



COMHAIRLE CONTAE CHIARRAÍ
KERRY COUNTY COUNCIL

17th June, 2022

Leahy Planning Ltd.,
Mill Road House,
Mill Road,
Ennis,
Co. Clare.

**e: Planning and Development Acts 2000 (as amended)
Planning File No. 22564**

A Chara,

I refer to planning application submitted by you on behalf of Seamus O'Sullivan & John Murphy for Retention Permission to retain fencing for land enclosure at Fenit Within, Fenit, Co. Kerry which was received by the Planning Authority on 30/5/2022.

Having regard to Section 34(12) of the Planning and Development Act 2000, as amended, Kerry County Council is precluded from considering this application as significant effects from the proposed development, individually or in-combination with other plans or projects, on a European Site in view of the sites' conservation objectives cannot be excluded.

Reasons for Decision:

- a. The retention being sought (which includes a NIS submitted by the applicant which) concludes an appropriate assessment is required
- b. The conclusions, as outlined above, reached by An Bord Pleanála in relation to a previous application for a Section 5 relating to the fencing, (An Bord Pleanála Reference 08.RL.3219).
- c. Case law in relation to a Planning Authority's legislative obligations under Section 34 (12) of the Planning & Development Act, 2000 as amended, particularly pertaining to the "development concerned" and having regard to a precedential decision made by An Bord Pleanála, which I note in this instance was to determine that an appropriate assessment was required.



As per Section 34(12) the application is returned herewith and, in the circumstances and notwithstanding the fact that an acknowledgement of receipt of a valid application was issued by the Planning Authority on the 3rd June, 2022 the Planning Authority is now obliged to invalidate the application.

The planning application, including all particulars, plans, drawings and maps are therefore returned herewith and planning application reg. no. **22/564** has been entered in the planning register as an invalid application.

As all Planning Department Refunds are paid via electronic fund transfer, the planning fee of **240.00** will be paid into account payee **Leahy Planning Ltd.** as soon as possible.

If you require clarification on the above, you are advised to telephone 066/7183582.

Yours faithfully,



 A.O. Planning

CC Seamus O'Sullivan, Tawlaght, Fenit, Co. Kerry.

CC John Murphy, Island Road, Fenit, Co. Kerry.

Memo

Date/Dáta: June 16th, 2022
To/Chuig: Planning, Kerry County Council
From/O: Cathy Fisher
Re/Le: Notional screening exercise under section 34(12) of the PDA 2000 of the retention permission 22564.

In reference to planning application number 22564 and the RETENTION PERMISSION to RETAIN DEVELOPMENT CONSISTING OF FENCING FOR LAND ENCLOSURE at FENIT WITHIN FENIT CO. KERRY, please note the following:

1. The retention application is partly located within a European site – the Akeragh, Banna and Barrow Harbour SAC and in proximity to the adjoining/adjacent to the Tralee Bay Complex SPA,
2. As regards the retention application 22564, I note this was previously subject to a Section 5 referral to Kerry County Council (KCC Ref: Exe, ABPREF:08.RL.3219),
3. I note further to this KCC issued an exemption for the development determining that an appropriate assessment was not required,
4. I note the Section 5 referral Exe 333 was subsequently referred to ABP,
5. I note ABP determined that the fencing was de-exempted by a number of restrictions under Article 9, including:
(d) the said erection of the fencing (partly) within a designated Special Area of Conservation requires an Appropriate Assessment and, therefore, comes within the restrictions on exemptions under section 4(4) of the Planning and Development Act, 2000, as amended:
6. I note the application for retention now being sought under PLREF:22564 relates to the retention of fencing within the Akeragh, Banna and Barrow Harbour SAC, as per the Section 5 referral to ABP,
7. I note in this instance under 22564 the applicant has submitted a *Screening Report for AA* with the application.
8. Regarding a notional screening exercise under section 34(12) of the PDA 2000, I note:
 - a. Table 1 below outlines the European Site which are within 15kms of the retention application,
 - b. Considering the nature, scale and location of the retention, I am satisfied that the only European sites within the zone of influence of the retention that are likely to be significantly affected is the Akeragh, Banna and Barrow Harbour SAC and the Tralee Bay Complex SPA,
 - c. I note the other European Sites as listed in Table 1 are physically removed from the retention and/or occur upstream; are in different catchments to the retention or have tenuous coastal connectivity which I believe is weak and not likely to act as a source-pathway-receptor (SPR) that would cause a likely significant effect.
 - d. I conclude therefore that the only European sites where a possible significant effect could occur from the retention is the aforementioned Akeragh, Banna and Barrow Harbour SAC and the Tralee Bay Complex SPA.

- e. Other European sites are excluded, there is no SPR connectivity including hydrological connectivity between the retention application and those other European Sites listed in Table 1.

Table 1: European Site which are within 15kms of the retention application.

Identification of relevant European sites using Source-Pathway-Receptor model and compilation of information on Qualifying Interests and conservation objectives				
European Site (code)	List of Qualifying Interest/Special Conservation Interest	Distance from proposed development(km)	Connections (Source-Pathway-Receptor)	Considered further in screening (Y/N)
Akeragh, Banna and Barrow Harbour SAC	Annexed habitat http://www.npws.ie/sites/default/files/protected-sites/conservation_objectives/CO000332.pdf	Within	Y	Y
Tralee Bay and Magharees Peninsula, West to Cloghane SAC	Annexed habitats and species. https://www.npws.ie/protected-sites/sac/002351	2.7km	N – the retention application is not in proximity to the SACs and is not hydrologically connected to the SACs. There is no SPR connectivity.	N
Magaharees Island SAC	Annexed habitat https://npws.ie/protected-sites/sac/002261	5km		
Slieve Mish Mts SAC	Annexed habitats. https://npws.ie/protected-sites/sac/002185	6.8km		
Mt Brandon SAC	Annexed habitats and annexed species https://npws.ie/protected-sites/sac/000375	11km		N
Ballyseedy Woods cSAC	Annexed habitat http://www.npws.ie/sites/default/files/protected-sites/conservation_objectives/CO002112.pdf	14km		N
Tralee Bay Complex SPA	BSCI Wintering waders and waterfowl https://www.npws.ie/protected-sites/spa/004188	Adjacent/Within	Y	Y
Magharee Island SPA	BSCI: Storm Petrel; Shag, Barnacle Goose, Common Gull, Common Tern, Arctic Tern, Little Tern. https://npws.ie/protected-sites/spa/004125	9km	N – the retention application is physically removed from the SPAs. There is no SPR connectivity.	N
Dingle Peninsula SPA	BSCI Fulmar; Chough & Peregrine http://www.npws.ie/sites/default/files/protected-sites/conservation_objectives/CO004189.pdf	10km		N
Kerry Head SPA	BSCI Chough & Fulmar https://www.npws.ie/protected-sites/spa/004189	10.5km		N
Castlemaine Harbour SPA	BSCI Wintering waders and waterfowl. https://www.npws.ie/protected-sites/spa/004029	15km		N
Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA	BSCI – Hen Harrier http://www.npws.ie/sites/default/files/protected-sites/conservation_objectives/CO004161.pdf	15km		N

- **Description and location of the development concerned**

The fencing erected around Fenit island is considerable in length. It is unusual in nature / design, (within an agricultural context), consisting of as it does of multiple rows of electrified wires and in some locations chainlink type fencing. Concrete was required to secure the fence in position at a number of locations. The fence is located within and adjoining potentially sensitive areas in Tralee Bay, partly within and adjoining the Tralee Bay Complex SPA and the Akeragh, Banna and Barrow Harbour SAC which are designated for a range of habitats and birdlife. The fields located on the landward side of the fence are potentially of use to bird species of conservation interest associated with Tralee Bay for foraging and roosting purposes.

Fencing can have direct habitat impacts on European Sites in which they are located during the construction stage and can result in indirect impacts by potentially facilitating changes to agriculture management of an area - as was determined in the Bord Pleanála Co Mayo case reference 16.RN.0001. Fencing can also form a barrier to species movement at a landscape level.

Having regard to its nature, scale and the location of the development concerned, it is considered that there was a probability or a risk that same would have significant effects on the following protected sites for the following reasons.

Akeragh Banna and Barrow Harbour cSAC,

Reasons: potential to directly impact on habitat including dry heath habitat during the construction stage by way of loss and trampling of vegetation and associated erosion of soil and indirectly by way of potential changes to agricultural practices, including potential intensification.

Tralee Bay Complex SPA

Reasons: potential to directly impact on qualifying interest bird species by way of construction stage disturbance and indirectly by way of potential changes to agricultural practices, including potential intensification.

9. Further to the above and having regard to:

- a. The retention being sought,
- b. The conclusions, as outlined above, reached by ABP in relation to a previous application for a Section 5 relating to the fencing, (ABP ref 08.RL.3219),
- c. Case law¹ in relation to a planning authority's legislative obligations under Section 34(12) of the PDA, 2000 as amended, particularly pertaining to the "development concerned" and having regard to a precedential decision made by ABP, which I note in this instance was to determine that an appropriate assessment was required,

¹ The High Court, Judicial Review 2019 No. 648. Between SUAIMHNEAS LIMITED (Applicant) and Kerry County Council (Respondent) and Emer O Sullivan (Notice Party). JUDGMENT of Mr. Justice Garrett Simons delivered on 9 July 2021.

