**

In respect of the drawings lodged there are a number of points to which we wish to bring your attention as follows:

4.2. Scale.

Article 227 (2) (c) of the regulations require drawings to comply with article 23. This article allows that Site Layout drawings may be at a scale of less than 1:500 where so agreed with the planning authority. Prior to lodgement of the original application I agreed in advance with the Board that the scales be at 1:1000 given the very large area of land involved (see e-mail attached as **Appendix 5**).

4.3. Landholding of the applicants.

Again, given the very large area of land involved it would clearly not be possible to indicate in blue the entire landholding of the applicants on a site location or site layout drawing. File plan folio maps are included with the application showing the full landholdings of the landowners (**Appendix 6**). Further, the full landholding of the applicants is shown on the 1:10,560 ordnance map included with the application.

4.4. Levels.

Given that this development is for retention of fencing rather than the provision of buildings containing floor levels, the height above existing ground level in each case of the fencing provided is indicated. As such, the provision of levels is "not applicable" as provided for under paragraph 23(1)(c) of the Regulations. Ordnance survey benchmarks of surrounding land levels are indicated on the 1 to 10,560 ordnance maps included on drawing OSS 22 02 01.

4.5. Site notice.

Planning regulations generally require that a site notice be placed in a position visible from the public road on entering the site. However, the location of this land is part of what is known as Fenit Island, and at times of high tide is not accessible. No public road serves or indeed comes anywhere near to land in question such that a site notice on the land could be visible from a public road. The regulations also make provision that where no public road adjoins the land, the site notice may be erected "in a conspicuous position on the land or structure so as to be easily visible and legible by persons outside the land or

structure". Site boundaries have been delineated as those areas within which the fencing proposed to be retained is located, and notices are put in locations that will be clearly visible from immediately outside these delineations. These locations are indicated with the letter "X" on attached drawing OSS-22-03-01.

4.6. Extent of development:

The application for development proposed to be retained relates only to those areas in respect of which Kerry County Council has issued enforcement proceedings (see below "planning history"). My clients reserve their position that any other fencing on their lands is exempted development.

4.7. Calculation of fees.

Fees can only be calculated on the basis of Class 13 of the Section 2 of Schedule 9 of the Regulations dealing with fees, i.e. "development not coming with any of the foregoing classes". An area of land surrounding the fencing is indicated as the site of the application and the area of the site is calculated thus giving the fee on the basis of cost per 0.1 hectares. The precise calculation of the fee is indicated on the application form.

Fee for Substitute Consent applications is required to be the same as a planning application (not a retention application).

5.0 Exceptional Circumstances.

Section 177 D of the Act outlines that the Board may grant Substitute Consent where it is satisfied

“that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent”
(177D(1)(b)).

177D(2) outlines the matters to which the Board may have regard in determining if exceptional circumstances exist. These are recited as follows:

177D (2) (b)

“whether the applicant had or could reasonably have had a belief that the development was not unauthorised;”

Given that under the section 5 referral taken on this matter by a third party in 2014 (Ref EX33), Kerry County Council had concluded that the development was authorised by virtue of being exempted development, it is clear that it was reasonable for the applicants in this case to assume that the development was authorised.

177D (2) (a)

“whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;”

Given that the original stage I Natura Impact Statement indicates no adverse effects it is clear that no circumvention of the Habitats Directive (or the EIA Directive) was intended.

177D (2) (c)

“whether the ability to carry out an assessment of the environmental impacts

of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such. an assessment has been substantially impaired;”

Again, given that the initial Stage I Natura Impact Statement indicated no adverse effects, and given the very limited nature of the works involved, it is very difficult to see how ability to carry out Appropriate Assessment could have been impaired. The board will of course be aware that public participation will be fully provided for with this application for substitute consent.

177D (2) (d)

“the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;”

The initial Stage I Natura Impact Statement indicated no adverse effects. In carrying out the remedial NIS as required for this application, our consultant has identified some possible effects and indicated remediation thereon.

177D (2) (e)

“the extent to which significant effects on the environmental or adverse effects on the integrity of a European Site can be remediated”

While some effects have been identified and will be remediated as indicated in the remedial NIS, it is doubtful if these could be described as significant.

177D (2) (f).

“whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;”

The applicants have exemplary records in terms of compliance with planning permissions and other than the instant case there are no enforcement proceedings pending against them.

177D (2) (g).

“such other matters as the Board considers relevant.”

We point out that the development in question is a small-scale development of a type very common in rural areas and erected by members of the farming community to protect livestock from danger as would be normal practice and as would normally be exempted development. We also point out that the erection of fencing was a necessary condition for participation in the Rural Environmental Protection Scheme operated by the Department of Agriculture and Food.

5.1. Remedial NIS.

Remedial NIS is attached. While the impacts are clearly very slight, what this report offers is remediation of an ongoing programme of maintenance repair and ongoing replacement of fencing as the need arises.

6.0. Considerations of proper planning and sustainable development.

6.1. The need for and the nature of the fencing.

Both Kerry Conty Council, in their initial exemption, and later the Board’s own inspector under RL 3219, agreed that the fencing was consistent with what would normally be considered agricultural fencing and that the fencing fell within Class 4, part 3 of the Second Schedule of the Regulations and, on that basis, was considered exempted development.

It is self evident that the fencing is necessary. It is the opinion of the applicants' agricultural adviser that in order to allow for the grazing of livestock on farms and for farmers to be registered as "keepers" of animals, holdings must have perimeter fencing that is stock proof, and must also prevent contact between stock on adjoining holdings.

Furthermore, without fencing there would be a serious risk of injury and death to cattle because of the high cliffs which form part of the lands owned by Mr. O'Sullivan and Mr. Murphy as demonstrated in the attached photographs. The absence of fencing would also risk the spreading of disease to the owners' animals, would represent a danger to the public from animals straying onto the foreshore and would be in direct breach of standard Department of Agriculture guidelines which would preclude the applicants from being eligible to apply for Departmental grant/subsidy schemes.

The fencing is also necessary to prevent dogs from worrying the applicants' cattle and preventing Neospora disease which is spread by dogs and transferable to cattle.

Removal of the fencing could also render the landholders liable to criminal and civil liability. Unless the applicants are granted substituted consent they will be prevented from farming their lands because the absence of fencing would expose them to civil and criminal liability in respect of their animals wandering onto the foreshore and creating a hazard for members of the public walking thereon.

It was accepted by Inspector Davis under RL3219 the fencing on the defendants' lands was of standard Department of Agriculture specification.

6.2. Fencing has always existed at this location.

The applicants wish to emphasise that there was always a fence along the perimeter of their lands and that such fencing was merely upgraded between 2006 – 2012.

The Board is asked to give consideration to the very human requirement that the applicants wish to continue farming their lands as they and their predecessors in title have done since time immemorial. They are unable to do so without standard agricultural fencing which is a fundamental legal requirement in any agricultural activity.

In the wake of storm Darwin in 2014 some of the fencing was repaired, and this seems to have triggered the first referral to Kerry County Council.

As outlined by the applicants' engineer, Mr. Mike Flynn of Hassett Leyden & Associates in his report of August 2019 and affidavit sworn in February 2020 (**Appendix 7**), the repairs to the applicants' fencing were done following the particularly severe Storm Darwin in 2014. He noted that it was difficult to see evidence of where the repairs had been done and that the repairs to the fencing were minimal in nature - "it does appear to me that the poles were simply re-erected and provided with new wires where required, with the majority of repair works being localised in manner." The repairs that were carried out were effectively "**De minimis**".

Mr. Flynn also confirms that large areas of fencing claimed in the enforcement proceedings on Mr. Murphy and Mr. O'Sullivan's lands were not damaged and therefore not repaired. It is quite clear that KCC acted in an entirely arbitrary

manner in deciding what part of the fencing was not exempted development given that they had previously decided that all of the fencing was exempted development.

The position being taken by Kerry County council lead would lead to an absurdity. The attached photographs demonstrate the sections of fencing totalling 1,697 metres and marked in red which Kerry County Council seeks to have removed. Other fencing on the site is not being impugned by Kerry County Council. As a consequence, Kerry County Council are attempting to have alternate parts of a continuous fence taken down which amounts to an absurdity.

6.3. Hardship and distress caused to the applicants.

Mr. Murphy is an old age pensioner (currently aged 84) who has a serious underlying medical condition. Similarly, while Kit McCarthy has an income as a psychiatric nurse, two of her siblings are unable to work because of special needs (one of them is blind) and she spends a significant portion of their income maintaining them. Liam McCarthy also spends most of his time looking after his special needs brothers.

Since 2005 the applicants have had to endure continuous distress and litigation as a result of repeated trespass, verbal abuse and on two occasions assault, by reason of their refusal to allow certain groups of persons access to their lands. There was also a claim that there was a public right of way over the applicants' lands which was formally withdrawn after Court proceedings were issued.

The applicants simple wish to proceed with their farming and to protect the security of their property as they always have done.

It should be noted that there has been considerable agitation on this matter by certain local persons. It should also be noted that any person who entered the applicants' lands without lawful authority did so as trespassers. Because of the frequency of such trespass and the fact that in February 2011 up to 150 people entered onto the applicants' lands and tore up their fencing, Seamas O'Sullivan and John Murphy instituted legal proceedings against the leaders of the agitators involved and obtained a permanent injunction prohibiting all persons having notice thereof from entering their lands without lawful authority.

If the Board refuses to grant the applicants substitute consent and the fencing has to be removed it would essentially be facilitating trespass on the said lands in breach of the said injunction.

6.4. Origin of enforcement map.

My client's solicitor, Mr Seamus O'Sullivan has attached his comments in regard to the origin of the enforcement map and the original map lodged with an Bord Pleanála under RL3219 (**Appendix 8**). It would appear that this map is tainted with illegality and should never have been used by the Planning Authority as a basis for enforcement.

It should be noted that while the circuit court judge was reluctant to apply the 2020 ruling of the Dennehy case (mentioned above) retrospectively in this matter, no such constraint would apply in respect of any other fencing on the site.

7.0. Documents attached.

In accordance with Section 177C (3)(a) of the Act we attach the following documents (attached as **Appendix A**).

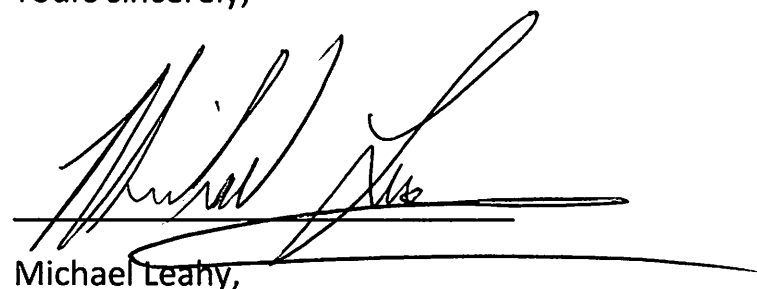
- Six copies of drawings indicating the development in question.
- Six copies of site location map.
- Six copies of aerial photographs relating to the key markers copies of photographs of the fencing in question.
- Six copies Remedial Natura impact Statement.

This application for substitute consent is made jointly by the landowners in question.

We trust that you will give this matter your consideration and will revert to us if there are any matters which require further clarification.

In conclusion we would state that there are no significant environmental issues with this application, that it is highly regrettable that so simple a matter can have involved so extensive a series of legal and planning processes in regard to my client's simple wish to continue to farm their holdings in peace as they always have done. We therefore ask that the board grant substitute consent as applied for.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Michael Leahy', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

for Leahy Planning Ltd.

On behalf of Mr Niall O'Sullivan, Mr John Murphy, Mr Liam McCarthy and Mrs Kit McCarthy.

Enclosed:

Appendix A: Drawings, drawing schedule and Remedial NIS

Appendix B: Aerial photographs related to fence locations and indication of fence types and linear lengths

Appendix 1. Board Order under RL3219 dated 15 July 2015.

Appendix 2. Orders of the Circuit Court, 26 January 2022 under under Circuit Court reference numbers 287/2018, 288/2018 and 289/2018.

Appendix 3. Letters of validation of applications for retention of the present development dated 3rd and 7th June 2022.

Appendix 4. Letters of invalidation for applications for retention of the same development dated 17 June 2022.

Appendix 5. Minutes of online pre-application meeting with the Board and email from Board regarding scales.

Appendix 6. File plan Folios and deed of transfers from Mr Seamus O'Sullivan to Mr Niall O'Sullivan

Appendix 7. Affidavit from Mr Mike Flynn

Appendix 8. Comments from Mr Seamus O'Sullivan, solicitor, in respect of origins of enforcement map

Cheque in your favour for €600