



An
Coimisiún
Pleanála

Inspector's Report ABP-320627-24

Type of Application	Substitute Consent, Section 177E of the Planning and Development Act 2000, as amended
Development	Provision of fencing. The application is accompanied by a remedial Natura Impact Statement (NIS)
Location	Fenit Within, Fenit, County Kerry
Planning Authority	Kerry County Council
Applicants	Niall O'Sullivan, John Murphy, Liam McCarthy and Kit McCarthy
Prescribed Bodies	Department of Housing, Local Government and Heritage
Observers	None
Date of Site Inspection	24 th November 2025
Inspector	Gary Farrelly

1.0 Introduction

- 1.1. This is a direct application to the Commission under Section 177E of the Planning and Development Act 2000, as amended. The application is accompanied by a remedial Natura Impact Statement (rNIS). As provided for under Section 177E(1A) of the Planning and Development Act 2000, as amended, the applicants entered into discussions with the Commission which are detailed within Appendix 5 of the documentation submitted with the application.

2.0 Site Location and Description

- 2.1. The subject site comprises of linear plots of land along the coast of Fenit Island, County Kerry. Fenit Island is located approximately 13km west of the town of Tralee. The island is linked to the mainland via a tombolo and a beach road which makes it accessible by foot and also by vehicle at low tide. Most of the land on the island is in private ownership, however, there are beaches and coastal areas that are accessible to the public, in particular on the western side of the island. There are also a number of roadways that are designated public rights of way as illustrated on the Tailte Éireann Land Direct mapping tool.
- 2.2. The tombolo as well as the coastal boundary of the island form part of the Akeragh, Banna and Barrow Harbour Special Area of Conservation (SAC) and Tralee Bay Complex Special Protection Area (SPA). The island also comprises of a number of recorded monuments including Fenit Castle (Ref. KE028-001) which the National Monuments Service describes as a castle in ruins standing on a limestone rock at the northeast extremity of the island.¹

3.0 Development subject to Substitute Consent

- 3.1. Retention permission is sought for the provision of agricultural fencing along the perimeter of the applicants' lands. The fencing extends to approximately 703 metres on the northwest side of the island, approximately 647 metres on the northeast side of

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<https://heritagedata.maps.arcgis.com/apps/webappviewer/index.html?id=0c9eb9575b544081b0d296436d8f60f8> (Accessed 17/02/26)

the island and approximately 336 metres on the east side of the island. The fencing comprises of a mixture of timber posts and steel posts with wires and steel mesh fixed between. The posts have been either set in concrete or driven into ground. The height of the fencing ranges from 1 metre to 1.8 metres. The application has been accompanied by a remedial Natura Impact Statement (rNIS) as well as the following documents:

- The Commission's Order of Referral RL3219, dated 16th July 2015, where it considered the subject fencing to be development and not exempted development due to Article 9(1)(a)(x) of the Planning and Development Regulations 2001, as amended, and Section 4(4) of the Planning and Development Act 2000, as amended (i.e. required Appropriate Assessment) (*Appendix 1 of submitted documentation*).
- The Orders of the Circuit Court delivered on 3rd March 2022 to the applicants finding the fencing to be unauthorised development and ordering its removal, with a stay of 9 months on the Orders applied (*Appendix 2*).
- Letters from the planning authority to the applicants confirming that it cannot determine the retention application due to the Referral RL3219 decision of the Commission outlining that Appropriate Assessment was required (*Appendix 4*).
- Minutes of the preapplication consultation meeting with the Commission held on 13th February 2024 (*Appendix 5*).
- An affidavit from the applicants' engineer as part of the Circuit Court case (dated 12th February 2020). This includes reasoning for the erection of the fencing to protect the applicants' livestock and farming enterprise (*Appendix 7*).
- A rebuttal document prepared by the applicants' solicitor in response to the planning authority's submission on this substitute application, together with a copy of a Circuit Court Order dated 22nd February 2012 ordering previous named defendants from entering Seamus O'Sullivan and John Murphy's lands without lawful authority.

4.0 Relevant Planning History

Section 5 Referral – Planning Authority Ref. EX333 / An Coimisiún Pleanála reference RL3219 (Order signed 16/07/2015)

This related to a third-party referral in response to the decision of the PA. The Commission considered the erection of fencing around the coastline of Fenit to be development and not to be exempted development for two reasons. Firstly, it came within the scope of restrictions on exemptions under Article 9(1)(a)(x) of the Planning and Development Regulations 2001, as amended, as there was evidence on file that there was public access to parts of the coastline within the past 10 years. Secondly, it considered that as the fencing was erected within the SAC, an appropriate assessment was required and therefore it came within the restrictions on exemptions under Section 4(4) of the Planning and Development Act 2000, as amended.

Invalidated Planning Applications -PA refs. 22/558² and 22/564³

These applications sought retention permission for the subject fencing and were accompanied by Appropriate Assessment screening reports which concluded that there was no potential for significant effects on the Natura 2000 network. They were lodged on 30th May 2022, however, on 17th June 2022 the PA invalidated the applications as per Section 34(12) of the Planning and Development Act 2000, as amended. The reason for this decision was due to the conclusions of the Commission in RL3219 that AA was required.

5.0 Policy and Legal Context

5.1. Kerry County Development Plan 2022-2028

It is an objective of the Council to:

KCDP 8-27 (Archaeological Heritage) Ensure that development (including forestry, renewable energy developments and extractive industries) within the vicinity of a recorded monument, zone of archaeological potential or archaeological landscape does not detract from the setting of the feature and is sited and designed appropriately

² <https://www.eplanning.ie/KerryCC/AppFileRefDetails/22558/0>

³ <https://www.eplanning.ie/KerryCC/AppFileRefDetails/22564/0> (Accessed 17/02/26)

and sympathetically with the character of the monument/feature/ landscape and its setting.

KCDP 10-37 (Adventure Tourism) Facilitate and support community groups in the development, maintenance and enhancement of sustainable walking routes at appropriate locations throughout the County.

KCDP 10-46 (Adventure Tourism) Facilitate and support the rural recreation officer in developing walking routes at appropriate locations in North Kerry.

KCDP 11-2 (Biodiversity) Maintain the nature conservation value and integrity of Special Areas of Conservation, Special Protection Areas, Natural Heritage Areas (NHAs) and proposed Natural Heritage Areas (pNHAs). This shall include any other sites that may be designated at national level during the lifetime of the plan in co-operation with relevant state agencies.

KCDP 11-56 (Sand Dunes) Prohibit the removal of beach material, aggregates, sand and gravel, including the removal of material from sand dune ecosystems.

KCDP 11-57 (Sand Dunes) Protect the sand dunes of the County, (which include annexed habitats), and prohibit any development that would damage the integrity (ecological and visual) of these areas.

KCDP 11-76 (Landscape Sensitivity) Have regard to any future National Landscape Character Assessment, Regional Landscape Assessments and Landscape Character Map, and the publication of Section 28 Guidelines on Landscape Character Assessment.

KCDP 11-77 (Landscape Sensitivity) Protect the landscapes of the County as a major economic asset and an invaluable amenity which contributes to the quality of people's lives.

KCDP 11-78 (Landscape Sensitivity) Protect the landscapes of the County by ensuring that any new developments do not detrimentally impact on the character, integrity, distinctiveness or scenic value of their area. Any development which could unduly impact upon such landscapes will not be permitted.

Section 11.6.3.1 Visually Sensitive Areas

Visually sensitive landscape areas comprise the outstanding landscapes throughout the County which are sensitive to alteration. Rugged mountain ranges, spectacular

coastal vistas and unspoilt wilderness areas are some of the features within this designation. These areas are particularly sensitive to development. In these areas, development will only be considered subject to satisfactory integration into the landscape and compliance with the proper planning and sustainable development of the area.

Section 14.8 Public Rights of Way

Public Rights of Way were listed and mapped as part of the Kerry County Development Plan 2015-2021, and these are appended to this Plan in Volume 3. It is important to note that this is not an exhaustive list. The omission of a Right of Way from this list shall not be taken as an indication that such a right of way does not exist. In addition, the inclusion of a route in this plan does not create a public right of way. Where no Public Rights of Way exist to important recreational areas, places of historic interest, architectural heritage, scientific sites and sites of cultural heritage, the Council will encourage the creation of such Rights of Way in co-operation with local landowners.

It is an objective of the Council to:

KCDP 14-69 (Public Rights of Way) Ensure the preservation of Public Rights of Way which give access to seashore, mountain, lakeshore, riverbank and other place of natural beauty or recreational utility.

KCDP 14-70 (Public Rights of Way) Protect all existing Public Rights of Way (including those not listed in this plan) and ensure that development does not impinge on these routes.

Tralee Municipal District Settlements Plan (Variation no. 1 of Kerry County Development Plan 2022-2028) - Section 3.3 Fenit

It is an objective of the Council to:

KCDP FT-5 (Masterplan) – Implement the measures and recommendations, where possible, as set out in the adopted Fenit Village Design Masterplan (2022), in a sustainable manner.

- Fenit Village Design Masterplan (2022)⁴

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<https://consult.kerrycoco.ie/en/system/files/materials/116/Fenit%2520Masterplan%2520Final%2520Report.pdf> (Accessed 17/02/26)

5.2. National Guidelines

- Appropriate Assessment of Plans and Projects in Ireland, Guidance for Planning Authorities (Department of Environment, Heritage and Local Government, 2009)

5.3. Planning and Development Act 2000, as amended

Section 177K – Decision of the Commission

(1A)(a) The Commission shall not grant substitute consent (whether subject to conditions or not) unless it is satisfied that exceptional circumstances exist that would justify the grant of such consent by the Commission.

(1J) In considering whether exceptional circumstances exist under subsection (1A)(a) the Commission shall have regard to the following matters:

- (a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- (b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- (c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;
- (d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;
- (e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated
- (f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;
- (g) such other matters as the Commission considers relevant.

5.4. Natural Heritage Designations

The subject lands are located within the Akeragh, Banna and Barrow Harbour Special Area of Conservation (SAC) (Site Code 000332) and Tralee Bay Complex Special Protection Area (SPA) (Site Code 004188). The SAC is also designated as a proposed Natural Heritage Area (pNHA).

5.5. Environmental Impact Assessment (EIA)

The development proposed to be retained as part of this substitute consent application is not a class for the purposes of EIA as per the classes of development set out in Schedule 5 of the Planning and Development Regulations 2001, as amended, (or Part V of the 1994 Regulations). No mandatory requirement for EIA therefore arises and there is also no requirement for a screening determination. I refer the Commission to Appendix 1 in this regard.

6.0 Submissions

6.1. Planning Authority (PA)

In accordance with Section 177I of the Planning and Development Act 2000, as amended, the PA submitted a report to the Commission on 25th October 2024. This is summarised as follows:

- The development has resulted in the cutting off of access to an established walkway that had been used by members of the public for many years.
- The list of public rights of way within the CDP is not exhaustive and the policy states clearly that the omission of a right of way from the list is not an indication that such a right of way does not exist. The Fenit island walkway is an example of this.
- An acknowledge of the Fenit island walkway is contained within Objective FT-GO-07 of the Tralee Municipal District Local Area Plan 2018-2024 which seeks to facilitate the Fenit Village Design Masterplan. This Plan identifies the Fenit island walkway and states that it has been cut-off and that the public right of way must be re-established. This is further reinforced within objective KCDP

14-70 of the CDP which seeks to protect all existing public rights of way, including those not listed in the Plan, and to ensure that development does not impinge on these routes.

- The Commission has already accepted under referral RL3219 that there is reasonable evidence of a history of the use of the walkway and that the development impeded access to it.
- The development is also contrary to objectives KCDP 10-37 and KCDP 10-46 which seek to facilitate and develop, maintain and enhance sustainable walking routes at appropriate locations throughout the County.
- The island is located within a visually sensitive area and the development would detrimentally impact upon the coastal character and natural beauty of its setting. In doing so it also contravenes objective KCDP 8-27 as it detracts from the setting of the archaeology and monuments located there.
- The environmental assessment unit generally concurs with the findings of the rNIS and considers that the proposal is not likely to have had / likely to have adverse impacts on European sites. It is unclear whether the biodiversity management plan is proposed to be implemented in its entirety. The recommendations for habitat enhancement and restoration are supported in principle, however, the details provided lack specificity in order to assess same.
- A timeline of the key dates relating to the enforcement history of the subject development is provided including details of legal proceedings. Copies of the served enforcement notices were submitted to the Commission on 24th September 2024 and 26th September 2024 (relating to withdrawn notices).
- It is recommended that substitute consent should be refused for 4 no. reasons.

Recommended Reasons for Refusal

1. It is considered that the development impedes the established public access and use of the walk along the coastal strip (along the foreshore and clifftop) of Fenit Island for recreational purposes. Therefore, the development contravenes objectives KCDP 10-37, 10-46 and the policy of the Kerry County Development Plan 2022-2028 to support and facilitate the maintenance and development of an integrated network of walking trails and cycleways along suitable corridors

with local connections to villages and tourist attractions. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.

2. It is considered that the development contravenes objective FT-GO-07 of the Tralee Municipal District Local Area Plan 2018-2024 (as amended), pursuant to its policy in the Fenit Village Design Plan to work with the local community to re-establish public access for all residents and visitors to the walk to Fenit Island and castle. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.
3. It is considered that the development, which is located in an area designated as Visually Sensitive Area in the County Kerry Development Plan 2022-2028, would detrimentally impact on the character, integrity, distinctiveness and scenic value of the area, which is necessary to preserve as an economic asset and an invaluable amenity which contributes to the quality of people's lives in accordance with objectives KCDP 11-76, 11-77 and 11-78 of the Kerry County Development Plan 2022-2028. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.
4. It is considered that the development which is within the vicinity of a number of recorded monuments and their surrounding landscape, contravenes objective KCDP 8-27 of the Kerry County Development Plan 2022-2028, as it is not sympathetic with its setting and detracts from the character of those monuments and the landscape. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.

6.2. Applicants' Response

The applicants issued a response to the report submitted by the PA on 14th November 2024. The response is summarised as follows:

- It is noted that the PA has accepted the findings of the rNIS and it is considered that this removes the only legitimate element which might have formed a reason for refusal in this matter.

- The applicants need the fencing in order to protect their agricultural holdings and enable them to continue the quiet enjoyment of their land.
- Many of the policies referred by the PA in its report are not relevant to the present application. It is difficult to see how the reference to preservation of archaeological remains relates to fencing which does not affect those remains. Policies where the Council seek to facilitate walking routes are admirable, but it does not allow the Council to create a right-of-way where none exists without going through the proper procedures.
- No right-of-way exists, as determined by the Court Order and applicants' solicitor's rebuttal document, which are both provided. The rebuttal document outlines the timeline of events since the settlement of the Circuit Court proceedings on 26th January 2022. A separate Circuit Order of 9th February 2012 put an end to the claim that there were any rights of way over the applicants lands and this was not appealed or challenged in any way.
- The Commission should also note that in the hearing of the PA's enforcement proceedings on 24th January 2022 the Court was advised that it had been agreed between parties that if Article 9(1)(a)(x) of the Regulations did not apply to the case the enforcement proceedings would not be sustainable. There was a clear acceptance that there had never been lawful access by members of the public to the applicants lands as referenced in the judgement of *Dennehy v An Bord Pleanála*, However, as *Dennehy* postdated the enforcement proceedings the Judge decided not to apply it retrospectively. There was a case to appeal this decision, however, it was advised that it was open for the applicants to apply for substitute consent.
- A copy of the Section 5 declaration issued by the PA on 15th April 2014 (before referral to the Commission) is provided declaring the works exempted development.
- A copy of the 9th February 2012 Circuit Court Order is provided which prohibited all persons from entering the applicants lands without lawful authority (*Seamus O'Sullivan was the plaintiff, however, Niall O'Sullivan is now the owner and applicant*).

- It is questioned how agricultural fencing could have a detrimental impact on the character, integrity, distinctiveness and scenic value of the area, particularly where those works would ordinarily be classed as exempted development.
- Questions are related regarding the wording of the Fenit Village Design Plan which makes reference to ongoing litigation and the requirement to establish a public right of way for all residents and visitors to the area. (*The Commission should note that this wording is not included within the current 2022 Fenit Village Design Masterplan document which replaced the Fenit Village Design Plan*).

6.3. Prescribed Bodies

In accordance with Section 177H(1) of the Planning and Development Act 2000, as amended, the Development Applications Unit (DAU) of the Department of Housing, Local Government and Heritage lodged a submission to the Commission on 9th October 2024. The Commission should note that the DAU did not provide comments regarding the existence or absence of exceptional circumstances. The submission is summarised as follows:

- It is assumed that any grant of substitute consent would also be a grant of consent for the maintenance of fencing.
- Page 18 of the rNIS noted no Annex I habitats occur in the area of the fencing which is based on a complete examination of the area of fencing in March 2022 and April 2024. The Department does not have evidence to disagree with this.
- 'Dot Density' data was not available in the cited NPWS Conservation Objectives Supporting document for the SPA because the area near where the fence occurs was not counted. This does not mean it is not used by birds and it is noted that page 21 of the rNIS mentions during a survey an observation of bar-tailed godwit within interior fields to the fencing outside the SPA and 10 other species present within the marine area.
- Some estuarine species are known to use inshore grasslands in Spring during high tides. Any fence maintenance should preferably be outside of the January-mid April period when overwintering birds need to build up reserves before

migration and when disturbance needs to be kept to a minimum. Similarly, if the fence is to be removed this should be outside of the January-mid April period.

- It should be noted that unregulated access by greater number of hikers in the autumn, winter and spring, over and above the traditional numbers and timings of people who would have used the shoreline in the 1980s or 1990s (the date of coming into force of the Birds and Habitats Directives) could also have disturbance effects on birds for which the SPA has been designated, and this may also need to be assessed.
- The ecological benefits of short-grazed turf for the bird species using the grasslands, as opposed to rough grass/low scrub in the absence of grazing, also means that having grazing as close as possible to the shore is beneficial.

7.0 Assessment

7.1. This assessment will consider the two tests for Substitute Consent (SC). The assessment of this application considers whether the applicants comply with 'Exceptional Circumstances', as required under Section 177K of the Planning and Development Act 2000, as amended, and the appropriateness of the development having regard to the proper planning and sustainable development of the area. The assessment of the remedial Natura Impact Statement (rNIS) can be found in Section 8 and Appendix 2 of this report. This section is presented as follows:

- Background to SC Application
- Assessment of Exceptional Circumstances
- Proper Planning and Sustainable Development Matters
 - Public Right of Way
 - Visual Amenity
 - Archaeological Heritage

Background to SC Application

7.2. Firstly, I highlight to the Commission that there is an extensive planning and litigation history associated with the subject development. The question of the development being exempted development was previously referred to the Commission on 6th May

2014, by a third party, after the PA considered it exempt development (PA ref. EX333 / ACP ref. 08.RL.3219). On 16th July 2015, the Commission deemed it not exempted development due to the requirement for an Appropriate Assessment and that it came within the scopes of Article 9(1)(a)(x) of the Planning and Development Regulations 2001, as amended, (*herein referred to as "PDR2001"*) (i.e. it comprised the fencing or enclosure of land habitually open to or used by the public). However, the Commission should note that it did not de-exempt it on the basis of the development obstructing a public right of way (i.e. Article 9(1)(a)(xi) of PDR2001). I am highlighting this as it is important in the context of paragraphs 7.20 and 7.21 below.

- 7.3. In response to this referral decision the PA served enforcement notices on the separate landowners on 2nd November 2015 (ref. U420/07) however, the notices were formally withdrawn on 23rd September 2016 due to a lack of clarity on the precise location of the fencing to be removed. Revised enforcement notices were served on the landowners on 3rd May 2017 (ref. U042/17). The case then proceeded to the Circuit Court where on 3rd March 2022 it ruled that the fencing was unauthorised development. The Court directed the applicants to remove the fencing with a stay on the Order for a period of 9 months.
- 7.4. In response to this, the landowners applied for retention permission from the PA and included Appropriate Assessment screening reports as part of the applications (refs. 22/558 and 22/564). However, the PA invalidated the applications due to the Commission's previous RL3219 decision where it determined that AA was required. On 11th July 2022, the applicants then applied to the Commission for leave to apply for substitute consent, however, on 8th January 2024 the Commission advised the applicants on the change in legislation under Section 11 of the Planning and Development, Maritime and Valuation (Amendment) Act 2022, which required the applicants to apply directly to the Commission for substitute consent. A pre-application consultation meeting was held on 13th February 2024 and subsequently this SC application was lodged on 21st August 2024.

Assessment of Exceptional Circumstances

- 7.5. Section 177K(1A)(a) of the Planning and Development Act 2000, as amended (*herein referred to as PDA2000*) states that the Commission shall not grant substitute consent (whether subject to conditions or not) unless it is satisfied that exceptional

circumstances exist that would justify the grant of such consent. I note that the applicants have put forward their exceptional circumstances case within pages 8-11 of their submitted report. The Commission should note that there have been no submissions from the public relating to this matter.

- 7.6. I note that there are seven matters to consider under Section 177K(1J) of PDA2000 which I have outlined as (a)-(j) in bold below, together with my assessment and conclusion on whether the applicants comply with same.

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

EIA Directive

- 7.7. Firstly, with regards to the Environmental Impact Assessment (EIA) Directive, I have determined under Appendix 1 of this report that the development to be retained is not a project for the purposes of the EIA Directive. Therefore, the project could not have circumvented the purpose and objectives of the EIA Directive. Accordingly, I consider that the applicants meet the exceptional circumstances tests, in terms of the EIA Directive, as also referenced within matters (c), (d) and (e) below.

Habitats Directive

- 7.8. The applicants claim that it was reasonable to assume that the development was authorised given that the original section 5 declaration from the PA (ref. EX333) determined that the development was exempted development and that AA was not required, before a third party referral to the Commission where the Commission determined AA was required. The applicants also highlight the fact that the Inspector of RL3219 screened out AA for the development. I highlight to the Commission that the development subject to this SC application took place prior to the Section 5 Referral decision.
- 7.9. I note the Circuit Court affidavit that accompanies the application (Appendix 7 of submitted documents). The affidavit confirms that the subject fencing was erected as agricultural fencing for the safety of the applicants' livestock including along the cliff edge. The works commenced in 2006 and were completed in 2008 with further repairs of the fencing carried out in March and April 2014 following damage caused by Storm

Darwin. I also note the Inspector's report of RL3219 accepted the need for the subject fencing to prevent stock accessing the shoreline and that the fencing was consistent with what normally be considered agricultural fencing.

- 7.10. It is my view that the intentions of the applicants were not to circumvent the Habitats Directive in avoiding preparing a NIS. On the basis of the information submitted, I am satisfied that there would have been a reasonable belief on behalf of the applicants that a development of this nature did not require the undertaking of an AA. The subject SC application has now been accompanied by a remedial Natura Impact Statement (rNIS). It is my view that exceptional circumstances on this matter have been satisfactorily demonstrated by the applicants.

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

- 7.11. Following on from my assessment above, I consider that the applicants could have had a reasonable belief that the development was not unauthorised. I note that the PA itself issued a Section 5 declaration (Ref. EX333) determining it exempted development prior to the third party referral (RL3219) to the Commission. Therefore, I consider that it was not a clear case that the works carried out were unauthorised. It is my view that exceptional circumstances on this matter have been satisfactorily demonstrated by the applicants.

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

- 7.12. The SC application has been accompanied by a rNIS and I am satisfied that this has been prepared by competent experts with sufficient baseline information on current conditions and information on the construction methodology of the development. The Commission should note that the SC procedure and rNIS have been subject to public participation and therefore this public participation process has not been substantially impaired. It is my view that exceptional circumstances on this matter have been satisfactorily demonstrated by the applicants.

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

- 7.13. The submitted rNIS concludes that the works do not pose a risk adversely affecting the integrity of any Natura 2000 site, alone or in-combination with other plans or projects. I note that no Annex I habitats were identified in the area of the fencing with it being located on dry grassland habitat merging onto rocky outcrops. Construction access was via the Beach road, road network and private lands where there was no direct contact with qualifying habitats of the SAC. I am satisfied that there is no potential for actual or adverse effects on site integrity. Therefore, it is my view that exceptional circumstances on this matter have been satisfactorily demonstrated by the applicants.

(e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

- 7.14. Having regard to the minor scale and nature of the development, to the conclusions of the submitted rNIS and to my appropriate assessment set out within Appendix 2, I am satisfied that there are no adverse effects on the integrity of the Europeans sites that need to be remediated. Therefore, it is my view that exceptional circumstances on this matter have been satisfactorily demonstrated by the applicants.

(f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

- 7.15. I note that the applicants do not have a history of unauthorised developments and with the exception of this case there are no other enforcement proceedings on file. Therefore, it is my view that exceptional circumstances on this matter have been satisfactorily demonstrated by the applicants.

(g) such other matters as the Commission considers relevant;

- 7.16. I would highlight to the Commission that the development subject to this substitute consent application is limited in scale and nature. The previous Inspector of Referral RL3219 considered the fencing to be that of agricultural type and noted its necessity in order to prevent livestock from accessing the shoreline. There has also been contrasting views on whether appropriate assessment was required for a development

of this nature. The original Section 5 declaration from the PA considered it exempt development (and therefore noted no AA issues), the Inspector's report of RL3219 screened out the need for AA but ultimately it was set out in the Commission's Order of RL3219 that AA was in fact required.

Overall Conclusion on Exceptional Matters

- 7.17. Having regard to the applicants' statement of exceptional circumstance submitted as part of this SC application, to the absence of any submissions or observations on file challenging the applicants case of exceptional circumstances, to the planning and litigation history associated with the development, to the rNIS submitted with the application and my Appropriate Assessment conclusions set out within Section 8 and Appendix 2 of this report, to the limited scale of the development proposed to be retained and to the purpose of the development to protect the applicants' livestock, I am satisfied that exceptional circumstances have been satisfactorily demonstrated by the applicants.

Proper Planning and Sustainable Development Matters

Public Right of Way

- 7.18. Having reviewed Tailte Éireann's Land Direct mapping tool⁵, I note that the location of the fencing is within a number of registered folios and no public rights of way or wayleaves are highlighted. This is in contrast to the south of the island where there are numerous identified public rights of way. Moreover, having reviewed the listed public rights of way set out in Volume 3, Appendix 1 of the Kerry County Development Plan 2022-2028 (CDP), I note that there are no designated routes within the subject lands.
- 7.19. The report from the PA recommending refusal states that the Fenit Village Design Plan (and objective FT-GO-07 of the Tralee Municipal District Local Area Plan 2018-2024) identified a walkway around the coast of Fenit as a public right of way which was cut-off and must be re-established. It was stated that the Council would work with the local community to reassert those rights in accordance with Objective KCDP 14-70 of the CDP (which relates to the protection of existing public rights of way). The PA also contends that the Commission has already accepted that there is reasonable evidence

⁵ <https://www.landdirect.ie/pramap/> (Accessed 17/02/26)

of historical use of the walkway and the subject development has impeded access to it (i.e. decision of RL3219). It is contended that this is contrary to Objectives KCDP 10-37 and KCDP 10-46 of the CDP. The Commission should note there have been no submissions or observations from members of the public and no specific statements provided declaring a right over the subject lands.

- 7.20. Firstly, with regards to the previous RL3219 decision of the Commission, I note that case law in relation to Article 9(1)(a)(x) of PDR2001 has changed since the RL3219 Order dated 16th July 2015 as highlighted by the applicants, that being the decision of the High Court in *Dennehy v An Bord Pleanála* [2018/849] on 19th May 2020. This was a Judicial Review case in relation to a Section 5 referral regarding the erection of a gate on a laneway that was previously used by patrons to access Fossa rowing club in County Kerry. The background to the Judicial Review case also included a decision of the Circuit Court which ruled that there was no public right of way. The Commission concluded that whilst there was no public right of way, the gate did fence and enclose land that was previously habitually open to or used by the public during the ten years preceding its erection (i.e. Article 9(1)(a)(x)) and, accordingly, decided that the development was not exempted development. However, the High Court ruled that the findings of the Circuit Court in terms of there being no public right of way led to the conclusion that the laneway was not habitually open to or used by the public and the decision of the Commission could have only been based on the fact that the persons using the laneway without the consent of the owners were trespassers. The decision that the development was not exempted development was quashed.
- 7.21. Similar to this case, the applicants have provided details of a Circuit Court Order dated 22nd February 2012, as well as a rebuttal statement from the applicants' solicitor. The Court Order prohibited any entering onto the lands of the applicants without lawful authority. Therefore, I consider that whilst the public may have previously used areas of the applicants lands as a walkway it appears that they did so without the consent of the landowners/applicants. Accordingly, it is my view that the Commission's previous decision of RL3219 does not preclude it from granting SC to the applicants in this case.
- 7.22. I also highlight to the Commission that the Tralee Municipal District Local Area Plan 2018-2024 and Fenit Village Design Plan referred to by the PA in its refusal recommendation are no longer in force and have been replaced by the Tralee Municipal District Settlements Plan (TMDSP) as part of Variation No. 1 of the Kerry

County Development Plan 2022-2028 (CDP), adopted on 21st July 2025, and the Fenit Village Design Masterplan (2022) (FVDM). Section 3.3 (Fenit) and objective KCDP FT-5 of the TMDSP seek to implement the measures and recommendations, where possible, as set out in the FVDM. Having reviewed the FVDM, I note that there is no commentary regarding the reestablishment of a cut-off right of way on the island. Therefore, I consider that the development to be retained would not contravene objective KCDP FT-5 of the TMDSP in this regard.

- 7.23. Having regard to my assessment above, I do not consider that it has been satisfactorily demonstrated by the PA that the subject fencing would enclose a public right of way. Section 14.8 of the CDP states that the PA will encourage the creation of rights of way in co-operation with local landowners. Therefore, I consider that the development to be retained would not contravene objectives KCDP 14-69 or KCDP 14-70 of the CDP. Furthermore, whilst objectives KCDP 10-37 and KCDP 10-46 seek to facilitate and support the development of sustainable walking routes in appropriate locations (*my emphasis*) I consider that these are aspirational objectives and, therefore, I consider it would be unreasonable to refuse permission to the applicants for the erection of agricultural fencing to protect their livestock in this regard.

Visual Amenity

- 7.24. I note that the report of the PA recommends refusal of the application on the basis of the development being located in a designated visually sensitive area (VSA) under the CDP. It is considered that it would detrimentally impact on the character, integrity, distinctiveness and scenic value of the area contravening objectives KCDP 11-76, KCDP 11-77 and KCDP 11-78 of the CDP in this regard.
- 7.25. I acknowledge that the area of the fencing is located on lands designated as a VSA within the CDP. However, the Commission should note that the fencing comprises of timber and steel post and wire/mesh fence ranging in height from between 1 metre and 1.8 metres. I consider that it represents quite a minor development with its stated necessity for the protection of the applicants' livestock.
- 7.26. Having inspected the site, having regard to the photographs submitted by the applicant and having regard to the limited scale and height of the fencing, I do not consider that the development to be retained would result in an adverse impact on the character or scenic value of the island landscape. Therefore, I am satisfied that the development

would not contravene objectives KCDP 11-76, KCDP 11-77 and KCDP 11-78 in this regard.

Archaeological Heritage

- 7.27. The PA's recommended final reason for refusal relates to the impact of the development on the setting of a number of recorded monuments and landscape contravening objective KCDP 8-27 of the CDP in this regard. The Commission should note that there is no internal report from the PA's archaeologist included in its submitted report. It should also note that the Development Applications Unit (DAU) of the Department of Housing, Local Government and Heritage did not raise any archaeological issues in its submission.
- 7.28. Having reviewed the National Monuments Service's Historic Environment Viewer I note that there are a number of recorded monuments within the vicinity of the fencing including KE028-022 (Sheepfold), KE028-001 (Castle), KE028-023001 (Church), KE028-024 (Chapel) and KE028-025 (Sheepfold). However, having regard to the limited scale of the works to be retained including limited nature of construction/maintenance works associated with same, I am satisfied that the development to be retained would not detract from the setting of any archaeological feature or landscape. Therefore, I consider that the development would not contravene objective KCDP 8-27 of the CDP in this regard.

8.0 Appropriate Assessment (AA)

- 8.1. I refer the Commission to Appendix 2 of my report in this regard. In screening the need for Appropriate Assessment, it was determined that the development subject of this SC application could have resulted or could result in significant effects on the Akeragh, Banna and Barrow Harbour Special Area of Conservation (SAC) and Tralee Bay Complex Special Protection Area (SPA), in view of the conservation objectives of the sites and that Appropriate Assessment under the provisions of Section 177V of the Planning and Development Act 2000, as amended, was required.
- 8.2. Following an examination, analysis and evaluation of the remedial NIS and all associated material submitted and taking into account the submissions from the PA

and Development Applications Unit (DAU) of the Department of Housing, Local Government and Heritage, I consider that adverse effects on site integrity of the Akeragh, Banna and Barrow Harbour SAC and Tralee Bay Complex SPA can be excluded in view of the conservation objectives of the sites and that no reasonable scientific doubt remains as to the absence of such effects.

9.0 Water Framework Directive (WFD) Screening

- 9.1. I note that the site is underlain by the Ardfert groundwater waterbody (Code IE_SH_G_008) which is classed as good ecological and chemical status for the 2019-2024 monitoring period.⁶ The site is also located within the Outer Tralee Bay coastal waterbody (Code IE_SH_040_0000) which is classed as good ecological status for the 2019-2024 monitoring period.⁷
- 9.2. I have assessed the project and have considered the objectives as set out in Article 4 of the Water Framework Directive which seek to protect and, where necessary, restore surface and groundwater waterbodies in order to reach good status (meaning both good chemical and good ecological status), and to prevent deterioration. Having considered the nature, scale and location of the project, I am satisfied that it can be eliminated from further assessment because there is no conceivable risk to any surface and/or groundwater waterbodies either qualitatively or quantitatively. The reason for this conclusion is due to the small-scale nature of the works associated with the development.
- 9.3. I conclude that on the basis of objective information, that the development would not have resulted in or will not result in a risk of deterioration on any waterbody (rivers, lakes, groundwaters, transitional and coastal) either qualitatively or on a temporary or permanent basis or otherwise jeopardise any waterbody in reaching its WFD objectives and consequently can be excluded from further assessment.

⁶ https://www.catchments.ie/data/#/waterbody/IE_SH_G_008?k=jpga8h

⁷ https://www.catchments.ie/data/#/waterbody/IE_SH_040_0000?k=4ysx9i (Accessed 17/02/26)

10.0 Recommendation

Having regard to the foregoing, it is my recommendation to the Commission that substitute consent should be **Granted**, subject to conditions, for the reasons and considerations set out below.

11.0 Reasons and Considerations

Having regard to the provisions of Section 177K(1A)(a) and (1J) of the Planning and Development Act 2000, as amended, the Commission is satisfied that the applicants have demonstrated that exceptional circumstances exist that would justify a grant of substitute consent in this instance. Having regard to this and to the following matters:

- (a) the limited scale of the development proposed to be retained and its purpose to protect the applicants livestock,
- (b) the provisions of the Kerry County Development Plan 2022-2028, as varied by the Tralee Municipal District Settlements Plan adopted on 21st July 2025,
- (c) the remedial Natura Impact Statement (rNIS) submitted with the application, and documentation on file generally,
- (d) the report and opinion of the planning authority submitted under Section 177I of the Planning and Development Act 2000, as amended, and the applicants response to the report,
- (e) the submission and observation made on the application by the Development Applications Unit of the Department of Housing, Local Government and Heritage,
- (f) the planning and litigation history associated with the site and development, and
- (g) the report of the Commission's Inspector,

it is considered that the development proposed to be retained, subject to conditions, would not impinge on any existing designated public right of way, would not significantly interfere with the character of the coastal landscape or seriously injure the visual amenities of the area, nor would it seriously injure any designated recorded monument or their setting. It is, therefore, considered that the development proposed

to be retained would be in accordance with the proper planning and sustainable development of the area.

12.0 Conditions

1.	The grant of substitute consent shall be in accordance with the plans and particulars submitted to An Coimisiún Pleanála with the application on the 21st day of August 2024, 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 and the development shall be carried out and completed in accordance with the agreed particulars. Reason: In the interest of clarity.
2.	(a) The mitigation measures contained in the submitted remedial Natura Impact Statement shall be implemented. (b) Any fence maintenance shall be carried out outside of the period between January and Mid-April. Reason: To protect the integrity of European sites.

Declaration

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 me, directly or indirectly, following my professional assessment and recommendation set out in my report in an improper or inappropriate way.

Gary Farrelly

Planning Inspector

17th February 2026

Appendix 1 – EIA Pre-Screening

Case Reference	320627-24
Development Summary	Retention of agricultural fencing
Development Address	Fenit Within, Fenit, County Kerry
	In all cases check box /or leave blank
1. Does the development come within the definition of a 'project' for the purposes of EIA? (For the purposes of the Directive, "Project" means: - The execution of construction works or of other installations or schemes, - Other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources)	☒ Yes, it is a 'Project'. Proceed to Q2. ☐ No, No further action required.
2. Is the development of a CLASS specified in Part 1, Schedule 5 of the Planning and Development Regulations 2001 (as amended)?	
☐ Yes, it is a Class specified in Part 1.	
☒ No, it is not a Class specified in Part 1. Proceed to Q3	
3. Is the development of a CLASS specified in Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) OR a prescribed type of proposed road development under Article 8 of Roads Regulations 1994, AND does it meet/exceed the thresholds?	
☒ No, the development is not of a Class Specified in Part 2, Schedule 5 or a prescribed type of proposed road development under Article 8 of the Roads Regulations, 1994.	
☐ Yes, the proposed development is of a Class and meets/exceeds the threshold.	
☐ Yes, the proposed development is of a Class but is sub-threshold.	

Inspector: _____

Date: 17th February 2026

Appendix 2: Appropriate Assessment

Stage 1: Screening for Remedial Appropriate Assessment (AA) Screening Determination	
Step 1: Description of the project and local site characteristics	
<i>Brief Description of project</i>	The project involves the retention of agricultural fencing along the coastline of Fenit Island as well as the future maintenance of the fencing.
<i>Brief description of development site characteristics and potential impact mechanisms</i>	The agricultural fencing is located along the coastline with most of it located on dry grassland habitat and on rocky outcrops. The fencing is located within the boundaries of both the Akeragh, Banna and Barrow Harbour SAC (000332) and Tralee Bay Complex SPA (004188).
<i>AA Screening Report</i>	The author of the rNIS previously screened out the need for AA as part of its Screening for Appropriate Assessment reports, dated 5th April 2022, which were submitted to the PA as part of application refs. 22/558 and 22/564. These screening reports concluded that there was no potential for significant direct, indirect or cumulative impacts as a result of the subject development and therefore a NIS was not required. It is stated that this was due to the pre-existence of the fencing, its replacement of previous fencing, its localisation, small scale and alignment with the extensive historic fencing present all over the island. However, due to the planning history and previous determination from the Commission under Referral RL3219 the PA considered that AA was required and thus invalidated the applications as per Section 34(12) of the Planning and Development Act 2000, as amended.

<i>Remedial Natura Impact Statement (rNIS)</i>	A rNIS has been carried out by Ecofact Environmental Consultants. I consider the author to be a competent expert. It is stated that the rNIS was prepared at the request of the landowners and includes proposed maintenance of the fencing as well as other general biodiversity and best practice measures. However, it is clarified that the measures are not deemed necessary to protect the integrity of any European site.
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Step 2: Identification of relevant European sites using the Source-Pathway-Receptor model

Two European sites are potentially within a zone of influence of the development as detailed within Table 1 below.

Table 1

European site (Code)	Qualifying Interests (QI)	Distance from development	Ecological Connections	Consider further in screening? Y/N
Akeragh, Banna and Barrow Harbour SAC (000332)	Annual vegetation of drift lines [1210] Salicornia and other annuals colonising mud and sand [1310] 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]	The fencing is located within the SAC and SPA boundaries.	Physically located within the SAC/SPA.	Yes

	Humid dune slacks [2190] European dry heaths [4030]			
Tralee Bay Complex SPA (004188)	22 QI Species Wetland and Waterbirds [A999]			Yes

Step 3: Describe the effects of the project (if alone or in combination) on European sites

Site Name Qualifying Interests	Possibility of significant effects (alone) in view of the conservation objectives of the site	
	Impacts	Effects
Site 1: Akeragh, Banna and Barrow Harbour SAC (000332) Annual vegetation of drift lines [1210] Salicornia and other annuals colonising mud and sand [1310] Atlantic salt meadows (Glauco-Puccinellietalia maritima) [1330] Mediterranean salt meadows (Juncetalia maritimi) [1410] Embryonic shifting dunes [2110]	<u>Direct Impact</u> Construction Works/emissions within SAC/SPA. <u>Indirect Impact</u> Spread of invasive species.	Disturbance Changes to habitat quality as a result of invasive species Habitat loss The possibility of significant effects cannot be ruled out without further analysis and assessment.

Shifting dunes along the shoreline with Ammophila arenaria (white dunes) [2120] Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130] Humid dune slacks [2190] European dry heaths [4030]		
Site 2: Tralee Bay Complex SPA (004188) Whooper Swan (Cygnus cygnus) [A038] Light-bellied Brent Goose (Branta bernicla hrota) [A046] Shelduck (Tadorna tadorna) [A048] Teal (Anas crecca) [A052] Mallard (Anas platyrhynchos) [A053] Pintail (Anas acuta) [A054] Scaup (Aythya marila) [A062] Oystercatcher (Haematopus ostralegus) [A130] Ringed Plover (Charadrius hiaticula) [A137] Golden Plover (Pluvialis apricaria) [A140] Grey Plover (Pluvialis squatarola) [A141] Lapwing (Vanellus vanellus) [A142] Sanderling (Calidris alba) [A144] Dunlin (Calidris alpina) [A149] Black-tailed Godwit (Limosa limosa) [A156] Bar-tailed Godwit (Limosa lapponica) [A157] Curlew (Numenius arquata) [A160]		

Redshank (Tringa totanus) [A162] Turnstone (Arenaria interpres) [A169] Black-headed Gull (Chroicocephalus ridibundus) [A179] Common Gull (Larus canus) [A182] Wigeon (Mareca penelope) [A855] Wetland and Waterbirds [A999]		
	Likelihood of significant effects from development (alone): YES	
	If No, is there likelihood of significant effects occurring in combination with other plans or projects?	
Step 4: Conclude if the development resulted in likely significant effects on a European site.		
Whilst the development may result in beneficial effects for the birds species of the SPA as outlined by the submission from the DAU, in terms of curtailing human access to the coastline and grazing areas being located closer to the shore, having regard to Section 2.2 of the 2009 Appropriate Assessment of Plans and Projects in Ireland Guidelines for Planning Authorities, I consider that the subject development is not directly connected with or necessary to the management of the European sites and therefore is subject to the requirements of Article 6(3) of the Habitats Directive. Based on the information provided within the application, to the planning history of the site where the Commission previously determined under referral RL3219 that Appropriate Assessment was required for the subject development and to the location of the development within the SAC and SPA, it is considered that it is not possible to exclude the possibility the development alone resulted in significant effects on the European sites from effects associated with the construction works within the SAC and SPA. A remedial Appropriate Assessment is required on the basis of the possible effects of the project ‘alone’. Further assessment in-combination with other plans and projects is not required at screening stage.		

Stage 2: Remedial Appropriate Assessment

The requirements of Article 6(3) as related to appropriate assessment of a project under Part XAB, Section 177V of the Planning and Development Act 2000, as amended, are considered fully in this section. The appropriate assessment is based on the remedial Natura Impact Statement (rNIS) submitted by the applicant in accordance with Section 177G of the Act.

Taking account of the preceding screening determination, the following is an appropriate assessment of the implications of the project in view of the relevant conservation objectives of the Akeragh, Banna and Barrow Harbour SAC and Tralee Bay Complex SPA based on scientific information provided by the applicant.

The information relied upon includes the following:

- Remedial Natura Impact Statement (rNIS) prepared by Ecofact Environmental Consultants.
- National Parks and Wildlife Service (NPWS) Conservation Objectives Supporting Documents for the SAC/SPA and related publications.
- Appropriate Assessment of Plans and Projects in Ireland, Guidance for Planning Authorities (Department of Environment, Heritage and Local Government, 2009).

I am satisfied that the information provided is adequate to allow for Appropriate Assessment. I am satisfied that all aspects of the project which would have resulted in or could result in significant effects are considered and assessed in the rNIS and mitigation measures designed to avoid or reduce any adverse effects on site integrity are included and assessed for effectiveness.

Submissions/observations

The report from the DAU of the Department of Housing, Local Government and Heritage outlines no evidence to disagree with the findings of the rNIS in terms of there being no Annex I habitat in the area of the fencing. The DAU also advises on any fence maintenance or fence removal

being outside of the January-mid April period as outwintering birds need to build up reserves before migration and when disturbance needs to be kept to a minimum.

The report from the PA outlines that the Environmental Assessment Unit generally concurs with the findings of the rNIS and considers that the proposal is not likely to have had/have adverse impacts on European sites.

Akeragh, Banna and Barrow Harbour SAC

Summary of key issues that could give rise to adverse effects (from screening stage):

- Habitat Loss
- Spread of Invasive Species

Qualifying Interest features likely to be affected	Conservation Objectives (Targets and Attributes)	Potential Adverse effects	Mitigation and Remedial Measures (summary)
Annual vegetation of drift lines [1210]	To maintain the favourable conservation conditions defined by attributes and targets including, a stable or increase habitat area, maintaining the range of coastal habitats and non-native species to represent less than 5% cover.	I note that Map 4 of the NPWS Conservation Objectives Supporting Document (2017) illustrates the mapped location of this QI approximately 2km northeast of the fencing which is based on data from the Coastal Monitoring Project and Sand Dunes Monitoring Project. The ecological surveys carried out	Having regard to the location of the fencing on grassland and rocky outcrops outside of any designated habitat, to the separation distance to the QI and to the level of dilution available within the coastal waterbody, and to the minor and short term nature of the construction works I am satisfied that there would

		by Ecofact in 2022 and 2024 did not record this QI within the location of the fencing.	have been no likely significant effects on this QI. No mitigation or remedial measures are required to avoid or reduce adverse effects. I note that the measures proposed by the ecologist in the rNIS are not deemed necessary to protect the integrity of European sites and are general biodiversity and best practice measures. I consider that no mitigation or remedial measures are required.
Salicornia and other annuals colonising mud and sand [1310]	To maintain the favourable conservation conditions defined by attributes and targets including, a stable or increase habitat area, maintaining the range of coastal habitats and no significant expansion of common cordgrass.	I note that the NPWS Supporting Document has not mapped this QI within the SAC and has an unknown extent. However, the ecological surveys carried out by Ecofact did not record this QI within the location of the fencing.	
Atlantic salt meadows (Glauco-Puccinellietalia maritimae) [1330]	To restore the favourable conservation conditions defined by attributes and targets including, a stable or increase habitat area, maintaining the range of coastal habitats and no significant expansion of common cordgrass.	I note that Map 3 of the NPWS Conservation Objectives Supporting Document (2017) illustrates the mapped location/potential location of this QI approximately 1.3km south of the fencing. Again there were no records of this QI within the location of the fencing from the 2022 and 2024 surveys.	
Mediterranean salt meadows (Juncetalia maritimi) [1410]	To maintain the favourable conservation conditions defined by attributes and targets including, a stable or increase habitat area,	I note that Map 3 of the NPWS Conservation Objectives Supporting Document (2017) illustrates the mapped location/potential location of	

	maintaining the range of saltmarsh habitats and no significant expansion of common cordgrass.	this QI approximately 2.6km northeast of the fencing and no habitat was recorded within the vicinity of the fencing from the 2022 and 2024 surveys.	
Embryonic shifting dunes [2110]	To maintain the favourable conservation conditions defined by attributes and targets including, a stable or increase habitat area, maintaining the range of coastal habitats and non-native species to represent less than 5% cover.	I note that Map 4 of the NPWS Conservation Objectives Supporting Document (2017) illustrates the mapped location approximately 2.1km northeast of the fencing and no habitat was recorded within the vicinity of the fencing from the 2022 and 2024 surveys.	
Shifting dunes along the shoreline with <i>Ammophila arenaria</i> (white dunes) [2120]	To restore the favourable conservation conditions defined by attributes and targets including, a stable or increase habitat area, maintaining the range of coastal habitats and non-native species to represent less than 5% cover.	I note that Map 4 of the NPWS Conservation Objectives Supporting Document (2017) illustrates the mapped location approximately 2.1km northeast of the fencing and no habitat was recorded within the vicinity of the fencing from the 2022 and 2024 surveys.	

Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130]	To restore the favourable conservation conditions defined by attributes and targets including, a stable or increase habitat area, maintaining the range of coastal habitats and non-native species to represent less than 5% cover.	I note that Map 4 of the NPWS Conservation Objectives Supporting Document (2017) illustrates the mapped location approximately 2.1km northeast of the fencing and no habitat was recorded within the vicinity of the fencing from the 2022 and 2024 surveys.	
Humid dune slacks [2190]	To restore the favourable conservation conditions defined by attributes and targets including, a stable or increase habitat area, maintaining the range of coastal habitats and non-native species to represent less than 5% cover.	I note that Map 4 of the NPWS Conservation Objectives Supporting Document (2017) illustrates the mapped location approximately 3.8km northeast of the fencing and no habitat was recorded within the vicinity of the fencing from the 2022 and 2024 surveys.	
European dry heaths [4030]	To maintain the favourable conservation conditions defined by attributes and targets including, a stable or increase habitat area, maintaining the soil nutrient status within natural range, maintaining the variety of vegetation communities, total cover of non-native species	This habitat is not mapped within the NPWS Conservation Objectives Supporting Document and therefore the total area is unknown. The ecological survey carried out in 2022 by the ecologist recorded what was thought to be a patch of	

	being less than 1% and the cover of disturbed bare ground being less than 10%.	degraded and fragmented EDH habitat. Therefore, there could have been potential for habitat loss as a result of the works and potential spread of invasive species. However, the further 2024 survey carried out by the ecologist ruled this habitat out as EDH and noted that the previous 2022 survey was carried out too early in the growing season.	
<u>Tralee Bay Complex SPA</u> Summary of key issues that could give rise to adverse effects (from screening stage): • Disturbance • Spread of Invasive Species			
Qualifying Interest features likely to be affected	Conservation Objectives (Targets and Attributes)	Potential Adverse effects	Mitigation and Remedial Measures (summary)

Whooper Swan (<i>Cygnus cygnus</i>) [A038] Light-bellied Brent Goose (<i>Branta bernicla hrota</i>) [A046] Shelduck (<i>Tadorna tadorna</i>) [A048] Teal (<i>Anas crecca</i>) [A052] Mallard (<i>Anas platyrhynchos</i>) [A053] Pintail (<i>Anas acuta</i>) [A054] Scaup (<i>Aythya marila</i>) [A062] Oystercatcher (<i>Haematopus ostralegus</i>) [A130] Ringed Plover (<i>Charadrius hiaticula</i>) [A137] Golden Plover (<i>Pluvialis apricaria</i>) [A140] Grey Plover (<i>Pluvialis squatarola</i>) [A141] Lapwing (<i>Vanellus vanellus</i>) [A142] Sanderling (<i>Calidris alba</i>) [A144] Dunlin (<i>Calidris alpina</i>) [A149] Black-tailed Godwit (<i>Limosa limosa</i>) [A156] Bar-tailed Godwit (<i>Limosa lapponica</i>) [A157] Curlew (<i>Numenius arquata</i>) [A160] Redshank (<i>Tringa totanus</i>) [A162]	To maintain the favourable conservation condition of the bird species which is defined by, including, no significant decrease in their distribution with no significant decrease in the range, timing and intensity of use of areas.	The rNIS noted that the dot diagrams of the 2009/10 waterbird survey programme show that many of the bird species forage and roost in close proximity to the fencing. The ecologist survey in April 2024 recorded Bar-tailed Godwits (<i>Limosa lapponica</i>) [A157] within the vicinity of the fencing. The rNIS acknowledges that there may have been some disturbance of birds when the fencing was being installed, however, any disturbance would have been short term in nature and minor due to construction machinery being minor and not above existing agricultural activities. Additionally, any future maintenance of the fencing would be short term in nature and minor compared to the usual use of agricultural machinery.	Site-specific code of practice for the maintenance of fencing. The undertaking of any maintenance works outside of the January to Mid-April period, as recommended by the DAU.
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Turnstone (<i>Arenaria interpres</i>) [A169] Black-headed Gull (<i>Chroicocephalus ridibundus</i>) [A179] Common Gull (<i>Larus canus</i>) [A182] Wigeon (<i>Mareca penelope</i>) [A855]			
Wetland and Waterbirds [A999]	To maintain the favourable conservation condition of the wetland habitat, defined by the habitat being stable and not significantly less than the area of 3,657 hectares.	The area of the fencing is not located within the wetland and waterbirds habitat and is located above the foreshore. There was no evidence of any invasive species during the ecologist's site visit and no evidence to suggest that any were introduced as a result of the fencing works. Therefore, no potential adverse impact considered on this QI.	

Assessment of issues that could give rise to adverse effects:

Habitat Loss

It was originally thought that there was an area of degraded and fragmented European dry heath present within the site when the ecologist visited it in March 2022. However, after a further survey of the site in April 2024 it ruled out the presence of this habitat. The original conclusion was due to the survey being completed too early in the growing season. The rNIS surveys recorded no Annex I habitats within the location of the fencing.

Spread of Invasive Species

Many of the QIs of the SAC and habitat of the SPA are sensitive to the spread of non-native invasive species. However, no non-native invasive plant species were recorded during the site surveys completed in March 2022 and April 2024.

Disturbance

The April 2024 survey carried out by the ecologist recorded bar-tailed Godwits within the vicinity of the fencing. The rNIS acknowledges that some disturbance of birds could have occurred when the fencing was being installed, however, it considers that it would have been very minor disturbance consistent with agricultural activities on the island. Any future maintenance would be minor in nature and would not be expected to result in any significant disturbance to birds that may be passing through. The submission from the DAU notes that bar-tailed godwits are known to use inshore grasslands in spring during high tides and recommends in the event of a grant of permission that fence maintenance should be outside the January to Mid-April period when overwintering birds need to build up reserves before migration and when disturbance needs to be kept to a minimum.

Mitigation

Section 6 of the rNIS allows for the recommendation of general biodiversity and best practice measures, however, states that the measures are not deemed necessary to protect the integrity of any Natura 2000 site. I note that the measures include a Code of Practice for the future

maintenance of the fencing to ensure activities are conducted responsibly, minimising environmental impacts and achieving the farm and property management objectives. A biodiversity management plan is also recommended to conserve and enhance the local environments, habitats and fauna of the area and would include monitoring of progress.

Whilst I acknowledge that the ecologist states that the measures are not essential for the protection of the European sites, I note that the submission from the DAU recommends that any future maintenance of the fencing takes place outside of the January to Mid-April period due to outwintering birds needing to build up reserves before migration and when disturbance needs to be kept to a minimum. I am in agreement with this recommendation and I also consider it to be in itself a mitigation measure that specifically avoids disturbance of the QIs of the SPA. I consider such measure could be integrated into the stated Code of Practice for the island and thus this measure forms part of my recommended conditions, if the Commission is minded to grant substitute consent.

In-combination effects

I am satisfied that in-combination effects has been assessed adequately in the rNIS (sections 5.2.3 and 5.3.3). The ecologist has demonstrated satisfactorily that no significant residual effects will remain and there was/is no potential for in-combination effects.

Findings and Conclusions

Based on the information provided, I am satisfied that adverse effects arising from aspects of the development to be retained can be excluded for the European sites considered in the remedial Appropriate Assessment. I am satisfied that the measures proposed to prevent adverse effects, together with the carrying out of any maintenance works outside of the period of January to Mid-April, have been assessed as effective and can be implemented.

Reasonable scientific doubt

I am satisfied that no reasonable scientific doubt remains as to the absence of adverse effects.

Site Integrity

The development to be retained will not affect the attainment of the conservation objectives of the Akeragh, Banna and Barrow Harbour SAC or Tralee Bay Complex SPA. Adverse effects on site integrity can be excluded and no reasonable scientific doubt remains as to the absence of such effects.