

Opinion

Re: Whether for substitute consent is required for fencing, entrance widening and spreading stones at the Cashel Newtowncashel Co. Longford.

Querist: Joe Sheahan, GALRO, Mill House, Killashee Street, Longford

Agent: Rachel Scanlon, Tormeys Solicitors Athlone

Counsel: Mary Moran-Long PhD BL

I have been instructed by Agent to prepare an opinion to advise as to whether the repair of fencing, entrance widening and spreading of stones in an area in close proximity to a SAC and SPA requires substitute consent; and if the planning authority cannot under planning law accept or validate a planning application on this site.

1. Background

An application was submitted to Longford County Council on behalf of Querist seeking:

“Permission for material change of use of existing dwelling to residence where care is provided for persons with intellectual or physical disability. The proposed works will also include upgrade of the existing entrance and boundary treatments, removal of non native invasive trees, proposed single storey extension, (C.92MSQ) to the NE & SE elevations and ancillary works all of which is within SAC and pNHA at Cashel Newtowncashel, Co. Longford.”

The application was received by Longford County Council planning authority on 26th May 2022 and allocated Planning Register Reference: 22/123. An Appropriate Assessment Screening Report prepared by Liam Madden, Architect was submitted with the application. The AA Screening Report concluded that a Stage 2 Appropriate Assessment and submission of a natura impact statement, NIS was not required.

The Planners Report (page 2) in respect of the application states:

“It is noted that works have already commenced with the applicant constructing a fence along the boundary of the land right into the lake, the widening of the gateway and deposit of large volumes of stone and the movement of stones along the shoreline. It is noted that the applicant has not proposed to retain any of these works.”

The Report continues:

“The applicant has submitted an appropriate assessment for the proposed development which concludes that the writer expresses the view that a Stage 2 Appropriate Assessment and submission of an NIS is not required and it was concluded that the proposed development can be objectively said not to have any significant impact on SAC0004, will not contribute to or impact upon and identified sensitivities or threats and will have no adverse impact on the NPWS conservation objectives.”

In the section entitled ‘Submissions / Observations’ the Planner refers to the submission received from Joseph Casserly objecting to the proposed development, the removal of evergreen trees, new septic tank, boundary fence or interchange with the land and the harbour has been commenced without planning. Mr Casserly claims that he has been farming the land for the last 20 years that he has squatters’ rights and a farm entitlement and is in the process of obtaining a title to the lands.

In this regard I am instructed that subsequent to Querist acquiring the site in November 2021, a neighbour, presumably Joseph Casserly who had rented lands and opened the boundaries on the lands was attempting to claim adverse possession. Querist, therefore, fenced the boundary and also widened the existing gate to the existing house. In addition, the driveway was stoned. These comprise a part of the works referred to at page 2 of the Planners report.

I am instructed that the movement of stones along the shoreline referred to in the Report is incorrect and no stones were removed or new imported stones placed on the shoreline.

At page 5 the Report titled ‘Planning assessment’ states: *“It is also noted that elements of work had been carried out within the SAC boundary and no proposal to rectify same has been submitted. The nature of the site from an unauthorised development point of view is therefore unclear.”*

The Planners Report includes the recommendation that permission be refused and gave the following reasons:

- 1. The proposed development site, situated adjacent to Lough Ree, is located within the Broad Zone of the lake as identified in Appendix 7: Natural Heritage and Environment and specifically under Policy CPO 12.34 of the Longford County Development Plan*

2021 to 2027 as being of high amenity and landscape quality in relation to their setting and, as such required to be protected from inappropriate development. i.e. development which adversely affects high amenity and landscape quality in relation to their setting. The development proposed would, if permitted, either by itself or the precedent it would set for other similar developments in the area, materially contravene these objectives and policies and, as such would be contrary to proper planning and sustainable development of the area.

- 2. The proposed development site situated adjacent to Lock Ree is located within the Broads Zone at the lake as identified in Appendix 7: Natural Heritage and Environment and specifically under Policy CP0 12.34 and Policy CP0 14.20 of the Longford County Development Plan 2021-2027 in addition to being located within a designated Special Area of Conservation (SAC site code 0004400), Special Protection Area (SPA site code 004064) and is a proposed Natural Heritage Area (pNHA site code 000440) and as such is required to be protected from inappropriate development i.e. development which adversely affect the natural environment as well as the high amenity and the landscape quality in relation to their setting. The unauthorised developments recently carried out on the site without the benefit of planning permission in addition to the development proposed without adequate landscaping and screening would, if permitted either by yourself or the precedent it would set for other similar developments in the area, materially contravene these objectives and policies and, as such, would be contrary to the proper planning and sustainable development of the area.*
- 3. It is considered that the proposed development by reason of its location within an area of high landscape is sensitivity and its size, layout and design would be visually intrusive and have a detrimental impact on the visual amenity of the surrounding landscape having regard to Policy CPO 14.20 of the Longford County Development Plan 2021-2027. The development proposed would, if permitted either by itself or the precedent it would set for other similar developments in the area, materially contravene this policy and would be contrary to the proper planning and sustainable development of the area.*
- 4. The planning authority are not satisfied that the proposed development, given its proximity to Loch Ree and its resultant intensification on an existing wastewater*

treatment, system, where no information regarding capacity or current working conditions has been submitted would not give rise to the risk of pollution of the watercourse and pose a significant threat to public health, including the health of the occupants of the proposed new dwelling including the quality of ground and surface waters. The proposed development would, if permitted, therefore, be contrary to Policy CP0 5.92 as designated under section 5.3.2.2 of the Longford County Development Plan. which aims to protect water quality in unserviced areas and as such would be contrary to the proper planning and sustainable development of the area.” (emphasis added)

Reasons no 2 for refusing permission as recommended by the Planner in his report refers to ‘*The unauthorised developments recently carried out on the site without the benefit of planning permission*’. The fencing and other works carried out without permission was considered in the reasons for refusing permission by the planning authority.

It is noted that a representative of Longford County Council visited the site after the fencing works were carried out and expressed the view that permission may be needed, however no further action was taken.

The decision of Longford County Council planning authority to refuse permission was appealed to the Board, Ref: ABP-314204-22. The Inspector appointed by the Board in her report made reference to ‘*A fence of uncertain origin and recent date, defines that boundary line*’, (1.1.1.) and ‘*The former gateway / entrance at the public road has been removed, and broken stone has been deposited, in large amounts, along the former driveway.*’ (1.1.5) At 2.1.5. reference is made to the AA Screening report by Liam Madden and its conclusion that ‘*..no likely significant effects, such as stage 2 appropriate assessment and submission of a NIS is not required.*’

Under Section 4.1. title ‘Planning History’ the Report states:

“Pre-planning meeting 31/11/202 – site is in a SAC of L Ree. Applicant proposes to change an existing bungalow into a care home with extending same. The council were aware that works on the site had already commenced. The gateway had been widened, fencing had been erected, a digger was on site, large volumes of stone had been imported onto the site. An exiting harbour, which never had the benefit of planning,

and stones had been removed from the shoreline and placed on the harbour. There is no exemption for the works and retention may trigger Substitute Consent. Advised to liaise with NPWS.”

Querist contests the claim that stones were moved from the shoreline to the harbour or at all.

The Inspector at Section 5.3. EIA Screening states:

5.3.1. Having regard to the nature and scale of the proposed development and the absence of any significant environmental sensitivity in the vicinity there is no real likelihood of significant effects on the environment arising from the proposed development. The need for an environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.”
(emphasis added)

At Section 7.2.14 titled ‘Assessment’ the Report states:

“The development may involve barrier effects. Although not detailed as part of this application / appeal, it is possible that barriers such as fences may be erected or may have been erected, with potential impact on the qualifying interest features and conservation objectives of the protected sites.” (emphasis added)

The Inspector recommended the following reasons for refusal:

Reasons and Considerations

1 On the basis of the information provided with the application and appeal and in the absence of a Natura Impact Statement the Board cannot be satisfied that the proposed development individually, or in combination with other plans or projects would not result in adverse effects on the integrity of European sites, Nos 000440, and 004064, in view of the sites’ Conservation Objectives, having regard to the location within these sites, the hydrological connectivity with the sites and the possibility that the development may pose a disturbance or barrier risk to qualifying interest species of these sites. In such circumstances the Board is precluded from granting permission.

2 On the basis of the information provided with the application and appeal the Board cannot be satisfied that the proposed development would not present a barrier to amenity use of the shoreline, in contravention of CPO12.34, and CPO12.48 to preserve,

protect and enhance the Counties inland lakes and waterways for their amenity and recreational resource amenity and to improve access thereto. The proposed development would accordingly be contrary to the proper planning and sustainable development of the area.

3 In the absence of information in relation to the site's suitability for the treatment of effluent, the Board cannot be satisfied that the proposed development would not impact adversely on groundwater and surface water and be contrary to policies to restrict development in the vicinity of the lakes to protect waters and aquifers. The proposed development would accordingly be contrary to the proper planning and sustainable development of the area.

4 The proposed development would increase the built form and the level of usage of an existing dwelling in an area of high amenity and landscape quality. From the information provided with the application and appeal the Board is not satisfied that the proposed development would not adversely impact on the visual amenities of the area. The proposed development would accordingly be contrary to the proper planning and sustainable development of the area.

The Boards by Order dated 24th November 2022 refused permission giving the following reasons and considerations:

“Having regard to the proposed development which involves the construction of an extension to an existing house, on the basis of the information provided with the application and appeal and in the absence of a Natura Impact Statement the Board cannot be satisfied that the proposed development would not result in an adverse effects on the integrity of European sites, Nos 000440 and 004064, in view of the sites’ Conservation Objectives, having regard to the location within these sites, the hydrological connectivity with the sites and the possibility that the development may pose a disturbance barrier risk to qualifying interest species of these sites. In such circumstances the Board is precluded from granting permission.”

The Board’s Direction included the following Note:

“In not agreeing with the Inspector regarding recommended reasons for refusals numbers 2, 3 and 4, the Board had regard to the proposed development which involved an extension to an existing house, which has an associated waste water treatment in-

site, and notwithstanding the increased area proposed, the dwelling is proposed to remain a three bedroom residence which would not lead to an increased occupancy over and above what could be expected for the existing three bedroomed house.

Further, it is considered that the proposed increase in the volumes of the built form is modest and would not have a significant impact of the visual amenities of the area.

Furthermore, on the basis of the information on the file, it is considered that the proposed development would not present a barrier to amenity use of the shoreline, where it is the policy of the County Council to reserved land adjacent to waterbodies in order to promote and facilitate the creation of waterside linear routes by means of enhancing and improving existing public rights of way, and where possible provide additional access to inland waterways through agreement, permissive access and/or the acquisition of land for public rights of way, and where this was not raised as an issue by the County Council and where no public right of way currently exist.”

The Board, in the main was supportive of the proposed development, however the issue of appropriate assessment was outstanding, which amounts to the sole reason for the refusal. It is noted that the Board in its reasoning makes no reference to the works which had commenced at the site as noted by the Council and the Inspector. This, however, should not be taken that the Board did not consider the works required to be regularised.

I am instructed that further meetings / communications with Longford County Council have taken place since January 2023. The Council appears to be satisfied with the proposed development to include the upgrade of and extension of the house, replace the wastewater treatment system, as long as all suitable environmental reports are provided.

The planning authority’s opinion regarding the works commenced is that they are minor but indicated that they are required to be regularised, potentially through the substitute consent process. It appears the planning authority is of the view that it cannot consider an application for retention where appropriate assessment is required.

Querist appointed VEON Forestry, Ecology & Environment to prepare a Natura Impact Statement, which is dated 11th April 2023. The Report refers to the proposed development: ‘The proposed works will consist of a widening of the existing entrance and upgrading the site

boundary fencing' It required to be clarified whether this references the works commenced at the site referred to by the planning authority and the Board's Inspector.

The VEON Report includes the results of an Appropriate Assessment screening as follows:

"It cannot be excluded 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 proposed project (i.e., the change of use, extension to dwelling and associated works) individually or in combination with other plans and projects, would have a significant effects of the following European Sites: Lough Ree SAC (000440) Lough Ree SPA (004064)"

As a result, an Appropriate Assessment of the proposed project is required, and a Natura Impact Statement shall be prepared in respect of the proposed project (i.e., the change of use, extension to the dwelling and associated works.)"

2. The Development

I am instructed that the planning authority have stated that *'they cannot under planning law accept or validate a planning application on this site,'* It is necessary, therefore, to clarify what comprises the 'development' in this instance.

The proposed development set out in the application form for permission, Reg Ref: 21/113 included: *'proposed works will also include upgrade of the existing entrance and boundary treatment'* It is not clear if the reference to the upgrade of exiting entrance and boundary treatment includes the fencing, etc which works had already been carried out, as referred to in the Planners Report *'constructing a fence along the boundary of the land right into the lake, the widening of the gateway and deposit of large volumes of stone.'*

Further reference in the Report is made to the works carried out within the SAC boundary and *'The nature of the site from an unauthorised development point of view is therefore unclear.'* Reason no 2 for refusing permission included in the planners Report and in the planning authorities decision refers to unauthorised development carried out at the site. A Council representative, having visited the site expressed the view that permission for the works may be needed.

The Inspector appointed by the Board also refers to the works in a number of sections in her Report. The Board, in its decision made no reference to the works which had been carried out.

Given the views relating to the works carried out at the site expressed by the planning authority, and included in its reasons for refusal, and referenced by the Inspector, it is advised that the works already carried out require to be regularised. However, those works must be distinguished from the proposed development which has not been commenced.

The ‘development’, which is within the boundary of SAC 00040 and SPA 004064 is comprised of two parts:

- i. development including fencing, widening of the gate entrance and stoning of the drive which has been carried out: and,
- ii. proposed development including a material change of use, upgrade and extension of bungalow, removal of trees, wastewater treatment etc, which has not commenced:

Each part of the ‘development’ is subject to different rules in planning law which are addressed below.

3. The Law

Section 3 of the Planning and Development Act 2000 as amended, the 2000 Act, provides for the meaning of development:

“**3.**—(1) In this Act, except where the context otherwise requires, "development" means—

(a) the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land, or

(b) development within the meaning of Part XXI (inserted by section 171 of the Maritime Area Planning Act 2021).

(2) For the purposes of subsection (1) and without prejudice to the generality of that subsection—

(a) where any structure or other land or any tree or other object on land becomes used for the exhibition of advertisements, or

- (b) where land becomes used for any of the following purposes—
- (i) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods,
 - (ii) the storage of caravans or tents, or
 - (iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders' waste, rubbish or debris,
- the use of the land shall be taken as having materially changed.
- (3) For the avoidance of doubt, it is hereby declared that, for the purposes of this section, the use as two or more dwellings of any house previously used as a single dwelling involves a material change in the use of the structure and of each part thereof which is so used.”

Section 32 of the 2000 Act provides for a general obligation to obtain permission.

- “32.—(1) Subject to the other provisions of this Act, permission shall be required under this Part—
- (a) in respect of any development of land, not being exempted development, and
 - (b) in the case of development which is unauthorised, for the retention of that unauthorised development.
- (2) A person shall not carry out any development in respect of which permission is required by subsection (1), except under and in accordance with a permission granted under this Part.”

The development which comprises fencing, widening of the gate entrance and stoning of the driveway of the lands within the boundary of Lough Ree SAC and SPA and which required a screening for appropriate assessment, and it appears, an appropriate assessment, are works within the meaning of s.3. The work are not exempted development, due to the location and requirement for appropriate assessment and required planning permission.

Section 2 of the 2000 Act defines unauthorised development as:

- “ “unauthorised development” means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use;

Reference is made to unauthorised development at the site by the Planner in his report and the planning authority in its reasons for refusing permission.

Section 34(12) of the Planning and Development Act 2000 as amended, the 2000 Act, provides as follows:

“(12) A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out—

- (a) an environmental impact assessment,
- (b) a determination as to whether an environmental impact assessment is required,
- or
- (c) an appropriate assessment.”

The works carried out are within the boundary of a SAC and SPA, and require an appropriate assessment, therefore s.34(12)(d) applies and the planning authority is precluded from considering an application for retention for the works.

Given that the works which have been commenced require regularisation through retention but cannot be considered by the planning authority due to the provisions of s.34(12) the single remaining option to regularise the works is to follow the relevant procedures set out in Part XA Substitute Consent in the 2000 Act as amended. This is addressed in detail below.

The provisions of section 34(12) of the 2000 Act do not apply to the proposed development for the material change of use, upgrade and extension of bungalow, removal of trees, wastewater treatment system etc, (part ii.) which has not commenced. An application may be submitted to the planning authority seeking permission for the proposed development under s.34. The proposed development is within the boundary of the SAC and SPA, therefore, a Natural Impact Statement must be submitted with the application.

The proposed development is subthreshold for the purposes of environmental impact assessment, EIA within the provisions of the 2000 Act and regulations. It is noted that the planning authority makes no reference to environmental impact assessment or screening, however, that does not eliminate such requirement. The Inspector appointed by the Board in her Report confirms that the proposed development does not require a screening for

environmental impact assessment to be carried and/or a EIAR to be prepared and that a preliminary examination will be sufficient.

Article 103 of the Planning and Development Regulations 2001 as amended, the 2001 Regulations provides for ‘Requirement to submit EIAR with subthreshold planning application.’ Art. 103(1)(a) provides:

“(a) Where a planning application for subthreshold development is not accompanied by an EIAR, the planning authority shall carry out a preliminary examination of, at the least, the nature, size or location of the development.

(b) Where the planning authority concludes, based on such preliminary examination, that—

(i) there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required,”

The Inspector’s opinion on the matter is that a screening for EIA is not required and therefore an Environmental Impact Assessment Report, EIAR is not required. In submitting the application for the proposed development, the onus under Article 103(1)(a) falls on the planning authority to carry out a preliminary examination of at least the nature, size or location of the development. In this instance, as the proposed development, which is modest in size and nature, is within the boundary of Lough Ree SAC and SPA, it is advised that the preliminary examination will be required in respect of location.

Preliminary examination has been described as pre-screening screening in respect of EIA in the context of similar provisions in Art. 109 of the regulations relating to appeal to the Board.

Shadowmill v An Bord Pleanala & Lilacstone 2023[IEHC] 157

Although preliminary examination falls to the planning authority, it is advised that as a precautionary measure that the application for permission submitted to the planning authority is accompanied by a preliminary examination prepared by a suitably qualified expert.

The preliminary examination is relevant given that Joseph Casserly, the neighbour who has objected and raised issues in respect of the previous application for permission is likely to appeal a decision of the planning authority to grant permission and/or in circumstances where the provisions of Art. 103 are not adhered to have grounds to judicially review the decision, leading to further delays.

In that regard Section 34(1) of the 2000 Act provides that a planning authority may decide to grant with or without permission or refuse permission for development where all requirements of the regulations are complied with. This provision is mandatory, therefore a failure to comply with a particular regulation may render a decision null and void. In circumstance where Art. 103 has been amended to transpose aspects of the EIA Directive as amended, it is advised that its provisions must be complied with.

4. Substitute Consent

The works carried out on site fall into a category, for which notice has not been served by the planning authority, therefore, in this instance the substitute consent procedure involves two stages: i.) the application to the Board for leave to apply for substitute consent and, if successful, ii) the application to the Board for substitute consent.

S177(C) provides that a person who has not received of a notice from the planning authority (under s.177B) carried out development which required an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, and in respect of which,

“(b) the applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.”

And such person may apply to the Board for leave to apply for substitute consent in respect of the development.

Subsection 177(D)(2) sets out the criteria which the Board is required to have regard in considering whether exceptional circumstances exist, as follows:

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

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

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

- (d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;
- (e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- (f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;
- (g) such other matters as the Board considers relevant.”

It is necessary that information and documents demonstrating and supporting exceptional circumstances are submitted to the Board with the application for leave to apply. In this context the circumstance relating to the claim of adverse possession in respect of the lands made by Joseph Casserly necessitated urgent action to be taken to repair fencing and fence off parts of the lands, to which he laid claim should be stated.

The application to the Board must include any documents considered relevant to support the application. (s.177(D)(3)(a))

The Board may request further information to be provided within a specified time. (s.177(D)(3)(b))

The Board also may seek information and documents from the planning authority in relation to any other development carried out by the applicant, which is required to be furnished by the planning authority within 6 week of the request. (s.177D(5))

Subsections 177C(3)(aa) and 177C(3A) relate to a process which arises where a determination as to whether an environmental impact assessment was or is required. In this regard it is noted that the Board’s Inspector was of the view in respect of the entire proposed development that *“The need for an environmental impact assessment can, therefore be excluded at preliminary examination and a screening determination is not required.”* It appears this comment applies to the entire development including the works which were carried out, the subject of an application for leave to apply for substitute consent. It is advised that an expert with the appropriate qualifications knowledge and skills advises in this regard.

Section 177D provides for the process which the Board must follow in deciding on an application for leave to apply for substitute consent. Section 177(D) (1) provides:

“177D.— (1) Subject to section 261A(21), the Board shall only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied—

.....

(b) 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.”

Subsection 177D(1A) provides for circumstances where the Board makes a determination as to whether an environmental impact assessment is required and sets out the information and documents to which it must have regard including information referred to in subsections referred to above 177C(3)(aa) and 177C(3A).

Subsection 177D(5A) applies where the determination under subsection under s.177D(1A) finds that the development did not or would not be likely to have significant effects on the environment and an environmental impact assessment is or was not required. It requires the Board to specify any features and any measures to avoid, prevent or reduce any potential significant adverse effects on the environment in respect of the development which were provided by the applicant under s.177C(3A). In this regard the advice / opinion of an expert having appropriate expertise should be sought.

The Board is required to make its decision 12 weeks after receipt of an application under s.177C(1) or 12 weeks after receipt of additional information under s.177C(3)(b) or 12 weeks after receipt of information from the planning authority under s.177C(5) whichever is the later. The Board, however, may extend the time for making its decision if it is not possible or appropriate to make the decision within the statutory timeframe and must issue a notice in that regard specifying the date when the decision will be made.

Notice of the Board’s decision and the reasons must be in writing to the applicant. If the decision is to grant leave the notice must contain a direction to apply for substitute consent

after 12 weeks of the notice, the application must be accompanied by a remedial EIAR or remedial NIS or both as considered appropriate by the Board. The Board must give a copy of its decision to the planning authority, the details of which must be entered in the planning register.

The Application for substitute must be made to the Board in accordance with the provisions of s.177E. s.177E(1) gives the Board authority, at its own discretion, to enter into consultations with the applicant before the application is submitted. Such application in this instance would be made subject to leave to apply for substitute consent being granted by the Board under s.177D to include :

- (b) state the name of the person making the application,
- (d) in accordance with a direction of the Board under section 177D(7), be accompanied by a remedial environmental impact assessment report, rEIAR (if appropriate) or remedial Natura impact statement, rNIS or both as the case may be,
- (e) be accompanied by the fee payable in accordance with section 177M,
- (f) comply with any requirements prescribed under section 177N which provides for the regulations and
- (g) be received by the Board within the period specified in section 177D as appropriate and may be accompanied by any other documents that the applicant considers would be of assistance to the Board in making a decision in relation to his or her application.

Section 177F provides for the content of a remedial environmental impact statement, if required, which is unlikely.

Section 177G provides for the content of a Remedial Natura impact statement, which will be required to be submitted with the application for substitute consent should the Board grant leave to apply for substitute consent.

The proposed development for the material change in use, extension and upgrade of the bungalow, wastewater treatment system removal of trees etc (Part ii) may be considered to be a stand-alone development which is not directly connected to the works which were carried out, i.e. fencing, widening of the entrance and stoning of the driveway (Part i), and which were required to be carried out as a matter of urgency given the adverse possession claim on the lands.

As previously stated, an application for the proposed development under s.34 of the 2000 Act may be submitted to the planning authority concurrently with an application for leave to apply for substitute consent under s.177C submitted to the Board.

5. Conclusion

In conclusion, the Planners Report, and the reasons for the planning authority's decision to refuse permission Reg Ref 21/123 contain references to works carried out and unauthorised development at the subject site.

The planning authority raised issues as to whether it could accept or validate an application for permission for the development. The Inspector appointed by the Board in her Report refers to the works which had been carried out. The Board, however made no such reference in its decision.

The fact that the site is within the boundary of Lough Ree SAC and SPA is central to the matter.

In the circumstances, it was necessary to set out what comprised the development in order to determine the rules under the Planning and Development Act, 2000 as amended which apply.

The development is in two parts, i.) the works including fencing, widening of the entrance and stoning of the driveway, which has been carried out; and ii.) the proposed development which includes a material change in use, upgrade and extension of the bungalow, a wastewater treatment system, removal of trees etc. and ancillary works.

The works which have been carried out require to be regularised through a retention procedure, however the provisions of s.34(12) preclude the planning authority from considering an application for retention. An application for leave to apply for substitute consent for the works, in exceptional circumstances under s.177C, therefore, must be made to the Board. The Board must have regard to certain criteria in respect of exceptional circumstances set out in s.177D(2) in deciding whether to grant leave to apply for substitute consent.

The information and documents demonstrating and supporting exceptional circumstances must be submitted to the Board with the application for leave to apply for substitute consent. In this context the circumstances relating to the claim of adverse possession in respect of the lands

made by Joseph Casserly necessitated urgent action to be taken to repair fencing and fence off parts of the lands, to which he laid claim should be stated.

If successful, the Board must direct that an application for substitute consent is made within 12 weeks of the notice of its decision.

The application for substitute consent must be accompanied *inter alia* with a remedial Natura impact assessment. The matter of environmental impact pre-screening, screening or EIA should be addressed on the advice of a suitably qualified expert.

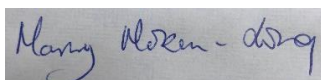
An application for permission for the proposed development which includes a material change in use, upgrade and extension of the bungalow, a wastewater treatment system, removal of trees etc. and ancillary works may be made to the planning authority under s.34 of the 2000 Act. The application must be accompanied by an NIS. The requirements of Article 103 of the regulations in respect of subthreshold EIA and preliminary examination must be addressed on the advice of a suitably qualified expert and appropriate steps taken.

The proposed development (Part ii) is a stand-alone development which essentially is not connected to the works carried out (Part i).

An application for the proposed development under s.34 of the 2000 Act, therefore, may be submitted to the planning authority concurrently with an application for leave to apply for substitute consent under s177C to the Board.

It is advised that the contested issue of alleged removal of stones from the shoreline and alleged works to a harbour is addressed with the planning authority in an application for planning permission, and with the Board in an application for leave to apply for substitute consent.

Nothing further occurs.

A handwritten signature in blue ink, reading "Mary Moran-Long".

Mary Moran-Long BL PhD

1st June 2023