



An  
Bord  
Pleanála

## Inspector's Report ABP309862-21

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<b>Development</b>	Construction of a bin storage enclosure and associated site works.
<b>Location</b>	Off Main Street, Dunfanaghy, County Donegal.
<b>Planning Authority</b>	Donegal County Council.
<b>Planning Authority Reg. Ref.</b>	21/50021.
<b>Applicant</b>	Brendan Devine.
<b>Type of Application</b>	Permission.
<b>Planning Authority Decision</b>	Grant.
<b>Type of Appeal</b>	Third Party -v- Grant.
<b>Appellant</b>	Bryan Orr.
<b>Observers</b>	None.
<b>Date of Site Inspection</b>	23 <sup>rd</sup> June, 2021.
<b>Inspector</b>	Paul Caprani.

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## 1.0 Introduction

ABP309862-21 relates to a third-party appeal against the decision of Donegal County Council to issue notification to grant planning permission for the construction of a bin storage enclosure off Main Street, Dunfanaghy, County Donegal. The main thrust of the third-party appellant's appeal is that the site in question was the subject of unauthorised works in the past and as the subject site is located within a designated Natura 2000 site the applicant is precluded from applying for planning permission without first gaining approval to apply for a substitute consent application.

## 2.0 Site Location and Description

- 2.1. The appeal site occupies an area of open space amounting to 21.76 square metres. The rectangular area is 7.1 metres in length and 3.5 metres in width. It is located in an area of open space/car parking to the rear of buildings fronting onto Main Street, Dunfanaghy and is located to the immediate north-west of Market Square - the main square within the village. The village of Dunfanaghy is located on the N56 National Secondary Route along the northern coast of Donegal.
- 2.2. Dunfanaghy is a popular tourist destination and there are many restaurants, cafes and bars situated along its main street. Many of these restaurants and bars incorporate ancillary storage and servicing areas to the rear of the premises.
- 2.3. The area of open space on which the subject site is located includes a number of wooden benches for outdoor eating. There are also a number of bin storage areas within and adjacent to the area of open space. A laneway running north-westwards from Market Square runs along the rear of the proposed bin enclosure. It serves a dwellinghouse further to the north-west and also serves as a rear access to a number of the commercial premises fronting onto Main Street. An area of shoreline is located approximately 30 metres to the east of the subject site. The shoreline forms part of the inner bay area of Dunfanaghy. This inner bay area together with the area of green space in which the subject site is located form part of the Horn Head and Rinclevan SAC (Site Code: 000147) Special Area of Conservation.

### **3.0 Proposed Development**

- 3.1. Planning permission is sought for a 21.76 square metre bin enclosure rising to a height of 1.8 metres incorporating panelised timber sheeting. The enclosure is to accommodate six large 1.2 metre square bins and is to incorporate an inward swinging gate. The enclosure is to be mounted upon a 150 millimetre concrete base and is to back onto a low stone wall which runs along the south-western and western edge of the open space area.

### **4.0 Planning Authority's Decision**

Donegal County Council issued notification to grant planning permission subject to a single condition stating that the development shall be carried out strictly in accordance with the lodged plans and details submitted with the application.

#### **4.1. Planning Authority's Assessment**

- 4.1.1. The application was lodged with the Planning Authority on the 12<sup>th</sup> January, 2021.
- 4.1.2. A third party submission from the current appellant was submitted by Joe Bonner, Town Planning Consultant.
- 4.1.3. A screening for appropriate assessment was undertaken which concluded that:
- The development is located on previously fill ground within the above mentioned Natura 2000 site and that the development will not result in any direct loss or fragmentation of habitat with the above mentioned Natura 2000 site.
  - Furthermore, the limited nature and scale of the development together with the fact that no species or habitats for which the Natura 2000 site has been designated are located within or in close vicinity of the site.
  - Having regard to the extent of the development within the town of Dunfanaghy in which the development is located and the fact that the development does not require effluent treatment the Planning Authority is of the opinion that the proposed development will not have a significant effect on the Natura 2000

site in question and as such, an appropriate assessment of the development is not required.

- 4.1.4. The planner's report notes details of the site location and description and the issues raised in the third-party submissions. The Planning Authority consider that planning permission exists for the filled area on which the development is located and it is not considered that the development is contingent upon any unauthorised filling or otherwise. Whether or not the applicant has the legal entitlement to carry out development on site is a civil matter and not a material planning consideration. Reference is made to the screening report which concludes that AA of the proposed development is not required in this instance.
- 4.1.5. It is considered that the proposed development lies within the urban fabric of Dunfanaghy Village and that the site is located outside of removed from any sensitive designations. Furthermore, it is considered that the nature and scale of the development is modest and would not injure the amenities of the area, would not be prejudicial to public health and would not endanger public safety by reason of a traffic hazard. On the basis of the above, Donegal County Council issued notification to grant planning permission subject to a single condition.

## **5.0 Planning History**

- 5.1. No history files are attached. Section 7 of the planner's report details the relevant planning history relating to the site.
- 5.2. Under Reg. Ref. 98/2193 permission was granted for the retention and completion of filling and the erection of a sea wall, tea-room, car parking and gardening area.
- 5.3. Under Reg. Ref. 98/2603 permission was granted for the erection of a retail development including basement and six apartments.
- 5.4. Under Reg. Ref. 04/2021 planning permission was refused by An Bord Pleanála on appeal for the retention and completion of filling and also the erection of a sea wall, tea room with vehicular entrance and car parking and garden area. The local authority planner's report notes that this appears to be a repeat application of 98/2193.

- 5.5. Under Reg. Ref. 06/31544 permission was granted for site development works to create a field. It is stated that an appeal to An Bord Pleanála was withdrawn.
- 5.6. Under Reg. Ref. 14/51191 Donegal County Council refused retention of planning permission for:
- A concrete wall with associated glazed panelling on top of same and concrete area associated with the provision of tables and benches.
  - Earth embanking.
  - Hardcore car parking area.
  - Walled enclosure containing bin storage and associated work.
- 5.7. Under Reg. Ref. 18/50553. Under this application an extension of the appropriate period was granted for five years for the permission granted under Reg. Ref. 13/50288 above.

## **6.0 Grounds of Appeal**

- 6.1. The decision was appealed on behalf of the applicant by Joe Bonner, Planning Consultant. The grounds of appeal are outlined below.
- Since the original submission to the Planning Authority was made in respect of the current application and appeal, new planning history associated with the site has come to light and this is referred to in the grounds of appeal.
  - It is stated that a number of questions on the planning application form in relation to land ownership, the location of the development within a Natura 2000 site and the planning history associated with the site have been incorrectly answered.
  - It is stated that the lands in question were/are under the ownership of the Department of Marine and not the applicant. This issue should have been the subject of a further information request by Donegal County Council and it is not apparent that the applicant has any authority to make the planning application or carry out the development.
  - Reference is made to the planning history of the site and in particular Reg. Ref. 04/2021. It is argued that the retention aspect of this application confirms

that unauthorised works took place on site. It is noted that during the previous application under 04/2021 that there were foreshore issues in respect of the development proposed. The planning inspector's report under Reg. Ref. PL05B.208556 notes that the site has been the subject of dumping and fill since 1989 and that the grant of planning permission by the Planning Authority fails to properly address the unauthorised development on site. The inspector's report concludes that the infill and the construction of the sea wall would be likely to have a significant effect on the candidate SAC and this aspect of the proposed development was not properly assessed by the Planning Authority. The Board upheld the inspector's recommendation and refused planning permission for two reasons on the basis of the visual impact of this development on a sensitive location and that the proposal could have an adverse impact on the integrity of the candidate SAC. Hence it is argued that there is no valid permission on the site and enforcement proceedings should have been undertaken by the Planning Authority.

- A subsequent application under Reg. Ref. 06/31544 for site development works to create a field was granted planning permission by Donegal County Council. A third party submission in respect of this application noted that unauthorised infilling of the development had taken place prior to the application on site but this was not referenced in the planner's report.
- Having regard to the planning history of the site and the unauthorised nature of works carried out on site and where an appropriate assessment was required, the applicant is in fact required to apply for substitute consent under the provisions of Section 177B of the Act. The grant of planning permission in 2006 is considered to be flawed as it failed to adequately address the previous unauthorised development which has taken place on site.
- As the applicant has not fully complied with all conditions associated with this grant of planning permission it is argued that it is still open to the Planning Authority to issue a warning letter under the provisions of Section 157(4)(b) of the Act in relation to the use of land.

- Reference is made to other precedent decisions where Donegal County Council determined that a substitute consent application was required for development for which AA or EIA is required.

## **7.0 Appeal Responses**

### **7.1. Planning Authority's Response to the Grounds of Appeal**

- 7.1.1. A response by Donegal County Council notes that the appeal submission goes through a lengthy planning history on site and selects segments from the planner's report in respect of previous history on the subject site outlining why permission should not be granted.
- 7.1.2. It is the contention of the Planning Authority that planning permission exists for the filled area on which the proposed development is located, and this permission was granted under Reg. Ref. 06/31544. The development therefore is not contingent upon on any unauthorised filling or otherwise.
- 7.1.3. The issue of ownership is a civil matter between the applicant and the Department of Marine.
- 7.1.4. The proposed development was the subject of a screening report which concludes that appropriate assessment of the proposed development is not required as it can be excluded on the basis of objective scientific information that the proposed development will not have a significant effect on the Horn Head and Rinclevan Special Area of Conservation.

### **7.2. Applicant's Response to the Grounds of Appeal**

- 7.2.1. It is stated that the appellant owns a holiday home in the area and resides primarily outside Belfast, County Antrim. In relation to ownership, it is stated that the applicant's father is the custodial owner through a lease/licence for a period of 35 years. The applicant's father has given permission for his son to seek planning permission for a bin storage area. The applicant is aware of two valid planning permissions which have been granted on the subject site under Reg. Ref. 06/31544 and 13/50288.



- 7.2.2. The whole basis of the grounds of appeal appears to be predicated on an attempt to get planning permission for a field which was granted in 2006 overturned. The appellant had an opportunity to object to the previous application but did not do so.
- 7.2.3. It is stated that the planning history has no part to play in the current application before the Board other than to note that there is a valid planning permission for a field and car parking on the subject site.
- 7.2.4. The bin storage area will not detract from the character and integrity of the area and will result in no additional traffic not will it injure the visual amenities of the area. The proposal will solve the problem of bins along the right of way along the private laneway to the rear of Main Street.
- 7.2.5. In a previous application the applicant's father submitted an environmental impact assessment in relation to the overall site and Donegal County Council would have taken this into consideration in granting planning permission for the previous application.
- 7.2.6. As far as the applicant is aware, the overall site was filled in before it became an SAC.
- 7.2.7. It is argued that the appeal is vexatious and that the appellant will continue to object to any development on the land to the front of his dwellinghouse.

### 7.3. **Natural Heritage Designations**

- 7.3.1. The site is located within the confines of the Horn Head and Rinclevan SAC (Site Code: 000147).
- 7.3.2. The conservation objective for this site is to maintain and restore the favourable conservation condition of Annex I habitats and/or Annex II species for which the SAC has been selected and these include:
- *Embryonic shifting dunes.*
  - *Shifting dunes along the shoreline with ammophila arenaria.*
  - *Fixed coastal dunes with herbaceous vegetation (grey dunes).*
  - *Dunes with salix repens ssp. argentea.*
  - *Humid dune slacks.*

- *Machairs (priority habitat).*
- *Oligotrophic to mesotrophic standing waters with vegetation of littorelletea uniflorae and/or isoeto-nanojuncetea.*
- *Geyer's whorl snail.*
- *Grey seal.*
- *Petalwort.*
- *Slender naiad.*

#### 7.4. EIAR Assessment

7.4.1. The development is not a class of development for which EIAR is required.

### 8.0 Planning Assessment

I have read the entire contents of the file, visited the subject site and its surroundings and have had particular regard to the issues raised in the grounds of appeal including the planning history pertaining to the site and I consider that the relevant and germane issues in determining the application are as follows:

- Principle of Development
- Planning History and Unauthorised Works
- Ownership of the Subject Site
- Appropriate Assessment and Substitute Consent Issues

#### 8.1. Principle of Development

8.1.1. The subject site is located in an informal area of open space which is used for outdoor seating, surface car parking and some bin storage. The green area in question could provide an appropriate amenity area for outdoor eating overlooking Dunfanaghy Bay. It could provide an appropriate outdoor communal area adjacent to Market Square which is a pleasant urban space within the centre of the settlement and also accommodates outdoor farmers' markets and commercial stalls from time to time. The area can also serve as a communal eating area for the various cafes and restaurants located to the immediate south facing onto Main Street and onto Market Square. Having inspected the site I noted that there is a proliferation of bins

associated with the commercial enterprises to the rear of Main Street and that a designated communal bin storage area such as that proposed would improve the visual and environmental amenities of the area of open space. The bin storage facility is appropriately cladded and is discreetly located to the rear of the green area and as such in my opinion will be acceptable in principle.

## **8.2. Planning History and Unauthorised Works**

- 8.2.1. The grounds of appeal place major emphasis on the planning history associated with the site and contend that works were carried out on the subject site which were unauthorised. It is stated that this conclusion was accepted by the Board in its decision under Reg. Ref. PL05B.208556. I note the contents of the inspector's report in relation to the same which concludes that unauthorised development had taken place on site. It also noted that to a large extent, the issue of unauthorised development lies outside the scope of the appeal in question and depends upon the operation of enforcement procedures by the Planning Authority. While the issue of unauthorised development may have been a relevant consideration in respect of PL05B.208556. I note that a subsequent application was lodged on the subject site under Reg. Ref. 06/31544. This application sought planning permission for site development works to form a field. The subject site formed part of the southern portion of the field which was granted planning permission under Reg. Ref. 06/31544. While third party submissions may have been made objecting to the proposed site development works to create a field, Donegal County Council granted planning permission for the said works and this in my view bestowed an authorisation of the works to be carried out in order to return the area of which the site forms part of, into a field that currently exists today. Objecting to a development where a valid permission has been granted in no way challenges the validity of the grant. I would therefore agree with the Planning Authority that there is a valid planning permission pertaining to the site to carry out site development works in order to create a field and as such I do not consider that the works in question relate to lands where unauthorised works have taken place. I am in agreement with Donegal County Council that planning permission exists for the filled area which was granted under planning Ref. 06/31544.

### **8.3. Ownership of the Subject Site**

8.3.1. The grounds of appeal contend that the lands in question belong to the Department of Marine and not the current applicant. The applicant in response states that the lands in question have been leased to the applicant's father for a period of 35 years. It is further stated that the applicant has been given permission from his father to seek planning permission for a bin storage area. Issues in relation to the ownership of the lands in question are a legal matter between the parties concerned. No substantial evidence has been furnished in the documentation on file as to the bona fides of either party in respect on land ownership. Should the Board consider it appropriate, it could invite each of the parties to furnish further information to substantiate their claims. However, I consider that the appeal can be determined in the absence of such information. Donegal County Council are clearly satisfied that sufficient legal interest exists for the applicant to make a planning application on the subject lands. In addition, I note the Development Management Guidelines which clearly state in Section 5.13 that the planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land. These are ultimately matters for resolution in the Courts. The guidelines also note as per Section 34(13) of the Planning Acts that a person shall not be entitled solely by reason of a permission to carry out any development. On the basis of the above I do not consider that the Board is precluded from granting planning permission for the proposed development in the absence of definitive evidence regarding land ownership.

### **8.4. Appropriate Assessment and Substitute Consent Issues**

8.4.1. The grounds of appeal rely on the provisions of Section 177B of the Planning and Development Act in that an application for substitute consent is required. This is predicated on the premise that the applicant is required to apply for retention of planning permission for a development for which a remedial Natura Impact Statement is required. This in turn is predicated on the assumption that a remedial Natura Impact Statement is required on the basis that the subject site is located within the confines of a Natura 2000 site and this automatically triggers the need for a Stage 2 Appropriate Assessment to be carried out. Donegal County Council have screened the application for the purposes of appropriate assessment and have correctly concluded in my opinion that a Stage 2 Appropriate Assessment is neither

warranted or justified in this instance. It is fully acknowledged that the proposed development is located within the confines of a Natura 2000 site and the qualifying interests associated with a Natura 2000 site are referred to above and are again set out below.

- *Embryonic shifting dunes.*
- *Shifting dunes along the shoreline with *ammophila arenaria*.*
- *Fixed coastal dunes with herbaceous vegetation (grey dunes).*
- *Dunes with *salix repens ssp. argentea*.*
- *Humid dune slacks.*
- *Machairs (priority habitat).*
- *Oligotrophic to mesotrophic standing waters with vegetation of *littorelletea uniflorae* and/or *isoeto-nanojuncetea*.*
- *Geyer's whorl snail.*
- *Grey seal.*
- *Petalwort.*
- *Slender naiad.*

8.4.2. The grounds of appeal have failed to identify how the proposed development will impact on the qualifying interests associated with the Natura 2000 site. It is proposed to assess the potential adverse impacts which could arise on the various qualifying interests associated with the SAC in question below. In assessing the potential impact arising from the proposal, I have had particular regard to the specific conservation objectives for the Horn Head and Rinclevan SAC contained on the NPWS website.

8.4.3. In relation to habitats that could potentially be affected, there are no *embryonic shifting dunes* [2110] in the vicinity of the site. The nearest such dunes are located at their closest point approximately 880 metres to the north-east of the subject site.

8.4.4. With regard to *shifting dunes along the shoreline with *ammophila arenaria* (white dunes)* [2120], the nearest habitats containing these qualifying features are located

over a kilometre away to the north-east of the site and c.3.5 kilometres away on the western side of Dunfanaghy Head.

- 8.4.5. With regard to *fixed coastal dunes with herbaceous vegetation (grey dunes)* [2130] at its closest point this habitat is located just less than 1 kilometre to the west of the subject site.
- 8.4.6. With regard to *dunes with salix repens ssp. argentea* [2170] the closest point this habitat is to the subject site is c.2 kilometres to the west.
- 8.4.7. With regard to *humid dune slacks* [2190] these habitats are located c.1.9 kilometres to the north-east of the site and 2.4 kilometres to the west of the site.
- 8.4.8. With regard to *machairs* [2180] which are priority habitats the nearest machair habitats to the subject site are 2.86 kilometres to the north-west of the subject site.
- 8.4.9. It is reasonable and appropriate to conclude that, having regard to the separation distances between the proposal and the qualifying habitats in question, that the proposal will in no way affect the habitats referred to.
- 8.4.10. With regard to species associated with the SAC the *geyer's whorl snail* are located in three separate square kilometre quadrants to the north-west of the subject site the closest of which is located 1.25 kilometres to the north-west of the subject site.
- 8.4.11. Only one location has been identified within the SAC for the *petalwort* [1395] and this site is located over 4 kilometres away to the south-west.
- 8.4.12. With regard to the *grey seal* [1364], the grey seal habitats include Dunfanaghy Bay and the shoreline area to the immediate east of the site. All breeding resting sites associated with the grey seal are located on the northern side of the Dunfanaghy Head Peninsula in excess of 3.4 kilometres to the north of the subject site.
- 8.4.13. While at its closest point the proposed bin storage area is located c.25 to 30 metres from the Dunfanaghy shoreline, it is not considered, having regard to the modest nature of the works to be undertaken in developing the bin storage area, that the proposed development represents any threat to the habitat of the grey seal either during the construction phase or operational phase.
- 8.4.14. Finally, in relation to the *slender naiad* the nearest slender naiad habitat is located in excess of 2.5 kilometres to the south of the subject site.

- 8.4.15. Arising from my assessment above therefore and having particular regard to the distribution of the habitats and species associated with the SAC in the context of the site in question and the minor nature of the works to be undertaken in developing the proposed bin storage area, I would reject the appellant's assertion that a Stage 2 Appropriate Assessment or that a remedial Natura Impact Statement is required in this instance.
- 8.4.16. In conclusion therefore the proposed development was considered in light of the requirements of Section 177U of the Planning and Development Act 2000, as amended. Having carried out screening for appropriate assessment, it has been concluded that the proposed development individually or in combination with other plans or projects would not be likely to have a significant effect on European Site No. [000147] or any other European Site in view of the site's conservation objectives and an Appropriate Assessment and the submission of an NIS or as suggested in the grounds of appeal, a remedial NIS associated with a substitute consent application is therefore not required.
- 8.4.17. This determination is based on the minor nature of development works associated with the bin storage facility and the fact that the works are located a considerable distance, in most cases over a kilometre from the qualifying interests associated with the SAC. The only exception to this being the habitat of the grey seal. However, it is considered that the proposed bin storage enclosure would be located a sufficient distance from the nearest part of the habitat associated with the grey seal and as such there is no potential for the proposed development to potentially adversely impact on this qualifying interest. In making this screening determination no account has been taken of any measures intended to avoid or reduce potentially harmful effects on the project on a European site.

## 9.0 Conclusions and Recommendation

Arising from my assessment above it is my considered opinion that notwithstanding the conclusions reached in the grounds of appeal that the Board cannot grant planning permission for this development, I consider that the development is acceptable in principle and the lands in which the development is located has the benefit of a valid planning permission and as such is not unauthorised and I also

consider that the proposed development notwithstanding the fact that it is located within the boundary of an SAC will have no adverse impact on the qualifying interests associated with that SAC. On this basis I consider that the Board should uphold the decision of the planning authority and grant planning permission for the proposed development.

## 10.0 Decision

Grant planning permission for the proposed development based on the reasons and considerations set out below.

## 11.0 Reasons and Considerations

It is considered that the proposed development is acceptable in principle on the subject site, and subject to conditions set out below will not seriously injure the amenities of the area or of property in the vicinity, will not be prejudicial to public health, will be acceptable in terms of traffic safety and convenience and notwithstanding its location within the boundary of a designated European site will not adversely impact on the integrity of the qualifying interests associated with this European site namely the Horn Head and Rinclevan SAC (Site Code: 000147). The proposed development would therefore be in accordance with the proper planning and sustainable development of the area.

## 12.0 Conditions

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to the commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

**Reason:** In the interest of clarity.



2. Details of the external finishes of the proposed bin storage area shall be agreed in writing with the planning authority prior to the commencement of development.

**Reason:** In the interest of visual amenity.

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Paul Caprani,  
Senior Planning Inspector.

14th July, 2021.