



An
Bord
Pleanála

Inspector's Report ABP317353-23

Development

Ground floor level extension (72.2sqm) within the undercroft area to the rear (east) of the permitted and part constructed dwelling (beneath the permitted master bedroom and upper level external terrace), the provision of an extension to the entrance/lobby area to the front (west) elevation (6.3sqm), the omission of the permitted chimney, and associated elevational changes and internal alterations and permission for (1) construction of an external terrace on the northern elevation at first floor level (25.8sqm), addition of an external staircase to provide access from ground level to the permitted rear external terrace at first floor level, and all associated development works above and below ground and (2) omission of condition no. 3 attached to DCC reg. ref. 19/51842 (relating to the modification of the site entrance) and omission of condition no. 10 (a) attached to DCC reg. ref. 19/51842 (relating to the removal of materials)

Location

Lurgabrack, Hornhead, Dunfanaghy, Co. Donegal

Planning Authority

Donegal County Council

Planning Authority Reg. Ref. 23/50406

Applicant

Aoife Hanna

Type of Application

Retention permission and permission

Planning Authority Decision

Conditional grant

Type of Appeal

Third Party

Appellant

Olive Durning

Observers

None

Date of site inspection

5th December 2023

Inspector

Trevor Rue

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1.0 Site Location and Description

- 1.1. The appeal site has a stated area of 0.256 hectares and is located in an elevated part of the countryside about 2 kilometres to the north west of Dunfanaghy. A dwelling has been substantially completed on the site. While it was vacant at the time of my site visit, there were indications that it had been occupied.
- 1.2. The site takes access from a poorly surfaced lane which runs northwards from Hornhead Road for about 300 metres. There are mature trees and a low stone wall at the site entrance, which is located on its south-western boundary.
- 1.3. The private road serves five dwellings in addition to the appeal site. There is a contemporary-style dwelling set back from the western side of the road. There is a 1½-storey dwelling and garage to the south east of the site, while to the north west there is a two-storey dwelling. Hornhead House, a derelict two-storey building, is further to the north west. The north-eastern site boundary is marked by a stone wall, beyond which there is open land.

2.0 Proposed Development

2.1. **Retention permission** is sought for:

- a residential extension at ground floor level to the rear of the dwelling;
- additional internal space to the front of the dwelling, enclosing an infill space at the entrance doorway; and
- omission of a previously proposed chimney.

2.2 **Permission** is sought for:

- an external terrace on the northern elevation at first floor level; and
- an external staircase to provide access from ground level to the previously proposed rear terrace at first floor level.

2.3 The application also seeks **permission** to carry out the development without complying with the following conditions attached to a previous grant of permission for a dwelling on the site:

3. *Prior to commencement of development the existing roadside boundary shall incorporate an entrance with a minimum width at road fence to line of gates of 9.15m minimum depth from road fence to line of gates of 2.45m and a minimum width on line of gates of 4.9m as set out in Figure 1 of Appendix 3 (Part B – development Guidelines and Technical Standards) of County Donegal Development Plan, 2018-2024.*
10. (a) *All hardcore in and around the location of the polishing filter shall be removed and the applicant shall provide evidence as to where this material is to be disposed of with details of same shall be submitted for written agreement to the Planning Authority prior to the commencement of development.*

3.0 Planning Authority Decision

3.1. Decision

On 18th May 2023, Donegal County Council decided to grant permission subject to five conditions. These included conditions relating to external finishes and visibility splays.

3.2. Planning Authority Reports

Planning Reports

3.2.1 The **planner's report** of 16th May 2023 provided the reasoning for the authority's decision. She described the site and the proposed development, summarised the responses of internal consultees and a prescribed body and the key points raised in a third party submission, set out the planning history and the policy context. Among the main issues she identified were the principle of development, siting and design, access, public health and the need for appropriate assessment.

3.2.2 The planner reached the following conclusions relevant to these matters:-

- Perceived deficiencies in previous decision making cannot be revisited. The decision to grant permission for a dwelling on the site was not appealed. The extension to a permitted development is acceptable in principle subject to compliance with all relevant requirements of the County Development Plan.
- The extensions are within the overall building envelope of the dwelling. The ground floor extension to the rear will not result in a materially greater impact on third parties than that of the permitted dwelling. The extension to the

entrance/lobby area will not have any impact on third parties. The omission of the chimney will not have a material impact on the overall dwelling design.

- The proposed external terrace would be sufficiently separated from adjoining properties so as not to have a material negative impact on their residential amenities. The proposed staircase would be minor in nature and would not impact on third parties to a greater degree than the dwelling does. Perceived damage to third party property is a civil matter.
- The private road has a particular rural character and serves a limited number of dwellings. The omission of Condition 3 would not impact on the access to the public road. Its replacement with one that requires that the access incorporates sufficient drainage is acceptable.
- The proposed development would not have any material impact on approved public health arrangements. The removal of Condition 10(a) and the use of the hardcore in connection with general site works associated with the development are appropriate.
- The proposed extension on a brownfield site with no significant additional loading on to the existing wastewater system would not be likely to have any significant effect and screening for appropriate assessment (AA) is not required.

Other Technical Reports

3.2.3. The Council's **Roads Service** comment was "Ok".

3.2.4. The Council's **Environmental Health Service** stated that it could not assess the application due to a lack of resources.

Prescribed Body

3.2.5. **An Taisce** commented that the application site is in a sensitive and exposed landscape area to the south of Horn Head and the proposed development would undesirably increase the impact of the existing development.

4.0 Planning History

4.1. **18/50036:** On 2nd May 2018, conditional permission was granted to Katie Byrne for erection of a two-storey house on the appeal site with attached car port, new entrance

to public road, entrance gates and piers, wastewater treatment system with percolation area and all associated site works.

- 4.2. **19/51842:** On 18th June 2020, permission was granted to the present applicant for construction of a two-storey dwelling on the appeal site with connection to on-site wastewater treatment system and associated site works, subject to 11 conditions. These included a condition relating to occupancy. It was a requirement that an independently certified wastewater treatment system suitable for a population equivalent of six persons be installed, operated and maintained in strict accordance with the supplier's instructions.
- 4.3. **UD2224:** Following a complaint from the appellant, the Council issued a warning letter on 16th August 2022 in respect of unauthorised development at the appeal site. An enforcement notice was issued in the week of 10th October 2022.

5.0 Policy and Context

5.1. Development Plan

5.1.1. Map 6.2.1 of the County Donegal Development Plan 2018-2024 indicates that the appeal site is in a Stronger Rural Area. Policy RH-P-3 applies in such areas. It requires applicants for planning permission for dwellings to demonstrate that they comply with one or more of the following:

- their primary employment is in a rural-based activity with a demonstrated genuine need to live in the locality of that employment base, for example, those working in agriculture, forestry, horticulture;
- they have a vital link to the rural area by reason of having lived in this community for a substantial period of their lives (seven years minimum), or by the existence in the rural area of long established ties (seven years minimum) with immediate family members, or by reason of providing care to a person who is an existing resident (seven years minimum);
- that, for exceptional health circumstances, they can demonstrate a genuine need to reside in a particular rural location.

5.1.2. Map 7.1.1 of the Plan indicates that the site is in an Area of Especially High Scenic Amenity, defined as sublime natural landscapes of the highest quality that are

synonymous with the identity of County Donegal. It says these areas have extremely limited capacity to assimilate additional development and accordingly development proposals must be formulated to ensure adequate integration into the receiving landscape. Policy NH-P-6 states that within Areas of Especially High Scenic Amenity, only developments assessed to be of strategic importance or developments that are provided for by policy elsewhere in the Plan shall be considered.

5.1.3. Policy RH-P-9 seeks the highest standards of siting and architectural design for all new dwellings constructed within rural areas and states that the Council will require that all new rural dwellings are designed in accordance with the principles set out in Appendix 4 of the County Development Plan, entitled 'Building a House in Rural Donegal – A Location, Siting and Design Guide'.

5.1.4. Among the design principles set out in Appendix 4 to the Plan are the following:

- The traditional ratio of solid to void should inform the treatment of the elevation.
- Windows should be given a vertical emphasis and complement the window to wall ratio accordingly.
- The treatment of the roof edges should be carefully considered and relate directly to the rural detailing of the area.
- Historically a 35 to 45 degree roof pitch provides maximum wind and rain resistance and is of particular rural reference.
- The use of local materials adds to local distinctiveness, responding to the setting within which the building sits and reinforcing a sense of place.
- New buildings in the countryside should respect the rural context, and contemporary design solutions should demonstrate an informed use of traditional reference.

5.1.5. Table 4 in Appendix 3 to the Plan sets out standard vision lines at accesses to non-national public rural roads outside 60 kilometre per hour speed limit zones.

5.2. Natural Heritage Designations

5.2.1. The appeal site is not subject to any natural heritage designation but is about 350 metres from the Horn Head and Rinclevan Special Area of Conservation (SAC) and a similar distance from the Horn Head to Fanad Head Special Protection Area (SPA).

5.2.2. The Horn Head and Rinclevan SAC, which includes Dunfanaghy Bay is designated primarily for its dune habitats. The Horn Head to Fanad Head SPA comprises several stretches of coastline but does not include Dunfanaghy Bay. It is designated for 10 bird species and for holding an assemblage of over 20,000 breeding seabirds.

5.2.3. On 12th July 2023, the Board wrote to the Department for Culture, Heritage and the Gaeltacht and the Heritage Council stating that it was of the opinion that the proposed development might have significant effects in relation to Horn Head and Rinclevan SAC and that it was appropriate in the interests of justice to request them to make submissions or observations to it. No such submissions or observations were made by the date specified in the letters, 8th August 2023.

5.3. EIA Screening

5.3.1 The proposed development is not one to which Schedule 5 of the Planning and Development Regulations, 2001, as amended, applies and therefore, the requirement for submission of an environmental impact assessment report and carrying out of an environmental impact assessment may be set aside at a preliminary stage.

6.0 The Appeal

6.1. Grounds of Appeal

- There were serious flaws in the Council's decision on the previous planning application 19/51842. The applicant had to satisfy the planning authority that she had a *bona fide* reason for choosing this particular site in Horn Head so as to comply with the provisions of the County Development Plan and in particular Policy RH-P-3. On the facts presented, she was not entitled to benefit under the policy and should have been refused permission.
- The appellant is a member of a long-established family from Horn Head. The subject site immediately abuts extensive lands owned by her and her brother. Her concerns arose when work on the house resulted in damage to, and undermining of, the boundary stone wall. It appeared to her that a proposed balcony, alien in any Donegal landscape and not least in Horn Head, would result in gross overlooking of her property and would blight and devalue it. When she complained to the planning authority, it quite rightly required work to

cease and the matter to be regularised. Although an enforcement notice was issued in October 2022, work continued unabated.

- In treating the current application as if it were for an extension to a house, the Council erred in law. It might be argued that it is an invalid application. As the house for which planning permission had been obtained in 2020 is not built in accordance with the approved plans, the entire edifice is unauthorised. In *Donegal County Council v John W McNulty*, it was held that an unauthorised porch to the front of a public house which was more than 100 years old rendered the entire building unauthorised. The application ought to have been made for completion and retention of a house, in which case the entire design (including balconies, excessive glazing and flat roof) could have been revisited.
- The proposed extensions appear to have all the hallmarks of living accommodation which could be advertised on Airbnb. In dealing with the current application, the Council did not take account of the applicant's past misbehaviour and impose an occupancy condition tying the use of the extensions to that of the entire house.
- The plans approved in 2020 showed the master bedroom set back from the boundary wall by about 1.3 metres but in the current application the balcony and therefore the underbuilding are shown right beside the boundary wall. The proposed steps leading to the balcony would also be flush with the wall, leaving zero space between. In a decision which worsens the loss of the appellant's privacy and represents an intolerable intrusion into her private space, the Council has also permitted the provision of substantial outdoor lighting all along the upper floor of the eastern elevation. This would render her property useless for her own plans for development.
- The Planning and Development Regulations 2001 exempt development within the curtilage of a house from the requirement for planning permission, provided it complies with specified conditions and limitations. Any extension above ground floor level shall be at least than 2 metres from any party boundary. Where the house is detached and the floor area of the extension above ground level exceeds 12 square metres, any window proposed at above ground level shall be at least 11 metres from the boundary it faces. The roof of any extension

shall not be used as a balcony or roof garden. The Regulations provide guidance to planning authorities when deciding on applications for new builds and the necessity to prevent the blighting of adjacent properties.

- A stream runs through the site and provides a potential hydrological channel for effluent and surface water discharge which could negatively impact on the Natura 2000 sites which straddle Horn Head. A Natura impact statement (NIS) ought to have been submitted with the original application 19/51842 but it is never too late to protect the environment. The Board should refuse the current application on the ground that in the absence of contrary information the development is likely to have a negative impact on the Natura 2000 sites.
- Should the Board grant permission, it is urged to impose conditions requiring (i) omission of outdoor lighting on the eastern boundary; (ii) the building of a wall rendered on all sides to sufficient height on top of the balcony on the eastern side; (iii) provision of obscure glazing in all places or its omission entirely; and (iv) omission of the steps proposed to be built into the party wall.

6.2. Applicant Response

- The applicant demonstrated her housing need to live in the area in her application 19/51842. This has no relevance to the assessment of the current application, which relates to modifications to a permitted and substantially constructed dwelling.
- It is not the applicant's intention to advertise the dwelling on Airbnb. The occupancy condition attached to the parent permission restricts its use to persons with a rural housing need. A report to the Council's Enforcement Section would be the appropriate course of action should unauthorised development take place.
- The 2020 permission approved extensive glazing along the eastern elevation. The large master bedroom window has already been accepted by the Council and the balcony space at first floor level will not materially add to the impact on the appellant's neighbouring agricultural field.

- When considering Application 19/51842, the Council determined that an AA was not required. No NIS or AA is required in respect of the current proposal, which merely modifies the permitted scheme.

6.3. Planning Authority Response

The Council wishes to rely on the planner's report and has no further comment.

7.0 Assessment

7.1. Issues

7.1.1. Having inspected the site and considered in detail the documentation on file for this Third Party appeal, it seems to me that the main planning issues are:-

- the validity of the application;
- the acceptability in principle of the proposed development at this location;
- the proposed design;
- the impact on the appellant's property;
- the impact on road safety;
- the impact on public health; and
- whether an AA is required pursuant to the European Union Habitats Directive (92/43/EEC).

7.2. Validity of the Application

7.2.1. From the limited information provided, the *McNulty* case law seems to relate to a building whose construction preceded the introduction of planning control in 1963. It is therefore not directly comparable to the circumstances of the present appeal. I am not persuaded that where planning permission has been granted and remains live, any development carried out in accordance with that permission can be rendered unlawful if some unauthorised works also take place on the site.

7.2.2. The Planning and Development Act 2000 makes provision for planning applications to be made for the retention of unauthorised development. The Planning and Development Regulations 2001 require the published notice of the application to provide a brief description of the nature and extent of the development. It is perfectly

clear from the description of development provided by the applicant that in this instance permission is sought to retain some works that were carried out without authorisation and to carry out some additional new works. I do not accept that the application is invalid.

7.2.3. The planning permission (referenced 19/51842) granted by the Council in 2020 has not been revoked. Should the Board decide to allow the appeal and refuse the present application, the applicant would be entitled to implement the approved development in full by 18th June 2025. The 2020 permission could therefore be described as a fall-back opportunity. The present appeal does not provide a means by which development rights conferred by that permission can be taken away.

7.3. Acceptability in Principle

7.3.1. Rightly or wrongly, the Council determined in 2020 that the appellant qualified for permission under Policy RH-P-3 of the County Development Plan. The extant permission authorises her to build a dwelling on the application site. This is not a matter than can be reviewed in the context of the present appeal.

7.3.2. The approved dwelling is subject to an occupancy condition which excluded the use of the dwelling as a holiday home. The current proposal would add a significant amount of floor space, including a fifth bedroom with *en suite* facilities, a utility room and a sizeable boot room. In my opinion, if the Board decides to approve the application it would be prudent for the avoidance of doubt to apply a similarly worded occupancy condition to the entire structure.

7.4. Design

7.4.1. The dwelling which has been constructed largely ignores the design principles set out in Appendix 4 to the Plan. The architectural composition incorporating large picture windows, balcony and a flat roof, is certainly not in keeping with traditional buildings in rural Donegal. However, the proposed changes are consistent with the character and appearance of the building as approved in 2020.

7.4.2. In my judgement, the additional internal space at the entrance doorway acceptably rationalises the boxy look of the front façade. The additional residential accommodation at ground floor level to the rear of the dwelling is not visually offensive and the omission of the previously approved chimney does not detract from the overall appearance of the building. The creation of an external terrace on the northern

elevation at first floor level, bordered by a frameless glass balustrade, would not unduly disturb the composition.

7.4.3. A rather crude blockwork wall (not clearly depicted on the submitted drawings) has been erected alongside the stone wall at the eastern site boundary. The proposed external concrete staircase would be built immediately beside the new wall to provide access to the rear terrace at first floor level. The staircase would not be particularly conspicuous from within the appeal site. I find that none of the elements presented in the current planning application is objectionable on design grounds.

7.5. Impact on Appellant's Property

7.5.1. The Planning and Development Regulations 2001 exempt certain categories of development from the requirement for planning permission. Provided certain conditions and limitations are met, such developments are automatically acceptable. Developments in the same categories which do not fulfil those conditions and limitations are not necessarily unacceptable but require detailed assessment. The Regulations should not be interpreted as guidance on how planning applications should be assessed or on how to avoid the blighting of neighbouring properties.

7.5.2. A map submitted on behalf of the appellant indicates that she owns 19.3 acres (7.8 hectares) of land to the north east, east and south east of the appeal site. It may be inferred that her brother owns a further 21.5 acres (8.7 hectares) to the west. No information has been provided about the appellant's own plans for development and there does not appear to be a current planning application. It seems that the appellant would have a good choice of sites available to her, should she meet the relevant planning policy criteria for a new dwelling in the countryside.

7.5.3. A magnificent view is available across the appellant's lands to Dunfanaghy Bay from the first floor master bedroom and rear terrace of the appeal dwelling. If the appellant were to build a dwelling on her land immediately to the east of the appeal site, it would interrupt the view from the applicant's property but its privacy would be severely compromised by the appeal dwelling. That would be the case with or without the changes proposed in the current planning application. There would be views into the appellant's lands from the proposed external steps but those lands are already overlooked by the existing authorised development. As there is no residential property in place whose amenity would be affected by the proposed changes to the dwelling, I

am not persuaded that their impact on the appellant's property is of such significance as to warrant the withholding of planning permission.

7.5.4. The conditions attached to the extant permission do not require the omission of the extensive areas of glazing, the provision of obscure glazing or the building of a wall on top of the balcony on the eastern side. It would not be justifiable, in my view, to impose such conditions were the Board to approve the current proposals. Modest outdoor light fittings have been installed on the eastern elevation of the dwelling but I see no good reason to require their removal.

7.6. Road Safety

7.6.1. Condition 3 of the 2020 permission 19/51843 was based on standards applicable to accesses on to public roads. The private lane from which the site takes access is rough and broken up in places and does not lend itself to fast driving. Implementation of the condition would require the removal of trees and part of a stone wall and thereby adversely affect rural character. I agree with the Council planner that the existing entrance is safe and should remain unaltered in accordance with the site layout plan.

7.7 Public Health

7.7.1. It is a condition of the extant permission that an independently certified wastewater treatment system suitable for a population equivalent of **six** persons was to be installed, operated and maintained in strict accordance with the supplier's instructions and documentary evidence of a five-year maintenance contract to be forwarded to the planning authority. A copy of such a contract was duly sent to the planning authority. A letter, dated November 2022, was submitted with the current application stating that the treatment unit had been installed and commissioned and was ready for use.

7.7.2. The site layout plan provides for the excavated bedding rock and bog material to be kept on site to be used for landscaping, which I find to be a reasonable solution. I agree that there is no need for Condition 10(a) of the 2020 permission.

7.7.3. The dwelling as approved in 2020 was to have four bedrooms. The dwelling as now proposed would have five bedrooms. According to Table 3.2 of the Environmental Protection Agency's 2021 Code of Practice, the wastewater treatment system should have a design capacity for a population equivalent of **seven** persons, to ensure that adequate treatment is provided. Paragraph 3.3 of the Code states that for every additional bedroom, irrespective of size, an additional 1 population equivalent should

be added. The current application relies on the wastewater system that has been installed but provides no indication as to its existing capacity. It cannot be said with certainty therefore that the proposal poses no risk to public health.

7.7.4. Conditions of the 2020 permission (i) required a land drain to be constructed up-gradient from the percolation area and polishing filter in order to protect the area from surface water runoff; (ii) required this land drain to connect to existing storm water drains; (iii) prohibited the discharge of surface water from the site to the adjacent laneway; and (iv) required the entrance to incorporate a drainage trap and pipework.

7.7.5. The current application, like its predecessor, proposes that surface water be disposed of via a soakpit but the location of the soakpit is not noted on the site layout plan. It is not clear from the layout plan how surface water would be kept separate from waste water. It seems inevitable that some surface water, including potentially pollutant runoff, would find its way into one of the streams shown on the layout plan or into the drain shown at the western end of the site. Topography indicates that in either case, the final destination would almost certainly be Dunfanaghy Bay.

7.8. **Appropriate Assessment Screening**

7.8.1. Internal reports on the planning authority's website seem to indicate that during the processing of the previous application 19/51842, AA screening was postponed pending the receipt of further information but not returned to when that information was submitted. A NIS was not provided with that application nor with the current one. The implications of the approved and proposed developments for the SAC and the SPA have therefore not been systematically considered.

7.8.2. The Board is required to consider whether there is a likelihood (or risk) that the proposed development would have a significant effect or effects on either of the Natura 2000 sites **in combination with** other plans or projects. The dwelling as approved in 2020 is one such project. There are several other properties in the Lurgabrack area which almost certainly rely on wastewater systems, septic tanks and/or soakaways.

7.8.3. The current application must be subject to AA if a likelihood of significant in-combination effects cannot be excluded on the basis of objective information. The capacity of the wastewater treatment system may be inadequate. The precise arrangements for disposal of surface water are unclear. The pathway and destination of any potentially polluting discharges via streams or drains are unspecified. The

implications of any discharges from the Lurgabrack area into Dunfanaghy Bay have not been identified. Effects on the conservation objectives of the SAC and the SPA have not been assessed. In these circumstances, I do not consider that it is possible to screen out the requirement for the submission of a NIS or the carrying out of an AA at this stage. If the Board accepts this analysis, it seems to me that it is precluded from granting planning permission.

8.0 Recommendation

8.1. I recommend that permission be refused.

9.0 Reasons and Considerations

9.1 On the available information, it cannot be excluded that the proposed development, in combination with other plans or projects, would have a significant effect or effects on the Horn Head and Rinclevan Special Area of Conservation or on the Horn Head to Fanad Head Special Protection Area. The Board is therefore unable to ascertain, as required by Regulation 27(3) of the European Communities (Natural Habitats) Regulations, 1997 that the development would not adversely affect the integrity of a European Site. It is considered that the proposed development would be contrary to the proper planning and sustainable development of the area.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.



TREVOR A RUE

Planning Inspector

27th December 2023