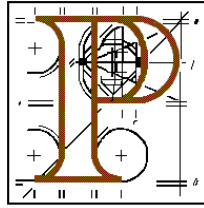


An Bord Pleanála



Inspector's Report

Development: Leave to appeal for substitute consent in relation to the infilling of a site adjoining a SAC site. Clonsharragh, Duncannon, New Ross, Co. Wexford.

Application for Leave to Apply for Substitute Consent under Section 177C(2)(b) of the Planning and Development Acts 2000-2014

Board Reference:	LS26.LS0022
Planning Authority:	Wexford County Council
Applicant:	Philip Wallace
Site Inspection:	29 th November 2015
Inspector:	Sarah Moran

1.0 STATUTORY CONSIDERATIONS

1.1 This is an application for leave to apply for Substitute Consent under section 177 of the Planning and Development Act 2000 (as amended).

1.2 Section 177C allows an applicant to apply to the Board for leave to apply for Substitute Consent in respect of a development which has been carried out, which would have required an Environmental Impact Assessment or an Appropriate Assessment.

1.3 Section 177D(i) provides that the Board shall only grant leave to apply for substitute consent where it is satisfied that an EIA, a determination as to whether an EIA is required, or AA was or is required in respect of the development and where it is satisfied –

a) *That a permission granted for the development by a planning authority or the Board is in breach of law, invalid or otherwise defective in a material respect, whether by reason of a final judgement of a court of competent jurisdiction in the State or the court of Justice of the European Union, or otherwise, by reason of-*

(i) *Any matter contained in or omitted from the application for permission including omission of an environmental impact statement or a Natura impact statement or both of these statements, as the case may be, or inadequacy of an environmental impact statement or a Natura impact statement or both of those statements, as the case may be, or*

(ii) *Any error of fact or law or a procedural error*

Or

(b) *that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.*

1.4 Section 177(2) provides that the Board shall have regard to the following matters in considering whether exceptional circumstances exist:

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 remedied;*
- f) *Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;*
- g) *Such other matters as the Board considers relevant*

1.5 Section 177D provides that the Board shall decide whether to grant leave to apply for substitute consent or to refuse to grant such leave. Where the Board decides to grant leave to apply for substitute consent, the notice shall contain a direction to apply for substitute consent within 12 weeks and to furnish with the application a remedial EIS or remedial NIS, or both if considered appropriate.

1.6 Section 177L provides that where the Board refuses an application for leave to apply for substitute consent, it may give a draft direction requiring the applicant:

- a) *To cease within the period specified in the draft direction, all or part of his or her activity or operations on or at the site of the development the subject of the application, where the Board forms the opinion that the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European site, or*
- b) *To take such remedial measures, within the period specified in the draft direction, as the Board considers are necessary for either or both of the following:*
 - (i) *To restore the site on or at which the development referred to in the application is situated, to a safe and environmentally sustainable condition;*
 - (ii) *To avoid, in a European site the deterioration of natural habitats and the habitats of species or the disturbance of the species for which the site has been designated, insofar as such disturbance could be significant in relation to the objectives of the Habitats Directive.*

Following a period of consultation, the Board may confirm, vary or withdraw the draft direction.

2.0 SITE LOCATION AND DESCRIPTION

2.1 The site is located at Clonsharrgh, Duncannon, New Ross, a lowlying coastal area at Bannow Bay, Co. Wexford. The site is located at the south eastern end of the village, where the beach has a sand dune system and a small river flowing into the sea. The site is to the immediate north of the river, at a junction of the

R737, which continues eastwards from Duncannon to Wexford town, and the local beachfront road. It is indicated as marshy in O.S. maps of the area, along with lands further to the east, which are known as Shanacloon wetlands. The site is currently improved grassland with some natural vegetation along the river bank. There is a drainage outfall to the river adjacent to the bridge. There is a mobile home park beyond the river to the south and housing on the opposite side of the R737 to the north. According to the documentation on file, the site has been used for the holding of fairs and circuses for many years. The applicant has submitted photographs of fairs at the site c. 1989. The site has also been subject to illegal dumping. The site has a stated area of 0.4808 ha.

- 2.2 The river along the southern site boundary is part of the River Barrow and River Nore SAC (site code 002162). The coastal area and the wetland area further to the east are also part of the SAC, see enclosed map which indicates the location of the site relative to the SAC boundary. The site is also to the immediate north of the Duncannon Sandhills pNHA (site code 001738), see enclosed map.
- 2.3 Lands at the south of the site are indicated as prone to coastal flooding on maps drawn from the OPW CFRAM studies.

3.0 BACKGROUND AND PLANNING HISTORY

3.1 20030949 PL26.203231

- 3.1.1 Wexford County Council refused permission to Joseph Casey for 12 no. houses for 3 no. reasons relating to (1) location outside the development boundary of Duncannon; (2) adverse impacts on the adjacent pNHA; (3) detrimental impacts on a designated sensitive landscape and on views from designated scenic route 10(a), adjacent to an environmentally sensitive coastal landscape. The decision was appealed by the applicant but the appeal was withdrawn.

3.2 20042157

- 3.2.1 Permission sought by Joseph Casey to construct 11 no. houses at the subject site. The application was refused for 4 no. reasons relating to (1) prematurity pending the adoption of a Local Area Plan for Duncannon; (2) detrimental impact on a designated Sensitive Landscape and on views from designated Scenic Route 10(a) adjacent to an environmentally sensitive coastal landscape; (3) traffic hazard due to insufficient information regarding the provision of footpaths, walls and roadside drainage; (4) location on the perimeter of Duncannon outside the natural boundaries of the settlement, contravention of County Development Plan policies which seek to minimise sporadic speculative developments that should be more appropriately located in towns and villages.

3.3 20044998 PL26.212843

- 3.3.1 Outline Permission sought by Seosamh O’Cathasaigh (Joseph Casey) for 4 no houses at the subject site. Wexford County Council granted permission subject to

14 no. standard conditions. The permission was appealed by a third party. The Board refused permission for the following 2 reasons:

1)

The site of the proposed development forms part of a restricted area of generally marshy land located between two areas of ecological value designated as a Special Area of Conservation (River Barrow and River Nore Special Area of Conservation – SAC No. 2162) and is bounded to the south by a water course (forming part of the SAC) running from a Phragmites species dominated marsh onto Duncannon Strand. It is an objective of the planning authority, as set out in the current Wexford County Development Plan, to protect the environment, especially sensitive areas, from inappropriate development, to restrict the reclamation of wetlands and marshlands that would damage coastal habitats and to conserve and protect internationally and nationally important habitats, including Special Areas of Conservation and contiguous habitats. Having regard to the nature and location of the proposed development and notwithstanding the residential zoning objective for the site as set out in the current Local Area Plan for Duncannon, the proposed development would contravene materially a development objective indicated in the Development Plan for the conservation and preservation of a European site insofar as the proposed development would adversely affect natural habitat types in Annex I of the Habitats Directive and which have been selected in accordance with Annex III (Stage 1) of the Directive. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.

2)

The proposed development, by reason of the orientation of dwellings on sites 1 and 2 and by reason of the layout proposed, would seriously injure the visual amenities of the area having regard to the prominent location of the site in an area designated as a sensitive landscape in the current Wexford County Development Plan, alongside a designated scenic route on the approach road to Duncannon Village. The proposed development would, notwithstanding the residential zoning objective for the site as set out in the current Local Area Plan for Duncannon, therefore, conflict with the provisions of the Development Plan and be contrary to the proper planning and sustainable development of the area.

3.4 20140944

3.4.1 The above named applicant Philip Wallace sought permission for an amenity and recreation area at the subject site in November 2014. The proposed development comprised:

- Stated site area 0.4808 ha.
- Amenity and recreational area with bowls area, football/soccer area and BBQ area.
- Footbridge over the river to connect to the mobile home park.
- A NIS was submitted with the application.

3.4.2 The planning authority carried out an AA screening, which concluded that the development was not likely to have any impacts on the listed Natura sites or on the Natura 2000 network. It was considered that significant impacts could be ruled out and that AA was not required.

3.4.3 The following points are noted from the planning report on file by the Senior Planner, dated 29th January 2015:

- The infilling of part of the development site would have required AA in advance of the works taking place. If the subject proposal were to be granted, it would be a de facto permission for retention of the unauthorised infilling, which would be contrary to the Habitats Directive.
- The NPWS had confirmed by phone that the development itself would not be likely to have impacts on the SAC, however the unauthorised infilling could have had impacts.
- The submitted NIS is essentially a screening report and does not refer to the sites' Conservation Objectives or conclusively state that the development would not impact on the integrity of the SAC. It therefore is insufficient to be considered as a NIS. There is insufficient information to ascertain cumulative impacts. It also proposes mitigation which is not permissible at screening stage.
- Part of the site is located within a flood zone. The uses are water compatible and the development would pass the Development Management Justification Test. However, the flood zone is a direct pathway to the SAC and the impacts of development within the flood zone need to be specifically addressed in the AA. Infilling within the site could cause flooding elsewhere, this also needs to be considered. An NIS would need to be informed by a site specific flood risk assessment.

3.4.4 Wexford County Council refused permission for the following 2 no. reasons:

1. *The development as proposed would bestow the benefit of authorisation to the infilling of land which has commenced without planning permission and without an Appropriate Assessment having been carried out in advance of the development. Having regard to the precautionary principle and the Habitats Directive the planning authority is precluded from granting planning permission for this development. The proposed development would also be contrary to Objective NH03 of the Wexford County Development Plan 2013-2019 which requires such assessment to be carried out.*
2. *Having regard to the nature of the proposed development, the individual and cumulative impacts associated with the unauthorised development, the risk of flooding of the site and the information provided in the NIS, the planning authority is not satisfied that the proposed development will not impact on the integrity of the River Barrow and Nore SAC. The proposed development would therefore be contrary to the Habitats Directive and Objective NH03 of the Wexford County Development Plan 2013-2019.*

4.0 PLANNING POLICY

4.1 The Planning System and Flood Risk Management Section 28 Guidelines for Planning Authorities, 2009

4.1.1 The Guidelines set out government policy on development and flood risk management. The overall aim of the Guidelines is to deliver sustainable development that minimises the risk of flooding to people and property by the avoidance of inappropriate development in areas at risk of flooding. Planning authorities are now required to incorporate flood risk management as a key consideration in the preparation of development plans, local area plans and the assessment of planning applications. The core objectives of the Guidelines are to:

- Avoid inappropriate development in areas at risk of flooding.
- Avoid new developments increasing flood risk elsewhere, including that which may arise from surface water run-off.
- Ensure effective management of residual risks for developments permitted in floodplains.
- Avoid unnecessary restriction of national, regional or local economic and social growth.
- Improve understanding of flood risk among relevant stakeholders.
- Ensure that the requirements of EU and national law in relation to the natural environment and nature conservation are complied with at all stages of flood risk management.

4.1.2 Flood risk is defined as a combination of the likelihood of flooding and the potential consequences arising. The Guidelines recommend a staged approach to flood risk assessment, which can be undertaken at any scale from national down to the individual site and comprises 3 stages: flood risk identification, initial flood risk assessment and detailed flood risk assessment. Flood zones are identified as a key tool in flood risk management with three types or levels of flood zones:

- Flood Zone A – highest probability of flooding (>1% for river flooding and >0.5% for coastal flooding).
- Flood Zone B – moderate probability of flooding (0.1-1% for river flooding and 0.1%-0.5% for coastal flooding)
- Flood Zone C – low probability of flooding (<0.1% for both river and coastal flooding)

4.1.3 The Guidelines outline a sequential approach to assessing proposals in areas of flood risk. The following key principles should be adopted by regional authorities, local authorities, developers and their agents when considering flood risk:

- Avoid the risk, where possible.
- Substitute less vulnerable uses, where avoidance is not possible.
- Mitigate and manage the risk, where avoidance and substitution are not possible.

Exceptions to the restriction of development due to potential flood risk are to be provided for through the use of a justification test, where the planning need and the sustainable management of flood risk to an acceptable level must be demonstrated. Table 3.1 of the Guidelines classifies developments according to their vulnerability to flooding with 3 no categories, i.e. water compatible

development, less vulnerable development and highly vulnerable development (including essential infrastructure). Table 3.2 sets out a matrix of vulnerability versus flood zone to illustrate appropriate developments and those required to take the Justification Test:

	Flood Zone A	Flood Zone B	Flood Zone C
Highly vulnerable development (including essential infrastructure)	Justification Test	Justification Test	Justification Test
Less Vulnerable Development	Justification Test	Appropriate	Appropriate
Water-compatible Development	Appropriate	Appropriate	Appropriate

- 4.1.4 Flood risk issues are to be considered at strategic level in the preparation of all levels of spatial planning policies. Planning authorities are also to apply the sequential approach to the development management process.

4.2 Wexford County Development Plan

- 4.2.1 The County Development Plan identifies Duncannon as a suitable location for a cluster of tourism related developments. Tourism objective TM04 is to develop and maximise the tourism potential of Wexford by facilitating the expansion of existing and the provision of new sustainable tourism products, facilities and infrastructure while ensuring the protection of the environment and subject to compliance with normal planning and environmental criteria and development management standards. Objective TM12 aims to promote the development of marine leisure and recreation clusters at appropriate locations along the county's coastline subject to compliance with coastal zone management objectives, normal planning and environmental criteria and development management standards. Objective TM27 is to consider the development and the extension of existing tourist related resorts and amenities outside of settlements where it is demonstrated that the development is dependent on an existing local resource or a unique site characteristic or where an overriding need is demonstrated, subject to compliance with normal planning and environmental criteria and development management standards. Objective TM30 is to promote and encourage the visual and environmental improvement of existing caravan parks and the upgrading of their associated infrastructure and facilities. Objective TM32 is to consider small scale additions or infill in existing caravan parks in conjunction with environmental and infrastructural improvements. This type of development will be resisted in areas already well provided for, in the open countryside, in areas of landscape vulnerability and sensitivity and adjacent to or within Natura 2000 sites.
- 4.2.2 Chapter 13 of the plan relates to Coastal Zone Management. Objective CMZ01 requires AA screening. Objective CZM04 aims to prohibit development within areas liable to coastal flooding, other than in accordance with the DoEHLG *Flood*

Risk Management Guidelines for Planning Authorities (2009). Objective CZM07 aims to ensure that developments in the coastal zone are correctly sited and designed having regard to visual impact on the coastal zone and the coastal landscape. Objective CZM09 aims to restrict development outside the boundaries of existing coastal settlements to that which is required to be located in that particular location, including “*Tourism related facilities appropriate to the particular coastal location (other than new build holiday home accommodation) where there is a demonstration of a location or resource based need.*” Objective CZM13 aims to ensure that developments are sensitively sited, designed and landscaped and do not detract from the visual amenity of the area. Objective CZM20 aims to consider appropriate tourism and recreational activities (other than new holiday home accommodation) in areas outside of existing settlements providing these activities do not cause significant adverse impacts on the coastal character and subject to normal planning and environmental criteria and development management standards.

- 4.2.3 Chapter 14 of the plan sets out policies on natural heritage. Objectives NH01 and NH02 relate to the protection of the character and integrity of SACs, cSACs, SPAs, NHAs, pNHAs, Nature Reserves, Refuges for Fauna and County Geological sites. Objective NH03 sets out the requirement for AA. Objective NH08 aims to ensure that development proposals leave a suitable ecological buffer zone between development works and areas or features of ecological importance. The site is located within the ‘Coastal’ zone as per the county Landscape Character Assessment. There is a ‘Landscape of Greater Sensitivity’ nearby to the south, associated with the Hook Peninsula. Section 14.4.3 of the Plan notes that some types of development will have an overriding need to be located in a Coastal landscape or in or near a Landscape of Greater Sensitivity. In such circumstances, and where an overriding need has been established, the Council will require that careful consideration is given to site selection and the scale, design, siting and landscaping of the development, in order to minimise potential adverse visual impacts on the landscape. Objective L08 is to consider appropriate rural recreational and tourism related developments which would facilitate public access to and appreciation of Upland, River Valley and Coastal Landscapes and Landscapes of Greater Sensitivity in the County subject to compliance with relevant County Development Plan objectives. Such developments should be appropriate in scale and be sited, designed and landscaped in a manner which minimises potential adverse impacts on the landscape and shall be in compliance with all other planning and environmental criteria and the development management standards contained in Chapter 18.
- 4.2.4 County Development Plan Objective RS07 is to develop sport, recreation and amenity facilities consistent with proper planning and sustainable development in appropriate locations in the county, subject to normal planning and environmental criteria and development management standards.
- 4.2.5 The site is located within Coastal Flood Zone A as per the Strategic Flood Risk Assessment of the County Development Plan, i.e. the area at highest risk of flooding from rivers and the coast.

4.3 Duncannon Local Area Plan 2004

- 4.3.1 The site was within the boundary of the Duncannon Local Area Plan 2004, under which it is zoned for low density residential development. However that plan has now expired.

5.0 APPLICATION TO BOARD

- 5.1 The application is submitted by SLR Consulting on behalf of the applicant Philip Wallace. It makes the following main points in relation to the background of the case:

- Given that Wexford County Council considers that AA would have been required, a grant of substitute consent would rectify the planning matters relating to the site. The applicant wishes to regularise the situation.
- It is submitted that the use of the site for fairs and circuses since the 1980s would require firm ground underfoot to allow for the traversing of heavy vehicles and the trampling of the ground by a large number of people and animals. It is therefore unlikely that the ground would have been marshy or soft underfoot at that time.
- The banks of the site were regularly used for the dumping of material that was dredged from the river. It is understood that these works were undertaken by Wexford County Council as recently as November 2014. The dredged material formed an area of uneven raised ground along the bank of the river. It has been suggested that the site was also used for the dumping of road planings following resurfacing works in Duncannon village. These works were also undertaken by the council and according to the Duncannon LAP. The site was also used for the dumping of domestic appliances.
- The Council installed 2 no. drainage pipes from the road to the river before the site was bought by the applicant. It is understood that these works were undertaken c. 2011-2012.
- The applicant purchased the site in 2013 and carried out the following works:
 - The removal of 3 no. skips of dumped domestic appliances and scrap metal;
 - The levelling of previously dumped dredged material near the river bank;
 - The spreading of previously dumped road planings (which comprise an inert material);
 - The spreading of 7 no. tractor-trailer loads of topsoil and the sowing of grass. The topsoil was obtained from arable land that was being redeveloped for a single dwelling (reg. ref. 20120055). The applicant also implemented a landscaping plan including native species and incorporating a wild buffer along the riverbank.
- According to the OPW fluvial and coastal flood mapping, the risk of fluvial site flooding is 1% Annual Exceedence Probability (AEP) (1:100 year) and for coastal flooding is 0.5%, i.e. flood Zone A as per the DoELG Flood Risk Management Guidelines. The proposed development is water compatible as per Table 3.1 of the Guidelines and as such is appropriate for Zone A, as per

Table 3.2. On this basis, it is submitted that the risk of flooding to the site is not a significant consideration in relation to the previously proposed development.

5.2 The applicant submits that exceptional circumstances apply for the following reasons:

- An EIA would not be required in relation to the works carried out at the site. Due to the size of the site (0.4808 ha), it would not meet the required threshold for EIA. The development would not, therefore, circumvent the requirements of the EIA Directive.
- The features of interest of the River Barrow and River Nore SAC include wetlands, estuaries, mudflats and sandflats not covered by seawater at low tide. The development site does not and did not include these or any of the habitats that comprise features of interest of the SAC. The site is not located within the SAC and there has been no loss of habitat within the SAC. There is no clear evidence, such as a report by an ecologist, to suggest that the site included Annex I habitat or wetland of ecological significance. The submission states *“Given that the site is not located in a European site and it does not support Annex 2 species, it is not protected under the Habitats Directive.”*
- The site was subjected to dumping prior to 2004 and it is understood that an enforcement case that may have related to similar works on adjoining lands was closed in 2006. The works undertaken by the applicant occurred when the land had already been the subject of modification through the placement of road planings and river dredgings. The material recently placed on the site comprised topsoil from an arable field. It is not considered that these relatively minor works would have caused the circumvention of the Habitats Directive. It is submitted that the ability to carry out AA has therefore not been substantially impaired. All that remains is inert material, which by its nature does not cause pollution.
- It has been suggested that the site may have comprised a wetland (Inspector’s report of PL212843). Given that the site was used for circuses and fairs until at least 1989, it is unlikely that it was consistently marshy at that time.
- It can reasonably be argued that any application for substitute consent would include a remedial NIS and as such, the regularisation of the status of the site would not result in a circumvention of the Habitats Directive.
- The applicant carried out works at the site in order to rectify the dumping that had previously taken place there prior to 2004. The majority of the works that took place at the site were prior to its purchase by the applicant, possibly by Wexford County Council. The applicant was not in receipt of professional planning advice when he carried out the works. The works undertaken were relatively minor. The Planning and Development (Amendment) (No. 2) Regulations 2011 amended the thresholds for the infilling of wetlands. Until then, many land improvement activities were exempted development and did not require an EIA unless the site exceeded 20 ha of wetlands in the case of water management projects. It is only since 2011 that the drainage or reclamation of wetlands in excess of 2 ha requires an EIS or in excess of 0.1 ha requires planning permission. The site in question is 0.4808 ha. Section

8(c) of the Planning and Development Regulations 2001 (as amended) states that the following is exempted development:

“Land reclamation works (other than reclamation of wetlands) consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development.”

Class 33 of Part I of Schedule 2 of the Regulations provides for the laying out and use of land as a park, private open space or ornamental garden; as a roadside shrine or for athletics or sports (subject to certain exclusions) where no charge is made. The Regulations also provide for the erections of fences and other such minor works in a domestic context. Given that the works undertaken were similar in nature to many forms of exempted development and resulted in the creation of private open space that would ordinarily be exempt, it is reasonable that the applicant considered that the removal of dumped items and the spreading of topsoil would not require planning permission, particularly given that he was not in receipt of professional planning advice at the time.

- The various applications relating to the site were the subject of public consultation and any substitute consent application would also be the subject of public consultation.
- The completion of the works would not substantially impair the completion of an AA or prevent public participation in any future application for substitute consent.
- As the works would not result in adverse effects on the integrity of the SAC, remediation would not be necessary.
- The applicant has not made any previous applications in relation to this site. It appears that enforcement action may have been in relation to similar works related to the adjoining site. Such works took place many years before the applicant purchased the site. Previous applications made in relation to the adjoining mobile home site were not made by the above named applicant.
- The land was zoned for residential development under the Duncannon LAP 2004. Such development would require significant earthmoving works, the introduction of asphalt, soils and other building materials to the site and the completion of landscaping works to a much greater degree than those undertaken by the applicant.
- The submission is accompanied by a copy of an undated letter from the applicant to Wexford County Council, which outlines works carried out at the site, also copies of pre-planning correspondence with the planning authority in relation to the subject works, which date to October 2014.

6.0 SUBMISSION OF PLANNING AUTHORITY

6.1 The following main points are noted:

- A NIS accompanied 20140944. The site directly adjoins the River Barrow River Nore SAC, however the proposed foot bridge crossed the SAC.
- It is noted from the Inspector’s report of PL26.212843 that the site is described as marshy and wetland and should properly be described as part of the Shanacloon wetlands.

- The infilling works carried out by the applicant have resulted in the raising of the land such that it is now the same level as the road. Retention is required having regard to the nature of the works, which took place as recently as 2013. In order to make a determination the planning authority would have required substantial information and assessment, which would need to be presented in an NIS and recorded through a stage 2 AA. The application therefore required substitute consent from the Board.
- Section 177D(2)(b) '*whether the applicant had or could reasonably have had a belief that the development was not unauthorised*'. The applicant may have had a belief that the infilling of land was not unauthorised as from accounts the applicant only purchased the site in 2013. The site has been used for the dumping of material dredged from the river over a number of years and it would appear that the intention was essentially to clean up and level off the site.
- Section 177D(2)(f), it appears from Council records that there is no previous enforcement case for the above named applicant.
- The Council has no objection in principle to the infilling of the subject lands providing it can be clearly demonstrated in an NIS and following AA the determination can be made that no significant effects on the site integrity occurred.
- The submission is accompanied by aerial photographs of the subject site:
 - 2000 aerial photograph in which the site appears to be in use.
 - 2005 aerial photograph in which the site appears to be in use, possibly for dumping.
 - 2012 aerial photograph in which the site does not appear to be in use.

7.0 APPLICANT RESPONSE TO PA COMMENT

7.1 The following main points are noted:

- The Council is supportive of the application and notes that it is reasonable to believe that the applicant was not aware that the development required planning permission. The Council also notes that the applicant has not been involved in any previous enforcement case.
- There was no ecological assessment available to confirm that the site was of ecological interest, comprised wetlands, included habitat that is cited in relation to the SAC or supported any Annex II species. In addition, the use of the site in the past for fairs and circuses indicates that the ground may not have been soft underfoot at that time.
- The submission repeats other points made in the application, as summarised above.
- Given the relatively minor nature of the development, it is requested that the Board considers whether or not AA is required under the Habitats Directive and whether or not the development would have had adverse effects on the conservation objectives of the adjoining SAC.

8.0 ASSESSMENT

- 8.1 As per Section 177D, the following matters are to be considered by the Board in deciding whether to grant leave to apply for substitute consent, given that permission has not been granted for the subject development:
- Whether works carried out at the site would have required Environmental Impact Assessment;
 - Whether works carried out at the site would have required Appropriate Assessment
 - Whether ‘exceptional circumstances’ exist as per section 177D(i)(b), such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.
- 8.2 For the avoidance of doubt, it is noted that this application for leave to apply for substitute consent relates to the following works carried out by the applicant at the subject site since he purchased it in 2013:
- The removal of 3 no. skips of dumped domestic appliances and scrap metal;
 - The levelling of previously dumped dredged material near the river bank;
 - The spreading of previously dumped road planings (which comprise an inert material);
 - The spreading of 7 no. tractor-trailer loads of topsoil and the sowing of grass, also the implementation of a landscaping plan including native species and incorporating a wild buffer along the riverbank.
- 8.3 Part 2(8) of the Planning and Development Regulations 2001 (as amended) states that the following is exempted development:

Works consisting of field drainage for agriculture, other than drainage and/or reclamation of wetlands, shall be exempted development.

Land reclamation works (other than reclamation of wetlands) consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development

Part 2(5) of the Regulations defines “wetlands” as:

“... natural or artificial areas where biogeochemical functions depend notably on constant or periodic shallow inundation, or saturation, by standing or flowing fresh, brackish or saline water”

Given that the subject site is within the flood plain of the River Barrow and River Nore SAC, it is considered that this definition would apply, therefore the development is not exempted from the need to apply for planning permission.

8.4 Environmental Impact Assessment

- 8.4.1 Schedule 5 of the Planning and Development Regulations (as amended) sets out the classes and thresholds of developments which require EIA. Part 2(1)(c) of Schedule 5 specifies:

Development consisting of the carrying out of drainage and/or reclamation of wetlands where more than 2 hectares of wetlands would be affected.

Given that the site as a stated area of 0.4808 ha, the subject development would be well below this threshold.

8.4.2 Article 103(2) of the Planning and Development Regulations 2001 (as amended by S.I. No. 476/2011 – Planning and Development (Amendment) (No. 3) Regulations 2011) provides that where a planning application for sub-threshold development is not accompanied by an EIS, and the development would be located on, or in, or have the potential to impact on:

- a) *a European site,*
- b) *an area the subject of a notice under section 16 (2)(b) of the Wildlife (Amendment) Act 2000 (No. 38 of 2000),*
- c) *an area designated as a natural heritage area under section 18 of the Wildlife (Amendment) Act 2000,*
- d) *land established or recognised as a nature reserve within the meaning of section 15 or 16 of the Wildlife Act 1976 (No. 39 of 1976) as amended by sections 26 and 27 of the Wildlife (Amendment) Act 2000,*
- e) *land designated as a refuge for flora or as a refuge for fauna under section 17 of the Wildlife Act 1976 as amended by section 28 of the Wildlife (Amendment) Act 2000,*
- f) *a place, site or feature of ecological interest, the preservation, conservation or protection of which is an objective of a development plan or local area plan, draft development plan or draft local area plan, or proposed variation of a development plan, for the area in which the development is proposed,*
- g) *a place or site which has been included by the Minister for Arts, Heritage and the Gaeltacht in a list of proposed Natural Heritage Areas published on the National Parks and Wildlife Service website,*

the planning authority shall, in determining whether the development would or would not be likely to have significant effects on the environment, have regard to the likely significant effects of the development on such site, area, land, place or feature as appropriate.

8.4.3 Article 103(3) provides that a planning authority shall, in determining whether a proposed development would or would not be likely to have significant effects on the environment, have regard to the criteria set out in Schedule 7 of the Regulations. Schedule 7 sets out the criteria for determining whether a development would or would not be likely to have significant effects on the environment, i.e.:

- 1) The characteristics of the proposed development, in particular:
 - the size of the proposed development,
 - the cumulation with other proposed development,
 - the nature of any associated demolition works,
 - the use of natural resources,
 - the production of waste,

- pollution and nuisances,
- the risk of accidents, having regard to substances or technologies used.

2) The location of the proposed development, the environmental sensitivity of geographical areas likely to be affected by proposed development, having regard in particular to:

- the existing land use,
- the relative abundance, quality and regenerative capacity of natural resources in the area,
- the absorption capacity of the natural environment, paying particular attention to the following areas:
 - (a) wetlands,
 - (b) coastal zones,
 - (c) mountain and forest areas,
 - (d) nature reserves and parks,
 - (e) areas classified or protected under legislation, including special protection areas designated pursuant to Directives 79/409/EEC and 92/43/EEC,
 - (f) areas in which the environmental quality standards laid down in legislation of the EU have already been exceeded,
 - (g) densely populated areas,
 - (h) landscapes of historical, cultural or archaeological significance.

3. The characteristics of potential impacts, i.e. the potential significant effects of proposed development in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to:

- the extent of the impact (geographical area and size of the affected population),
- the transfrontier nature of the impact,
- the magnitude and complexity of the impact,
- the probability of the impact,
- the duration, frequency and reversibility of the impact

8.4.4 This assessment has been prepared with regard to the guidance provided in the DoEHLG document *Environmental Impact Assessment (EIA) Guidance for Consent Authorities Regarding Sub-Threshold Development*, 2003.

8.4.5 The subject development is immediately adjacent to and within the floodplain of the River Barrow and River Nore SAC (Site Code 002162) and adjoins the Duncannon Sandhills pNHA (Site Code 001738), see enclosed maps. Under the Wildlife Amendment Act (2000), NHAs are legally protected from damage from the date they are formally proposed for designation. With regard to the above, the primary potential for significant environmental effects such that EIA would have been required is in relation to impacts on the pNHA. Potential impacts on the Natura 2000 network may properly be considered in the course of AA.

8.4.6 The following comments are noted from the Site Synopsis for the pNHA:

*“The Duncannon Sandhills site comprises Duncannon Strand and the freshwater marsh in the valley to the east in Shanacloon Townland. The rocks around Duncannon ford have a rich flora of seaweeds typical of a moderately exposed shore and the cliffs themselves support a number of coastal species on ledges, including Thrift (*Armeria maritima*), Rock Samphire (*Crithmum maritimum*) and Buck’s-horn Plantain (*Plantago coronopus*).*

*The dunes which fringe the strand are dominated by Marram grass (*Ammophila arenaria*) towards the sea. Other species present include Wild Sage (*Salvia verbenaca*), a rare species listed in the Irish Red Data Book.*

*The marsh to the east is situated in a narrow valley and is dominated by Common Reed (*Phragmites australis*) which gives way to areas of Soft Rush (*Juncus effuses*) and Tufted Hairgrass (*Deschampsia cespitosa*). Two notable components of the marsh are the sedges, Greater Pond-sedge (*Carex riparia*) and Greater Tussock-sedge (*Carex paniculata*).”*

It is clear that, although the site is not within the pNHA, it is an integral part of an interconnected complex of environmentally sensitive areas, i.e. the river, its associated flood plain and wetlands to the east and the sand dune system at the mouth of the river further to the west. I note in this regard the following comment from Inspector’s report of PL26.212843:

“From my examination of the file and the site inspection, it is clear that the site is marshy and wetland and should be properly described as part of the Shanacloon wetlands.”

The applicant states that the site was used for circuses and fairs and submits this as evidence that it was not a wetland. However, such an occasional use does not mean that the area would not have been inundated at other times.

- 8.4.7 The NIS document on file was prepared by Dr. Betsy Hickey, Consulting Ecologist in November 2014 and was submitted with 20140944. It considers potential impacts on the pNHA along with impacts on the Natura 2000 network. The Site Synopsis for the pNHA is included as an appendix. The NIS states that the subject site was examined on 2 occasions (late April and mid June 2014) for Wild Sage (*Salvia verbenaca*), a rare red data book species which is present in the pNHA. There was no sign of the species on either of these occasions or of either of the 2 sedges – greater tussock sedge (*Carex paniculata*) or greater pond-sedge (*C. riparia*), also present in the pNHA.
- 8.4.8 With regard to the subject development, it appears that the lands at the site were already disturbed before the works took place as they had been used for illegal dumping and for the disposal of road planings. The development in question, as described by the applicant, was limited in scale and nature. It did not involve any toxic substances. There was some potential for cumulative impacts given that the site had been used for illegal dumping in the past. However, the works appear to have been an attempt to remedy the previous dumping rather than continue it, i.e. the removal of waste, the levelling the site and the spreading of previously

dumped road planings. The only new material introduced to the site would have been the topsoil, which, it is stated, was sourced from a nearby building site and was inert material. The works took place over a relatively short period, 2013-2014, i.e. limited duration. The principal environmental impact that would have arisen is likely to have been impacts on water quality in the river due to siltation of run-off from the earthworks. The raising of the ground and the consequent loss of flood plain could also have resulted in additional inundation of the associated wetland to the east, within the pNHA. There is no evidence or statement that any mitigation measures were implemented. However, I do note that wild existing vegetation has recovered along the river bank, as per the photographs on file and the site description in the NIS.

- 8.4.9 On balance, having regard to the following, it is considered that the subject development is unlikely to have resulted in significant effects on the environment and that EIA would not have been required:
- The stated site area is well below the threshold for EIA.
 - The limited extent and duration of the works in question.
 - The retention of the existing vegetation along the river bank.
 - The above description of the pNHA.

8.5 Appropriate Assessment

8.5.1 The obligation to undertake AA derives from Articles 6(3) and 6(4) of the Habitats Directive. AA involves consideration of whether the plan or project alone or in combination with other projects or plans will adversely affect the integrity of a Natura 2000 site in view of the site's Conservation Objectives and includes consideration of any mitigation measures to avoid, reduce or offset negative effects. Natura 2000 (also known as European) sites comprise Special Areas of Conservation (SACs), designated under the EU Habitats Directive and Special Protection Areas (SPAs), designated under the EU Birds Directive (92/43/EEC). Ireland is obliged under both national and European legislation to maintain SACs at a favourable conservation status, i.e. ensuring their ecological integrity. Under the Habitats directive, the test for this favourable conservation status of a habitat is achieved when:

- Its natural range, and the area it covers within that range, is stable or increasing, and
- The ecological factors that are necessary for its long term maintenance exist and are likely to continue to exist for the foreseeable future, and
- The conservation status of its typical species is favourable.

Favourable conservation status is achieved for a species when:

- Population data on the species concerned indicate that it is maintaining itself, and
- The natural range of the species is neither being reduced nor likely to be reduced for the foreseeable future, and
- There is, and will probably continue to be, a sufficiently large habitat to maintain the population on a long term basis.

8.5.2 The AA determination must be carried out before a decision is made or consent given for the proposed plan or project. Consent can only be given after having

determined that the proposed development would not adversely affect the integrity of a European Site in view of its Conservation Objectives. Case law of the Court of Justice of the European Union as established that the assessment carried out under Article 6(3) cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of a project on a European site (Case C-258/11, Sweetman and others). Unlike EIA, there are no thresholds.

8.5.3 AA screening is required in this instance to determine on the basis of a preliminary assessment and objective criteria whether the subject development (as outlined above) alone and in combination with other plans or projects could have significant effects on a Natura 2000 site in view of the site's conservation objectives. The following Natura 2000 sites are located within 15km of the subject site (see enclosed map):

Name of Site	Site Code	Distance from Appeal Site (km)	Conservation Objectives/Qualifying Interests
River Barrow and River Nore SAC	002162	Within 50m.	<p>There are detailed conservation objectives for the following Qualifying Interests:</p> <ul style="list-style-type: none"> • Estuaries [1130] • Mudflats and sandflats not covered by seawater at low tide [1140] • Salicornia and other annuals colonising mud and sand [1310] • Atlantic salt meadows (<i>Glauco-Puccinellietalia maritima</i>) [1330] • Mediterranean salt meadows (<i>Juncetalia maritimi</i>) [1410] • Water courses of plain to montane levels with the <i>Ranunculum fluitantis</i> and <i>Callitriche-Batrachion</i> vegetation [3260] • European dry heaths [4030] • Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels [6430] • Petrifying springs with tufa formation (<i>Cratoneurion</i>) [7220] • Old sessile oak woods with <i>Ilex</i> and <i>Blechnum</i> in the British Isles [91A0] • Alluvial forests with <i>Alnus glutinosa</i> and <i>Fraxinus excelsior</i> (<i>Alno-Padion</i>, <i>Alnion incanae</i>, <i>Salicion albae</i>) [91E0] • <i>Vertigo moulinsiana</i> (<i>Desmoulin's Whorl Snail</i>) [1016] • <i>Margaritifera margaritifera</i> (Freshwater

			<ul style="list-style-type: none"> Pearl Mussel) [1029] • Austropotamobius pallipes (White-clawed Crayfish) [1092] • Petromyzon marinus (Sea Lamprey) [1095] • Lampetra planeri (Brook Lamprey) [1096] • Lampetra fluviatilis (River Lamprey) [1099] • Alosa fallax fallax (Twaiite Shad) [1103] • Salmo salar (Salmon) [1106] • Lutra lutra (Otter) [1355] • Trichomanes speciosum (Killarney Fern) [1421] • Margaritifera durrovensis (Nore Pearl Mussel) [1990]
Ballyteigue Burrow SAC	000696	13.8km	<p>There are detailed conservation interests for the following Qualifying Interests:</p> <ul style="list-style-type: none"> • Estuaries [1130] • Mudflats and sandflats not covered by seawater at low tide [1140] • Coastal lagoons [1150] • Annual vegetation of drift lines [1210] • Perennial vegetation of stony banks [1220] • Salicornia and other annuals colonising mud and sand [1310] • Spartina swards (Spartinion maritimae) [1320] • Atlantic salt meadows (Glauco-Puccinellietalia maritimae) [1330] • Mediterranean salt meadows (Juncetalia maritimi) [1410] • Mediterranean and thermo-Atlantic halophilous scrubs (Sarcocornetea fruticosi) [1420] • Embryonic shifting dunes [2110] • Shifting dunes along the shoreline with Ammophila arenaria (white dunes) [2120] • Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130] • Atlantic decalcified fixed dunes (Calluno-Ulicetea) [2150]
Ballyteigue Burrow SPA	004020	14.65km	<p>There are detailed conservation objectives for the following Qualifying Interests:</p> <ul style="list-style-type: none"> • Light-bellied Brent Goose (Branta bernicla hrota) [A046] • Shelduck (Tadorna tadorna) [A048] • Golden Plover (Pluvialis apricaria) [A140] • Grey Plover (Pluvialis squatarola) [A141] • Lapwing (Vanellus vanellus) [A142]

			<ul style="list-style-type: none"> • Black-tailed Godwit (<i>Limosa limosa</i>) [A156] • Bar-tailed Godwit (<i>Limosa lapponica</i>) [A157] • Wetland and Waterbirds [A999]
Bannow Bay SAC	000697	4.8km	<p>There are detailed conservation objectives for the following Qualifying Interests:</p> <ul style="list-style-type: none"> • Estuaries [1130] • Mudflats and sandflats not covered by seawater at low tide [1140] • Annual vegetation of drift lines [1210] • Perennial vegetation of stony banks [1220] • Salicornia and other annuals colonising mud and sand [1310] • Atlantic salt meadows (<i>Glaucopuccinellietalia maritimae</i>) [1330] • Mediterranean salt meadows (<i>Juncetalia maritimi</i>) [1410] • Mediterranean and thermo-Atlantic halophilous scrubs (<i>Sarcocornetea fruticosi</i>) [1420] • Embryonic shifting dunes [2110] • Shifting dunes along the shoreline with <i>Ammophila arenaria</i> (white dunes) [2120] • Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130]
Bannow Bay SPA	004033	6km	<p>There are detailed conservation objectives for the following Qualifying Interests:</p> <ul style="list-style-type: none"> • Light-bellied Brent Goose (<i>Branta bernicla hrota</i>) [A046] • Shelduck (<i>Tadorna tadorna</i>) [A048] • Pintail (<i>Anas acuta</i>) [A054] • Oystercatcher (<i>Haematopus ostralegus</i>) [A130] • Golden Plover (<i>Pluvialis apricaria</i>) [A140] • Grey Plover (<i>Pluvialis squatarola</i>) [A141] • Lapwing (<i>Vanellus vanellus</i>) [A142] • Knot (<i>Calidris canutus</i>) [A143] • 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] • Wetland and Waterbirds [A999]
Hook Head SAC	000764	7.4km	<p>There are detailed conservation objectives for the following Qualifying Interests:</p> <ul style="list-style-type: none"> • Large shallow inlets and bays [1160] • Reefs [1170]

			<ul style="list-style-type: none"> • Vegetated sea cliffs of the Atlantic and Baltic coasts [1230]
Lower River Suir SAC	002137	8.3km	<p>There is a general conservation objective to maintain or restore the favourable conservation condition of the Annex I habitat(s) and/or the Annex II species for which the SAC has been selected:</p> <ul style="list-style-type: none"> • Atlantic salt meadows (<i>Glaucopuccinellietalia maritimae</i>) [1330] • Mediterranean salt meadows (<i>Juncetalia maritimi</i>) [1410] • Water courses of plain to montane levels with the <i>Ranunculon fluitantis</i> and <i>Callitricho-Batrachion</i> vegetation [3260] • Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels [6430] • Old sessile oak woods with <i>Ilex</i> and <i>Blechnum</i> in the British Isles [91A0] • Alluvial forests with <i>Alnus glutinosa</i> and <i>Fraxinus excelsior</i> (<i>Alno-Padion</i>, <i>Alnion incanae</i>, <i>Salicion albae</i>) [91E0] • <i>Taxus baccata</i> woods of the British Isles [91J0] • <i>Margaritifera margaritifera</i> (Freshwater Pearl Mussel) [1029] • <i>Austropotamobius pallipes</i> (White-clawed Crayfish) [1092] • <i>Petromyzon marinus</i> (Sea Lamprey) [1095] • <i>Lampetra planeri</i> (Brook Lamprey) [1096] • <i>Lampetra fluviatilis</i> (River Lamprey) [1099] • <i>Alosa fallax fallax</i> (Twaite Shad) [1103] • <i>Salmo salar</i> (Salmon) [1106] • <i>Lutra lutra</i> (Otter) [1355]
Tramore Dunes and Backstrand SAC	000671	12.1km	<p>There are detailed conservation objectives for the following Qualifying Interests:</p> <ul style="list-style-type: none"> • Mudflats and sandflats not covered by seawater at low tide [1140] • Annual vegetation of drift lines [1210] • Perennial vegetation of stony banks [1220] • <i>Salicornia</i> and other annuals colonising mud and sand [1310] • Atlantic salt meadows (<i>Glaucopuccinellietalia maritimae</i>) [1330] • Mediterranean salt meadows (<i>Juncetalia maritimi</i>) [1410] • Embryonic shifting dunes [2110] • Shifting dunes along the shoreline with <i>Ammophila arenaria</i> (white dunes) [2120]

			<ul style="list-style-type: none"> Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130]
Tramore Back Strand SPA	004027	12.4km	<p>There are detailed conservation objectives for the following Qualifying Interests:</p> <ul style="list-style-type: none"> Light-bellied Brent Goose (<i>Branta bernicla hrota</i>) [A046] Golden Plover (<i>Pluvialis apricaria</i>) [A140] Grey Plover (<i>Pluvialis squatarola</i>) [A141] Lapwing (<i>Vanellus vanellus</i>) [A142] 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] Wetland and Waterbirds [A999]
Keeragh Islands SPA	004118	12.8km	<p>There is a general conservation objective to maintain or restore the favourable conservation condition of the Qualifying Interest:</p> <p>1.0 Cormorant (<i>Phalacrocorax carbo</i>) [A017]</p>

8.5.4 A NIS document was submitted with 20140944, dated November 2014, which was carried out by Dr. Betsy Hickey, Consulting Ecologist. The following points of same are noted:

- The development is located in the groundwater catchment of the River Barrow and River Nore SAC. This SAC contains water dependent habitats and species sensitive to water quality. These include the Freshwater Pearl Mussel, Crayfish, Twiate Shad, Atlantic Salmon, Otter, Sea Lamprey, River Lamprey and Brook Lamprey. Species specific to Waterford Estuary include polychaetes and bivalves such as Lug Worm, Marine Bristle worm, Scoloplos Armiger, Sand Mason and the Common Cockle.
- Over half of the site has historically been marshy, with regard to submitted O.S. maps. The only part of the site that was not formerly wet was in the northwest corner. Prior to its acquisition by the applicant, the site had been used as a dumping ground for various forms of waste including discarded household appliances, rubble, old cars, etc. Much of this was removed by the applicant, who then imported material (hard fill, sub soil and top soil) to the site. This has resulted in the land being slightly higher (approx. 75cm) such that it is now the same level as the road which borders the north and west of the site. The land is now in grass with ornamental planting on 3 sides but not on the river. There is a possibility that lands upstream will occasionally flood.
- A field survey of the development site was carried out to inform the screening assessment. A record was made of the plant species found at the site.
- Construction at the site would create a potential for disturbance of the sides of the river channel, also the release of concrete or chemicals with detrimental effects on water quality. Cumulative impacts as a result of disturbance to the river channel could result in pushing tidal waters upstream, which would probably continue to overflow into the adjacent marsh. Proposed mitigation measures are outlined.

- A field survey of the development site was carried out to inform the screening assessment. A record was made of the plant species found at the site.
- The NISA concludes that, subject to the implementation of the proposed mitigation measures, there would be no impact on the adjacent SAC.

8.5.5 The planning authority carried out an AA screening for the development proposed under 20140944. The above named SPAs and SACs are listed. The assessment concludes that no element of that proposal would be likely to give rise to impact on the Natura 2000 network. No likely direct, indirect or secondary impacts are identified.

8.5.6 I also note the following comments by the Development Applications Unit of the DoEHLG on file PL26.212846:

“Although the site of the proposed development lies outside of the River Barrow and River Nore Special Area of Conservation (SAC) No. 2162 it lies between a stream that runs from an area of Phragmites species dominate marsh and on to Duncannon Strand, both part of the SAC. Therefore, the site is sandwiched in between the SAC ... It is our recommendation that a more appropriate planting scheme should be used along the boundary to the outflow stream. It should be dominated by native Salix species. In addition, no waste/rubble should be stored within 20m from this stream.”

8.5.7 Having regard to the source-pathway-receptor model and to the intervening distances, it is considered unlikely that the subject works would have had any significant impacts on the Natura sites listed above except for the River Barrow and River Nore SAC. However, due to the nature of the works, it is clear that the potential arose for impacts on water quality within the SAC, which could in turn have resulted in significant impacts on the water dependent habitats and species listed as qualifying interests of the SAC. I note that the Site Synopsis for the SAC states that water quality is vulnerable and that good water quality is necessary to maintain the populations of the Annex II animal species within the site. The following is noted in particular with regard to threats to the SAC:

“Drainage activities in the catchment can lead to flash floods which can damage the many Annex II species present. Capital and maintenance dredging within the lower reaches of the system pose a threat to migrating fish species such as lamprey and shad. Land reclamation also poses a threat to the salt meadows and the populations of legally protected species therein.”

With regard to the above and to the precautionary principle, it is considered that AA screening at a minimum would have been required.

8.6 Exceptional Circumstances

8.6.1 Section 177(2) sets out the matters that the Board shall have regard to in considering whether exceptional circumstances exist. Each part of Section 177(2) may be considered separately as follows.

- a) *Whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;*

This is the fundamental consideration. As discussed above, the subject works are well below the threshold for EIA and are considered not to have resulted in significant environmental impacts such that EIA would have been required with regard to article 103(3) of the Act. Regularisation of the development therefore would not circumvent the requirements of the EIA Directive. The purposes and objectives of the Habitats Directive are to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the Member States, to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics

There is potential for impacts on the conservation interests of the adjacent River Barrow and River Nore SAC, primarily by way of impacts on water quality with consequent impacts on water dependent habitats and species. The extent and nature of any historic and ongoing impacts can be considered by a remedial NIS. A Substitute Consent permission would give an opportunity to mitigate and monitor any ongoing impacts. It is therefore considered that regularisation of the development concerned would be unlikely to circumvent the purpose and objectives of the Habitats Directive.

- b) *Whether the applicant had or could reasonably have had a belief that the development was not unauthorised;*

The applicant submits that he was not in receipt of professional planning advice when he carried out the works. The application also notes that also that many land improvement activities were exempted development until the Planning and Development (Amendment) (No. 2) Regulations 2011 changed the thresholds for the infilling of wetlands such that the drainage or reclamation of wetlands in excess of 2 ha requires an EIS or in excess of 0.1 ha requires planning permission. In addition, the works undertaken were similar in nature to many forms of exempted development and resulted in the creation of private open space that would ordinarily be exempt. This point is considered reasonable. I also note the submission of the planning authority, which is supportive of the applicant's endeavour to clean up the site.

- 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;*

While the works carried out by the applicant have undoubtedly changed the nature of the site, it is evident from the available historical maps and from the planning report on file that the site had already been used for illegal dumping for some time before it was acquired by him. It therefore had already been disturbed

and it is unlikely that original features remained. The works have not had any significant impact on residential amenities or on any neighbouring property. Third parties would have the right to make submissions if the applicant is granted leave to apply for Substitute Consent.

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;

The above assessment of the need for EIA and AA considers potential environmental impacts. It concludes that there is potential for impacts on the qualifying interests of the River Barrow and River Nore SAC, which would need to be considered further by a Stage 2 AA. The potential impacts relate to water quality and consequent impacts on water dependent species and habitats. The can properly be considered by a remedial NIS.

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

The works carried out were limited in extent and of relatively short duration. The site is now inert and stable and there does not appear to be any evidence of ongoing impacts as a result, although this matter would be fully considered in a remedial NIS. While it is accepted that part of the floodplain has been removed, the overall area is small, i.e. part of the total site area of 0.4808 ha according to the NIS on file.

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

Illegal dumping was carried out at the site prior to its acquisition by the applicant and there is no evidence that he has carried out unauthorised development elsewhere. Historic enforcement action by the planning authority in the vicinity related to works at adjoining sites that were not in the ownership of the applicant. The works that are the subject of this application appear to have been carried out in good faith as an attempt to remedy the previous dumping and clean up the site. I note the submission of the planning authority in this regard.

g) Such other matters as the Board considers relevant

I note that the site is unzoned lands at the edge of Duncannon village. The development of the site as an amenity area to serve the adjacent caravan park would generally be in accordance with tourism and settlement policies of the current Wexford County Development Plan, as set out above. The development does not result in an intensification of the use of the adjacent caravan park and does not result in any traffic or visual impact issues in this sensitive landscape. While it is located in the flood plain, the subject works and any proposed future developments at the site would be considered with regard to the guidance provided in the DoEHLG *The Planning System and Flood Risk Management Guidelines for Planning Authorities* (2009).

8.6.3 In view of these matters, it is considered that regularisation of the development concerned would be unlikely to circumvent the purpose and objectives of the EIA Directive or the Habitats Directive and that exceptional circumstances did apply as per section 177D.

8.7 Conclusion

8.7.1 The subject development comprises works which would have required planning permission and which would have required AA screening at a minimum with regard to the precautionary principle. An application for Substitute Consent is therefore necessary to regularise the situation. Having regard to the above assessment, it is considered that regularisation of the subject development concerned would not circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive and that exceptional circumstances did apply as per section 177D of the Act.

9.0 RECOMMENDATION

9.1 I recommend that the Board **grant** the applicant leave to apply for Substitute Consent under section 177D(4) of the Planning and Development Act 2000 (as amended), for the Reasons and Considerations set out below.

REASONS AND CONSIDERATIONS

Having regard to-

- (a) On the basis of the information available and with regard to the following:
 - (i) The conservation objectives for the River Barrow and River Nore SAC;
 - (ii) The location of the site within the flood plain of the River Barrow and River Nore SAC and the consequent potential for significant effects on a Natura 2000 site.

Appropriate Assessment would have been required to ascertain whether the development alone or in combination with other plans and projects would affect the integrity of the Natura 2000 site in view of its conservation objectives but that such an assessment was not carried out.

- (b) On the basis of the information available and with regard to the following:
 - (i) The subject works were carried out in good faith and the applicant was unaware of the requirement to apply for planning permission;
 - (ii) The inert nature and limited duration of the works carried out;
 - (iii) The lack of any apparent ongoing significant environmental impacts;

- (iv) The works are generally be in accordance with the provisions of the Wexford County Development Plan 2013-2019

It is the decision of the Board to grant the applicant leave to apply for Substitute Consent under Section 177D of the Planning and Development Act 2000 (as amended) in relation to the subject works.

Sarah Moran,
Senior Planning Inspector
29th November 2015