



An
Bord
Pleanála

Inspector's Report ABP306362-20

Question

Whether ground excavation and the cultivation, harvesting and replanting of Marram Grass constitutes development that is or is not exempted development.

Address

Narin and Portnoo Golf Links and Castlegoland Beach Narin, Portnoo, County Donegal.

Referrer

Tony Kitterick and Others.

Planning Authority Reg. Ref.

Donegal County Council.

Owner/Occupier

Liam and Jane McDevitt.

Type of Application

Section 5 Referral.

Date of Site Inspection

14th May, 2020.

Inspector

Paul Caprani.

Contents

1.0 Introduction.....	3
2.0 Site Location and Description	3
3.0 Activities Undertaken at and Adjacent to the Golf Course	4
4.0 Declaration Issued by Donegal County Council.....	4
4.1. Referral Submitted	4
4.2. Declaration Issued by Donegal County Council	6
5.0 Referral to the Board	7
5.2. Donegal County Council’s Response to the Referral Submitted	9
5.3. Narin and Portnoo Golf Club Response to the Referral	9
6.0 Planning History.....	12
7.0 Legislation	12
8.0 Assessment.....	14
8.1. Introduction	14
8.2. Development.....	15
8.3. Exemptions on Development under the Provisions of Article 6.....	16
8.4. Restrictions on Exemption under the Provisions of Article 9.....	16
9.0 Conclusions and Recommendation	22

1.0 Introduction

- 1.1. A question has arisen pursuant of Section 5 of the Planning and Development Act as to whether or not ground excavations, alterations and demolition of private and public property at Narin and Portnoo Links Golf Course and at Castlegoland Beach is or is not development and/or is or is not exempted development. The question was initially referred to Donegal County Council for a declaration under the provisions of S.5 of the Act. The council determined that the ground excavation, alteration and demolition on private and public property constituted development which is exempted development.
- 1.2. Under the provisions of section 5(3) the decision of Donegal County Council was referred to An Bord Pleanála for review. The referral to the Board argues that the ground excavation, alteration and demolition constitutes development which was not exempted development on the basis that the works:
- Contravene a planning condition associated with a previous grant of planning permission.
 - The works clearly constitute an extension to the existing golf course and therefore cannot fall under Class 34 of the Planning and Development Act.
 - The works result in an obstruction to a public right of way
 - and the development is located within a proposed natural heritage area and is within or adjacent to a special area of conservation.

2.0 Site Location and Description

- 2.1. The referral relates to two separate sites in proximity to each other within and adjacent to Narin and Portnoo Golf Links in mid-west Donegal. The small settlements of Narin and Portnoo are located approximately 10 kilometres north of Ardara and 12 kilometres north-west of Glenties. The 18-hole golf course is located adjacent to Tramore Strand, immediately east of the settlements of Narin and Portnoo. The golf course sweeps along a south-west/north-east axis towards the small headland of Carrickfadda. Castlegoland Beach is located to the immediate

east of Carrickfadda Headland. It comprises of a wide expansive beach and strand area (see photographs attached). A post and wire fence separates the private golf course from the public beach area.

3.0 Activities Undertaken at and Adjacent to the Golf Course

- 3.1. The referral submitted to the Board do not explicitly set out exact details of the activities which have been allegedly been undertaken on site. Information contained in the response to the referral submitted on behalf of the golf course indicate that works carried out in Area A (see drawing SK-01) appear to be located in the middle of a fairway and involve the creation of a new sand bunker within the fairway. The activities carried out involve the removal of the upper layer of fairway so as to expose the underlying sand to form a natural bunker along the fairway.
- 3.2. The works at Area B as indicated on Drawing SK-01 relates to lands to the north near Carrickfadda Head and contiguous to Castlegoland Beach. Information on file indicate that this area has been recolonised by grassland from the adjoining beach area and was used as a practice fairway, driving range and an area for golf lessons. The golf club argue that the works involve the harvesting of grass and the transplanting of marram grass within the course.
- 3.3. Notwithstanding the wording of the question in the referral to the Board there appears to be no demolition works associated with the activities undertaken.

4.0 Declaration Issued by Donegal County Council

4.1. Referral Submitted

- 4.1.1. A declaration was sought from the Council by the current referrer Mr. Tony Kitterick on the 10th October, 2019.
- 4.1.2. The referral argues that the works undertaken in Area A constitute excavation. Works at Area B relates to works on the foreshore outside the jurisdiction of the golf course and under the jurisdiction of Donegal County Council. Section 225 of the Planning and Development Act confirms an obligation to obtain permission for any development on these lands. It is argued that any development on the foreshore is

treated the same as development on the mainland with all necessary requirements for an application for planning permission.

- 4.1.3. The submission goes on to outline the exempted development provisions set out in the Planning Acts and Regulations. In this regard specific reference is made to Class 45, Part 1 of Schedule 2 and Class 34, Part 1 of Schedule 2 of the Planning and Development Regulations, 2001. Reference is also made to the various restrictions and exemptions set out under Article 9 of the said Regulations.
- 4.1.4. Specifically, reference is made to Article 9(1)(a)(i) where it is argued that the proposal contravenes a condition attached to a previous planning permission.
- 4.1.5. Reference is also made to Article 9(1)(a)(iii) which provides that development will not be exempt where it endangers public safety by reason of a traffic hazard or obstruction to road users. It is argued that the works at Point A impede the clear impediment to a passage along the public pedestrian pathway and works at Point B obstruct vehicular access and pedestrian access from the public road to Castlegoland Beach.
- 4.1.6. Reference is also made to Article 9(1)(a)(iv) which states that development shall not be exempt where it interferes with the character of a landscape or view or prospect of special amenity. It is argued that the works in question are located in areas designated as “High Scenic Amenity” and “Especially High Scenic Amenity and High Scenic Amenity”.
- 4.1.7. Reference is also made to numerous policy statements contained in the development plan with regard to natural heritage and marine resource coastal management. It is argued that the works undertaken contravene these policy statement and as such de-exempts the works undertaken.
- 4.1.8. Reference is also made to Article 9(1)(a)(vii) which states that any development will not be exempt where it comprises of the excavation, alteration or demolition of places, caves, sites, features or other objects of archaeological, geological, historic, scientific or ecological interest. It is argued that the works undertaken impact on the natural heritage objectives, archaeological objectives, tourism and marine objectives set out in the development plan. It is argued that the area in which the works are undertaken are of premier archaeological and ecological importance.

- 4.1.9. It is also argued that the works undertaken are unauthorised and therefore the provisions of Article 9(1)(a)(viii) apply.
- 4.1.10. Finally, it is argued that the proposal obstructs a public right of way and as such Article 9(1)(a)(ix) applies.
- 4.1.11. A number of appendices are also attached to the submission of the Planning Authority which include:
- An archaeological report on the Narin and Castlegoland Beach areas.
 - A sample of correspondence filed to Donegal County Council confirming acknowledgement by the public of the rich archaeological interest of the grounds.
 - Sample letters proving habitual public use of the public rights of way which are obstructed by the works undertaken.
 - Various photographs proving extensive usage of the public rights of way.

4.2. **Declaration Issued by Donegal County Council**

- 4.2.1. The assessment by Donegal County Council notes that a new gate and a new fence has been erected along the field boundary to the north-east along the edge of Castlegoland Beach and along the edge of the headland and along the western edge of the golf course with its boundary along Narin Beach. The Planning Authority is satisfied that the activities undertaken constitute the carrying out of works and would therefore constitute 'development' within the meaning as set out in the Planning and Development Act, 2000.
- 4.2.2. Reference is made to Class 34 of Schedule 2 of Part 1 which exempts works incidental to the maintenance of any golf course. The Planning Authority is satisfied that the works are associated with the maintenance and alteration of the Narin and Portnoo Links Course.
- 4.2.3. The excavations and alterations which are the subject of the referral are localised notwithstanding the fact that the site is located in an area of scenic amenity. It is considered that the landscape has the capacity to absorb sensitively located development of the scale and design that will enable it's assimilation into the receiving landscape and will not detract from the quality of the landscape. The

Planning Authority considers that the works will have no adverse impact on the scenic amenity value of the landscape and as such the works are deemed to be exempted development.

5.0 Referral to the Board

- 5.1. The referral is the same as that submitted to the planning authority. For completeness it is again summarised below:
 - 5.1.1. The referral argues that the works undertaken in Area A constitute excavation. The referral argues that the works undertaken in Area B relate to works on the foreshore outside the jurisdiction of the golf course and under the jurisdiction of Donegal County Council. Section 225 of the Planning and Development Act confirms an obligation to obtain permission for any development on these lands. It is argued that any development on the foreshore is treated the same as development on the mainland with all necessary requirements for an application for planning permission.
 - 5.1.2. The submission goes on to outline the exempted development provisions set out in the Planning Acts and Regulations. In this regard specific reference is made to Class 45, Part 1 of Schedule 2 and Class 34, Part 1 of Schedule 2 of the Planning and Development Regulations, 2001. In relation to Class 45 it is argued that the works undertaken are not for the purpose of surveying land. R In relation to Class 34 reference is made to the various restrictions and exemptions set out under Article 9 of the said Regulations.
 - 5.1.3. Specifically, reference is made to Article 9(1)(a)(i) where it is argued that the proposal contravenes a condition attached to a previous planning permission.
 - 5.1.4. Reference is also made to Article 9(1)(a)(iii) which provides that development will not be exempt where it endangers public safety by reason of a traffic hazard or obstruction to road users. It is argued that the works at Point A impede the clear impediment to a passage along the public pedestrian pathway and works at Point B obstruct vehicular access and pedestrian access from the public road to Castlegoland Beach.
 - 5.1.5. Reference is also made to Article 9(1)(a)(iv) which states that development shall not be exempt where it interferes with the character of a landscape or view or prospect

of special amenity. It is argued that the works in question are located in areas designated as “High Scenic Amenity” and “Especially High Scenic Amenity and High Scenic Amenity”.

- 5.1.6. Reference is also made to numerous policy statements contained in the development plan with regard to natural heritage and marine resource coastal management. It is argued that the works undertaken contravene these policy statement and as such de-exempts the works undertaken.
- 5.1.7. Reference is also made to Article 9(1)(a)(vii) which states that any development will not be exempt where it comprises of the excavation, alteration or demolition of places, caves, sites, features or other objects of archaeological, geological, historic, scientific or ecological interest. It is argued that the works undertaken impact on the natural heritage objectives, archaeological objectives, tourism and marine objectives set out in the development plan. It is argued that the area in which the works are undertaken are of premier archaeological and ecological importance.
- 5.1.8. It is also argued that the works undertaken are unauthorised and therefore the provisions of Article 9(1)(a)(viii) apply.
- 5.1.9. Finally, it is argued that the proposal obstructs a public right of way and as such Article 9(1)(a)(ix) applies.
- 5.1.10. A number of appendices are also attached to the submission of the Planning Authority which include:
 - An archaeological report on the Narin and Castlegoland Beach areas.
 - A sample of correspondence filed to Donegal County Council confirming acknowledgement by the public of the rich archaeological interest of the grounds.
 - Sample letters proving habitual public use of the public rights of way which are obstructed by the works undertaken.
 - Various photographs proving extensive usage of the public rights of way.

5.2. Donegal County Council's Response to the Referral Submitted

- 5.2.1. A response from Donegal County Council received by the Board on 10th February, 2020 states that the content of the referral has been noted and the Planning Authority refers the Board to the content of the Senior Executive Planner's report dated 6th December, 2019.

5.3. Narin and Portnoo Golf Club Response to the Referral

- 5.3.1. A response was received from Manahan Town Planning Consultants. By way of introduction it is stated that it is inaccurate to claim that the works involve ground excavation or demolition or that they were carried out on public property. The response goes on to set out the background to the proposed development. It is stated that many golf courses in Ireland are running into financial difficulties and that the golf club in question required investors to pay off debt and upgrade and improve the course. In this regard the golf club employed the services of Gil Hanse a golf architect who is renowned for his minimalist style. His works involve the removal of artificial features such as bunkers and lakes from courses and to use as much as possible the natural landscape. The works at 'Area A' involve the creation of a natural sand bunker in line with the minimalist design principles. These works involve the restoration of a sandy area which existed many years ago and involve the removal of an upper layer of ground and vegetation on the slope. In conjunction with this, a number of artificial bunkers have been removed.
- 5.3.2. Works at 'Area B' involve the harvesting of grass for transplanting elsewhere within the course.
- 5.3.3. In relation to rights of way, the referrer claims that there are rights of way across the golf course and that they wish to exercise these rights. Reference is made to the right of way to Castlegoland Beach however it is not clear exactly where this right of way is located. It is suggested that staff in Donegal County Council are also unclear as to where exactly the right of way referred to in the County Plan may be located. It is also suggested that the right of way was extinguished in 2004. It is stated that the extinguishment of this right of way was not removed from the development plan. In view of the loss of this route, the referrers are now seeking to establish rights of way across the golf course to the beach instead. The owners of the golf course do not

accept that any of these walkways/routes claimed to be established public rights of way are in fact rights of way. Reference to rights of way in the historic 6 inch may be it is argued a boundary between two adjoining townlands. The referrers also make incorrect claims as to rights of way over the golf course not just on foot but also by vehicle. It is argued that there have never been any vehicle routes to the beach in question. Golf club buggies are not permitted to travel off designated haul routes or fairways within the golf course. It is argued that the vehicular and pedestrian rights of way referred to in the referral do not exist.

- 5.3.4. In response to the issue of access, the golf club is currently investigating the creation of a walkway alongside the edge of the course which would give pedestrian access to Castlegoland Beach. It is the view of the golf course that cars and pedestrian traversing lands across the golf course via alleged rights of way would not be in accordance with the proper planning and sustainable development of the area and would not protect the conservation and ecology of the area. Due to the contemporary litigious environments in which we live and health and safety considerations, it is not suitable to have public rights of way traversing golf courses. The provision of fencing and gating is necessary to stop casual and irregular access by caravans, cars, horses and other vehicles in order to prevent damage to the golf course and the ecology of the area.
- 5.3.5. The response then goes on to address the exempted development provisions associated with the golf course. In this regard it is argued that the works undertaken fully fall within Class 34 of the Exempted Development Regulations.
- 5.3.6. The final section of the submission specifically addresses the restrictions on exemptions referred to under Article 9 in the referrers' submission.
- 5.3.7. With regard to contravention of a condition attached to a previous permission, it is stated that a number of permissions have been applied for and approved in relation to the golf course. The works at Area A or B are not inconsistent with any of the conditions in these permissions.
- 5.3.8. The proposal does not consist of or comprise the formation, laying out or material widening as a means of access to a public road which exceeds 4 metres in width. Thus it is argued that the works do not endanger public safety by reason of a traffic hazard or obstruction to road users.

- 5.3.9. It is argued that the proposed development in no way interferes with the character of the landscape. In this instance it is argued that the minimalist design intention of the golf course will seek to make use of the existing landscape, that the golf course will be more in keeping with the landscape than previously. It is also noted that there is no view or prospect of special amenity value of special interest value listed in the development plan at this location.
- 5.3.10. The works in question do not involve the excavation or alteration of a site of interest that it is an objective of the county development plan to preserve or protect.
- 5.3.11. It is stated that the works do not interfere with any archaeological feature.
- 5.3.12. It is stated that two recent planning applications were accompanied by a screening for appropriate assessment carried out by a specialist firm in this field. In the case of both applications, it came to the conclusion that the proposal would not be likely to have a significant effect on the integrity of a European site. On this basis it can be concluded that the Section 5 reference is equally unlikely to have a significant effect on the integrity of a European site due to the modest nature of the works and the fact that they are located outside the boundary of the site.
- 5.3.13. It is acknowledged that Area B is within an area proposed but not yet designated as an NHA. The applicants have consulted on many occasions with the National Parks and Wildlife Service who have not raised any objection to the works in question.
- 5.3.14. The submission goes on state that the proposal does not contravene any of the other restrictions set out under Article 9.
- 5.3.15. The final section of the submission details the submission made by the golf club in respect of the referral submitted. It reiterates that works described as Area A is a bunker and the works described as Area B has, since early 2018 been maintained as a nursery for renovations to the course. In relation to Area B a number of complaints were made by locals and both Donegal County Council and the NPWS investigated the site. The NPWS, according to the submission, were content with the harvesting that was being undertaken and suggested that the applicants stay within the existing fence line. Donegal County Council did request in writing that the golf club replant the areas where Marram plants were harvested.
- 5.3.16. The response from the golf club goes on to state that the proposed development

- does not contravene any planning conditions associated with previous applications,
- does not constitute an extension to the golf course,
- does not result in an obstruction of the right of way,
- does not adversely impact on a natural heritage area, and
- that development is not located within a special area conservation.

6.0 Planning History

6.1. Details of PL05.RL2252 are attached. Under this referral the Board determined that site excavation works and alterations to the golf course layout which involved encroachment into sand dunes, constituted works which were not incidental to the management and maintenance of the golf course and that the alterations constitute an extension to the golf course and on this basis it was considered that the works undertaken constitute development which were not exempted development.

7.0 Legislation

7.1. Planning and Development Act 2000

- 7.1.1. Section 2 “works” includes *any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.*
- 7.1.2. Section 3 “development” *means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.*

7.2. Planning and Development Regulations 2001 (as amended)

- 7.2.1. Article 6(1) states that *subject to Article 9, development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in Column 2 of the said Part 1 opposite the mention of that Class in the said Column 1.*
- 7.2.2. Class 34 of Part 1 of Schedule 2 states that *works incidental to the maintenance and management of any golf course or pitch and putt course including alterations to the*

layout thereof, excluding any extensions to the area of the golf course or the pitch and putt course, constitutes exempted development. There are no conditions and limitations attached to Class 34.

7.2.3. *Article 9(1) development to which Article 6 relates shall not be exempted development for the purpose of the Act if*

(a) the carrying out of such development would

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Acts,

(iii) endanger public safety by reason of a traffic hazard or obstruction to road users,

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

(vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation, conservation or protection of which is an objective of the development plan or local area plan for the area in which the development is proposed, or pending a variation of the development plan or local area plan, or the making of a new development plan or local area plan, in the draft variation of the development plan or the local area plan or the draft development plan or draft local area plan.

(viiB) comprise development in relation to which the Planning Authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,

- (viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.
- (viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,
- (xi) obstruct any public right of way.

8.0 Assessment

8.1. Introduction

- 8.1.1. This referral relates to two separate areas of land, one of which, Area A, both parties agree is located within private property being within the confines of the Narin and Portnoo Golf Links. In relation to Area B, a larger area of land to the north of Area A adjacent to Castlegoland Beach, the referred alleges that the lands in question are outside the confines of the golf course. The golf club acknowledges that this area was part of the beach many decades ago but has been used by the club as a practice fairway, driving range and an area for golf lessons in the recent past. I can find not explicit statement in the golf club's response to the referral as to whether or not the harvesting of Marram Grass is exclusively located within the confines of the golf club. Having carried out a site inspection (see photos attached) it appears that the area in which Marram Grass is being grown is located within the boundary fence of the golf course. However, I cannot state definitively whether or not any cultivation of this grass was taking place beyond the fence boundary and on the adjacent public beach. I did note evidence of Marram Grass growing beyond the fence of the golf club, however whether this grass was being cultivated or growing naturally it is impossible to say. Furthermore, it is not altogether clear from the referrers' submission as to what are the explicit nature of the supposed work being undertaken in Area B.
- 8.1.2. Based on the information contained on file, and having regard to the purpose of Section 5 of the Planning and Development Act 2000, namely whether or not certain

works as defined in the Act constitute development, it is beyond the remit of the Board to determine whether or not the golf course has encroached on public lands. Any land ownership disputes are a matter for the Courts and not a matter for An Bord Pleanála. One of the tenets of the referrers' submission is that unauthorised works have taken place outside the confines of the golf course and that such unauthorised development by virtue of its unauthorised nature cannot be considered exempted development. It is apparent that there is a dispute between the parties in question as to whether or not activities have taken place on lands outside the ownership or confines of the golf course and based on the information contained on the file I do not consider that the Board can or indeed should adjudicate on this issue.

8.2. Development

- 8.2.1. The first question that the Board must determine is whether or not the activities referred to constitute "works" as defined in the Act. Works are defined as "any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal". I consider that it can be reasonably concluded that in the case of Area A, and this is acknowledged by the golf club, that the activities involved "removal of the upper layer of the ground vegetation" this in my view constitutes at the very minimum an alteration to the lands and a more extreme interpretation of the said activities could be construed as "excavation". It is therefore in my view activities that would constitute 'works' as set out in the definition of the Act.
- 8.2.2. With regard to Area B, regardless of whether or not the lands in question are located in public or private ownership the cultivation and harvesting of Marram Grass and the subsequent transplanting of Marram Grass to "rewild the area" constitutes an anthropogenic intervention in this coastal area and as such in my view can be considered an alteration to the lands in question. The Board can therefore in my opinion come to the same conclusion that the activities undertaken in this area constitute "works" as defined by the Act.

8.3. Exemptions on Development under the Provisions of Article 6

- 8.3.1. It is in my view reasonable to conclude that the creation of a natural sand bunker along a fairway and the cultivation and harvesting of grass for transplanting and reseeded elsewhere within the golf course would fall under the provisions of Class 34 of Schedule 2, Part 1 of the Planning and Development Regulations, 2001 (as amended). The works undertaken would in my view be classed as works which are '*incidental to the maintenance and management of any golf course*' and would therefore constitute exempted development under Class 34.

8.4. Restrictions on Exemption under the Provisions of Article 9

- 8.4.1. The final matter which the Board must determine in relation to this referral is whether or not any of the restrictions under Article 9 would apply. The referrer argues that restrictions under Article 9(1)(a)(i), (iii), (vi), (vii), (viiB), (viiC), (viii) and (xi) would apply.
- 8.4.2. These are assessed under separate headings below.

Restrictions under Article 9(1)(a)(i)

- 8.4.3. The referrers argue that the works undertaken contravene a condition attached to a previous permission namely Condition No. 4 of Planning Reg. Ref. 18/50855. Condition No. 4 states that "*all works associated with the development shall be confined to the proposed development site. No filling or, encroachment into the nearby coastal habitat with the special area of conservation shall occur.*

Reason: *To ensure the integrity and preservation of Natura 2000 sites and their qualifying interests.*

- 8.4.4. The works that were undertaken in Area B do not involve any filling and do not physically encroach into the Natura 2000 site in question. Any works undertaken in Area B appear to be physically separated, albeit contiguous to the Natura 2000 site in question. I found no evidence of Marram Grass being cultivated, harvested or transplanted within the Natura 2000 site in question. On this basis I can only conclude therefore that Condition No. 4 of Planning Reference 18/50855 is not being contravened by the works undertaken.

Restrictions under Article 9(1)(a)(iii)

8.4.5. The referrers argue that the works undertaken endanger public safety by reason of a traffic hazard or obstruction to road users. I do not consider that it can be reasonably argued that the creation of a natural bunker within the confines of a golf course or planting of Marram Grass away from any roadway or track constitutes a traffic hazard or would endanger public safety by reason of a traffic hazard or obstruction to road users. Neither area in which the works are located, are situate on or contiguous to a public or private thoroughfare which would result in an obstruction to that thoroughfare. There are no public roads within or leading to the site in question. A gravelled roadway leads part of the way to Area B, and this degenerates into a sandy track as it progresses towards Castlegoland Beach. Again, whether or not this constitutes a public right of way is a matter of dispute between the parties. Nevertheless, the works undertaken in providing for a natural bunker and the planting of Marram Grass do not represent a traffic hazard and obstruction to road users.

Restrictions under Article 9(1)(a)(vi)

I would generally be in agreement with the conclusions reached in the declaration issued by Donegal County Council in that, while the works undertaken are located in an area of significant scenic amenity, the works undertaken will have little impact on the landscape character of the receiving environment. The scenic amenity quality of the landscape is reflected in the designations set out in the development plan. The lands in which the works are located are designated as being either “high scenic amenity” or “especially high scenic amenity”. However, the creation of a natural sand bunker within a fairway on a golf course does not in my view interfere with the character of the landscape nor does the cultivation or harvesting of Marram Grass in a coastal area contiguous to sand dunes in any way interfere or form an incongruous feature within the landscape. The works undertaken are reflective of the existing landscape and both constitute natural interventions which sit comfortably within the prevail character of the landscape. The cultivation and reseedling of Marram Grass in an area dominated by such grass would not detract from the character or amenity of the landscape. I further note that there are no designated scenic views in the vicinity of the golf course that would be affected by the works undertaken.

Restrictions under Article 9(1)(a)(vii)

This restriction on exemption relates to the excavation, alteration or demolition of places, caves, sites, features or other objects of archaeological, geological, historic, scientific or ecological interest. The preservation, conservation and protection of which is an objective of the development plan or local area plan in which the development is proposed. I can find no reference in the Donegal County Development Plan to any specific objectives relating to sites of archaeological, geological, historical, scientific or other interest with are A or B which will in any way be affected as a result of the works undertaken.

Restrictions under Article 9(1)(a)(viiB)

This restriction relates to development that would require appropriate assessment because it would be likely to have a significant effect on the integrity of a European site.

Neither Area A or Area B is located within a Natura 2000 site. Area A at its closest point is located c.100 metres to the north-west of the west of Ardara/Mass Road SAC (Site Code:000197). Site B is located to the immediate west of the boundary of the same SAC.

The SAC has a large number of qualifying interests which are set out below.

Estuaries [1130]

Mudflats and sandflats not covered by seawater at low tide [1140]

Large shallow inlets and bays [1160]

Annual vegetation of drift lines [1210]

Atlantic salt meadows (Glauco-Puccinellietalia maritimae) [1330]

Mediterranean salt meadows (Juncetalia maritimi) [1410]

Embryonic shifting dunes [2110]

Shifting dunes along the shoreline with Ammophila arenaria (white dunes) [2120]

Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130]

Decalcified fixed dunes with Empetrum nigrum [2140]

Atlantic decalcified fixed dunes (Calluno-Ulicetea) [2150]

Dunes with Salix repens ssp. argentea (Salicion arenariae) [2170]

Humid dune slacks [2190]

Machairs (in Ireland) [21A0]*

Oligotrophic waters containing very few minerals of sandy plains (Littorelletalia uniflorae) [3110]

Oligotrophic to mesotrophic standing waters with vegetation of the Littorelletea uniflorae and/or Isoeto-Nanojuncetea [3130]

Northern Atlantic wet heaths with Erica tetralix [4010]

European dry heaths [4030]

Alpine and Boreal heaths [4060]

Juniperus communis formations on heaths or calcareous grasslands [5130]

Semi-natural dry grasslands and scrubland facies on calcareous substrates (Festuco-Brometalia) (important orchid sites) [6210]*

Molinia meadows on calcareous, peaty or clayey-silt-laden soils (Molinion caeruleae) [6410]

Lowland hay meadows (Alopecurus pratensis, Sanguisorba officinalis) [6510]

Blanket bogs (if active bog) [7130]*

Depressions on peat substrates of the Rhynchosporion [7150]

Alkaline fens [7230]

Vertigo geyeri (Geyer's Whorl Snail) [1013]

Margaritifera margaritifera (Freshwater Pearl Mussel) [1029]

Euphydrias aurinia (Marsh Fritillary) [1065]

Salmo salar (Salmon) [1106]

Lutra lutra (Otter) [1355]

Phoca vitulina (Harbour Seal) [1365]

Petalophyllum ralfsii (Petalwort) [1395]

Najas flexilis (Slender Naiad) [1833]

While the harvesting, cultivation and reseedling of Marram Grass are located on lands outside the boundary of the SAC, I do not consider that significant effects on the qualifying interests can be ruled out having regard to the close proximity of the Natura 2000 site in question. Marram Grass is particularly important in Coastal Dune formation and stabilisation. The matted roots help stabilise the sand dunes enabling them to grow and become colonised by other plant species. The SAC in question incorporates a number of coastal qualifying interests which are located in the immediate area. Some of these qualifying interests include

- *Embryonic shifting dunes*
- *Shifting dunes along the shoreline with Ammophila Arenaria,*

- *Fixed coastal dunes with herbaceous vegetation.*
- *Decalcified fixed dunes with *empetrum nigrum*.*
- *Atlantic decalcified fixed dunes,*
- *Dunes with *salix, repens ssp. argentea*,*
- *Humid dune slacks and*
- *Machairs (priority habitat in Ireland).*

8.4.6. Impacts arising from the reseeded, harvesting and cultivation of Marram Grass over an area of c.2 hectares could have a significant effect on the above qualifying interests particularly as Marram Grass is instrumental in dune formation. It is my opinion that potential adverse impacts on dune formation as a result of the works being undertaken in Area B cannot be categorically ruled out without further assessment. It is also possible that the works undertaken in Area B could potentially result in fragmentation of dune habitat and could alter the potential dynamics of dune formation in this area. It is on this basis that I consider that the works undertaken would trigger the requirement for a Stage 2 Appropriate Assessment in order to properly evaluate the potential impact of the works undertaken on the qualifying interests associated with the west of Ardara/Mass SAC and therefore the restriction on the exemption under Section 9(1)(a)(viiB) would apply.

8.4.7. While the submission on behalf of the golf course indicates that the NPWS have been notified on numerous occasions with the National Parks and Wildlife Service and that the NPWS have not raised any objections in relation to the works undertaken; no written evidence has been provided suggesting that the NPWS are in fact satisfied that any works undertaken in Area B would not require appropriate assessment. The Board could prior to determining the application, seek the views of the NPWS as to whether potential impacts arising from the harvesting and cultivation of Marram Grass could have a potential impact on the qualifying interests referred to and thus trigger the requirement for a Stage 2 assessment.

8.4.8. The minor nature of the works in Area A being located c100 m from the boundary of the SAC and not involving the planting of Marram Grass which is so critical in dune formation will not affect the qualifying interests of the SAC.

8.4.9.

Restrictions under Article 9(1)(a)(viiC)

8.4.10. This restriction involves works consisting or comprising of development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under Section 18 of the Wildlife (Amendment) Act 2000. The applicant acknowledges that works carried out in Area B are partially located in a proposed Natural Heritage Area. A strict legal interpretation of the restrictions set out under Article 9(1)(a)(viiC) may not apply in this instance as the lands in question are not designated as a Natural Heritage Area but rather a proposed Natural Heritage Area. Proposed Natural Heritage Areas do not have the same legal standing as NHA's and there is no specific reference to pNHA's under 9(1)(a)(viiC). It is clear however that the features of scientific interest associated with the proposed natural heritage area are the same as the qualifying interests set out in the SAC. The works undertaken therefore for reasons elaborated above have the potential to impact on these features of scientific interest notwithstanding its designation as a pNHA only.

Restrictions under Article 9(1)(a)(viii)

8.4.11. This restriction relates to the alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use. This restriction on exemption specifically relates to a non-authorised structure or a structure the use of which is unauthorised. Under the Planning and Development Act, 2000 "structure" means any building, structure, excavation or other thing constructed or made on, in or under any land or any part of a structure so defined. In the case of Area A excavation has taken place however this excavation is located within the confines of the existing golf course and would be exempted under the provisions of Class 34 of Part 2, Schedule 1. With regard to Area B it is not altogether clear whether the works undertaken are located outside the confines and ownership of the golf course and on public land as suggest in the referral and therefore no definitive conclusion can be reached as to whether or not the works in Area B constitute unauthorised development. Legal disputes in relation to land ownership are a matter for the Courts and not An Bord Pleanála.

Restrictions under Article 9(1)(a)(xi)

8.4.12. A dispute arises between the parties in relation to public rights of way across the lands in question. One of the rights of way is enshrined in Appendix 3, Table 15 of

the Donegal County Council Development Plan (Right of Way No. 30 – Castlegoland Beach). The submission on behalf of the golf course argues that there are no rights of way and the right of way referred to was extinguished in 2004. It was also suggested that the right of way indicated in the referrer's submission is not in fact a right of way but relates to the demarcation of a townland boundary on the historic map submitted. The response also suggests that the right of ways referred to would necessitate the traversing of fairways which would give rise to health and safety and litigation concerns. The Board is not in a position to determine whether or not rights of ways exist across the lands in question based on the information contained on file. As in the case of land ownership, it is considered that any issues as to whether or not rights of way exist upon or across the golf course are a matter for the Courts and not An Bord Pleanála. It is nevertheless appropriate to state in my opinion that the works undertaken in Area A or Area B will not result in an obstruction or impediment to an existing right of way. The works currently before the Board (ie the creation of a natural sand bunker or the planting and cultivation of Marram Grass) do not involve the erection of any fence or structure which would impair the right of persons crossing the lands in question and for this reason I would consider that the restrictions under Article 9(1)(a)(xi) would not apply.

9.0 Conclusions and Recommendation

Arising from my assessment above, I consider that the activities undertaken in Area B referred to in the referrers' submission constitute works and therefore constitute development under the provisions of the Act. I further consider that the works undertaken relate to works which are incidental to the maintenance and management of the golf course in question and as such would fall within Class 34 of the Exempted Development Regulations set out in Schedule 2, Part 1 of the 2001 Planning Regulations. I also consider however that the restrictions on exemption set out under Article 9(1)(a)(viiC) would apply as the works undertaken comprise of development for which an appropriate assessment is required on the basis that likely significant effects on the integrity of a European site cannot be ruled out on some of the qualifying interests included in the the West of Ardara/Mass Road SAC (Site Code 000197) which is located contiguous to Area B. I therefore consider that the

works undertaken at Area B constitute development which is not exempted development and I recommend that the Board issue an order as follows:

WHEREAS a question has arisen as to whether or not ground excavation and the cultivation, harvesting and transplanting of Marram Grass constitutes development and where it constitutes development whether or not such development is or is not exempted development.

AND WHEREAS the question was referred to Donegal County Council by Tony Kitterick and Others on 10th October, 2019 to Donegal County Council.

AND WHEREAS Donegal County Council in its declaration on 6th day of December, 2019 declared that the works constituted development which is exempted development.

AND WHEREAS on the 9th day of January, 2020 the question was referred to the Board and where the Board in considering this referral had particular regard to

- (a) The nature of the activities undertaken
- (b) Section 2 of the Planning and Development Act, 2000
- (c) Article 6 of the Planning and Development Regulations, 2001 and in particular
- (d) Class 34 of Schedule 2, Part 1 of the Exempted Development Regulations
- (e) And the Restrictions on the Exempted Development Regulations and in particular the restrictions under Article 9(1)(a)(i), (iii), (vi), (vii), (viiB), (viiC), (viii) and (xi).

AND WHEREAS the Board concluded that:

In relation to Area A the removal of soil in a fairway to form a natural sand bunker constituted works in accordance with the definition set out in Section 2 of the Planning and Development Act and therefore constituted development as set out in Section 3 of the Planning and Development Act. Furthermore the Board considered that the development was exempted development on the basis what it fell within the

provisions of Class 34 of the Part 1 of Schedule 2 of the Planning and Development Regulations being works incidental to the maintenance and management of any golf course and the Board considered that none of the restrictions set out in Article 9 would apply.

The activities undertaken at Area B constituted works in accordance with the definition set out in Section 2 of the Planning and Development Act and therefore constituted development as set out in Section 3 of the Planning and Development Act and that the works in question fell within Class 34 of Schedule 2, Part 1 of the Planning and Development Regulations, 2001 (as amended) as they related to works incidental to the maintenance and management of the golf course. The Board also decided that the works constituted development which would require an appropriate assessment on the basis that likely significant effects on the integrity of a European site could not be ruled out.

NOW THEREFORE An Bord Pleanála in exercise of the power conferred on it by Section 5(4) of the 2000 Act, hereby decides that the works undertaken constitutes development that is not exempted development.

Paul Caprani,
Senior Planning Inspector

June 8th , 2020.