



An  
Bord  
Pleanála

## Inspector's Report ABP-302903-18

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<b>Nature of Application</b>	Application for confirmation of Irish Water Compulsory Purchase (Ballycoolen to Kingstown/Forrest Little Trunk Main Scheme) Order, 2018
<b>Location</b>	Townlands of Ballycoolen, Cloghran, Grange, Huntstown, Kilshane, Newtown, St Margaret's, Kingstown, Millhead, Barberstown and Forrest Great in North County Dublin, Co. Dublin
<b>Applicant</b>	Irish Water
<b>Local Authority</b>	Fingal County Council
<b>Objectors</b>	<ol style="list-style-type: none"><li>1. Food Central Development UC Landowners</li><li>2. Keelings UC Landowners</li><li>3. William P Keeling and Sons UC Landowners</li></ol>
<b>Date of site inspection</b>	7 <sup>th</sup> and 8 <sup>th</sup> February 2019
<b>Date of Oral Hearing</b>	13 <sup>th</sup> February 2019
<b>Inspector</b>	Niall Haverty

## 1.0 Introduction

### 1.1. Overview

- 1.1.1. This is an application by Irish Water for confirmation by the Board of a Compulsory Purchase Order ('CPO'), entitled 'Irish Water Compulsory Purchase (Ballycoolen to Kingstown/Forrest Little Trunk Main Scheme) Order, 2018'.
- 1.1.2. The Compulsory Purchase Order relates to the compulsory acquisition of rights over land in the townlands of Ballycoolen, Cloghran, Grange, Huntstown, Kilshane, Newtown, St Margaret's, Kingstown, Millhead, Barberstown and Forrest Great in North County Dublin and it is made pursuant to the powers conferred on Irish Water, which is designated as a water services authority, by sections 32 and 93 of the Water Services Act 2007, as amended.
- 1.1.3. A total of 10 No. objections to the CPO were received and an Oral Hearing to consider the objections was held on 13<sup>th</sup> February 2019 in the offices of An Bord Pleanála. 7 No. objections were withdrawn either prior to, or during the course of the Hearing, and this report therefore considers the remaining 3 No. objections.

### 1.2. Purpose of CPO

- 1.2.1. The purpose of the CPO is to facilitate the undertaking of development referred to as the 'Ballycoolen to Kingstown/Forrest Little Trunk Main Scheme', which would comprise c. 10km of 1200mm diameter water supply pipeline, extending from Ballycoolen Reservoir to Forrest Little, to the north of Dublin Airport.
- 1.2.2. Irish Water states that water is currently provided to mid and north Fingal from the Ballycoolen reservoir via an existing 900mm (or 36") diameter gravity pipeline dating from the 1960s, and contends that the proposed pipeline would augment this existing pipeline in order to accommodate future population growth and development in Fingal and to also provide improved security of supply to existing customers.
- 1.2.3. The proposed pipeline would run below ground, parallel to the existing pipeline over much of its length, but diverging from the existing route in a number of areas (refer to Section 2.0 for further details).

### 1.3. **Accompanying Documents**

1.3.1. The application was accompanied by the following:

- Managing Director's Order authorising the making of the CPO, dated 10<sup>th</sup> September 2018.
- Compulsory Purchase Order and Schedule thereto, dated 19<sup>th</sup> September 2018.
- CPO Maps.
- Engineer's Report, dated 10<sup>th</sup> September 2018, outlining the need for the scheme, confirming that the proposed work is in conformity with the planning and development objectives of the area, that the acquisition of the land is suitable and necessary for the purpose and recommending that a CPO be made.
- Route Selection Report, dated August 2018.
- Newspaper notice, published in the Northside People West on 3<sup>rd</sup> October 2018.
- Sample copy of notice sent to landowners.
- Certificate of service of CPO notices.

### 1.4. **Format of CPO and Schedule**

1.4.1. The CPO states that the wayleaves described in Sub-Part A of Part 2 of the Schedule are to be permanently acquired over the lands described in Sub-Part B of Part 2 of the Schedule. It also states that the rights of way described in Sub-Part A of Part 3 of the Schedule are to be permanently acquired over the lands described in Sub-Part B of Part 3 of the Schedule and that the rights described in Sub-Part A of Part 4 of the Schedule over the lands described in Sub-Part B of Part 4 are to be temporarily acquired (these lands relate to the temporary working area). I note, with reference to Part 1 of the Schedule, that no permanent land acquisition is proposed.

1.4.2. The lands described in the Schedule are stated to be lands other than land consisting of a house or houses unfit for human habitation and not capable of being rendered fit for human habitation at reasonable expense.

- 1.4.3. Sub-Part B of each Part of the Schedule assigns an identification number to each plot of land and describes the quantity, type, townland, owner or reputed owner, lessee or reputed lessee and occupier of each plot, as relevant.

## 2.0 Site Location and Description

- 2.1. As noted above, the CPO relates to lands in the townlands of Ballycoolen, Cloghran, Grange, Huntstown, Kilshane, Newtown, St Margarets, Kingstown, Millhead, Barberstown and Forrest Great in North County Dublin.
- 2.2. The proposed pipeline route, which forms the basis for this CPO, commences in the vicinity of Ballycoolen reservoir, and runs in a generally eastward direction through North West Business Park, passing under Cappagh Road into lands associated with Huntstown Quarry. It then runs in a northward direction through the quarry lands parallel to Cappagh and Kilshane Roads, before turning in a north east direction through agricultural lands adjoining the quarry lands. The pipeline would then pass through an existing sleeve laid under the N2 National Road, and continue in a north east direction through primarily agricultural lands towards the western boundary of Dublin Airport. It would then continue in a more northerly direction, again through primarily agricultural lands, a short distance to the west of the Airport's western boundary, passing through the north western corner of the DAA landholding. The proposed pipeline route would then continue in an eastern direction along the northern edge of the L3132, with a number of encroachments into the large Keelings Fruit/Food Central landholding (it would also tie into the existing Kingstown to Lissenhall water main, within the Keelings landholding). The proposed pipeline would then terminate with a tie-in to the existing Swords to Lissenhall water main at the junction of Cooks Road and Forrest Road, to the west of Forrest Little Golf Club.
- 2.3. The majority of the proposed pipeline wayleave is parallel to the existing 900mm pipeline, although it diverges from the route of the existing pipeline in North West Business Park, at the north west of Huntstown Quarry, at Newtown Cottages (to the west of Dublin Airport) and at the Keelings lands.

### 3.0 Planning History

- 3.1. **Reg. Ref. F18A/0643:** Planning permission granted to Food Central Development UC for junction upgrades at the R108 junction with Food Central to include addition of traffic signals, left turn and right turn lanes, and all associated and ancillary works, and permission refused for the retention of 2 No. existing advertisement signs.

### 4.0 Planning Policy Context

#### 4.1. Fingal Development Plan 2017-2023

- 4.1.1. Section 1.6 sets out the Strategic Policy for the Development Plan, item 17 of which is to “work with Irish Water to secure the timely provision of water supply and drainage infrastructure necessary to end polluting discharges to waterbodies, comply with existing licences and Irish and EU law, and facilitate the sustainable development of the County and the Region”.
- 4.1.2. Section 1.10 sets out an Economic Overview for Fingal, and includes a series of Key Economic Challenges, including ‘water supply and drainage issues’, where it states that “Fingal need to work closely with Irish Water to ensure that adequate provision of infrastructure is provided to ensure that wastewater and water services will not be a limiting factor in achieving forecasted growth targets in the future”.
- 4.1.3. Section 7.2 of the Development Plan relates to Water Services and states that “the sustainable growth of the County is dependent on the provision of services and infrastructure. A Plan led approach, in accordance with the County’s Core Strategy and Settlement Strategy is required for the delivery of such services in order to ensure there is adequate capacity to support the future development of the County”.
- 4.1.4. It also states that “Fingal will work closely with Irish Water to inform and influence the timely provision of infrastructure within the County in line with Fingal’s Settlement Strategy”.
- 4.1.5. The Statement of Policy included in Section 7.2 states that:
- Liaise and cooperate with Irish Water to ensure the delivery of the proposed Capital Investment Plan 2014 -2016 (or any updated plan) or any other relevant investment works programme of Irish Water that will provide

infrastructure to increase capacity to service settlements and to jointly investigate proposals for future upgrades of treatment plants and participate in the provision of a long term solution for waste water treatment for the Greater Dublin Area.

- Liaise and cooperate with Irish Water to ensure that an adequate supply of water fit for human consumption is provided.

4.1.6. The following Objective is noted:

- **DW02:** Liaise with Irish Water to ensure that an adequate supply of drinking water for domestic, commercial, industrial and other uses is available for the sustainable development of the County.

## 5.0 **Objections**

### 5.1. **Overview**

5.1.1. A total of 10 No. objections to the CPO were received. Of these, 7 No. objections were withdrawn either prior to, or during the course of the Oral Hearing, and the remaining 3 No. objections can be summarised as follows.

### 5.2. **Food Central Development UC Landowners, Keelings UC Landowners (CPO Ref. for Keelings Food Central: 075, 076, 077, 082, 083, 086, 087, 118, 119, 120, 121) and William P Keeling & Sons UC Landowners (CPO Ref. 088, 089, 090, 091, 098, 099)**

5.2.1. Three objections were received from Food Central Development UC Landowners, Keelings UC Landowners and William P Keeling & Sons UC Landowners<sup>1</sup>, respectively. The same issues were raised in the three objections and can be summarised as follows:

- There are other better alternatives.
- The scheme does not address or include a plan for the upgrade or replacement of the existing vulnerable west-east watermain,

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<sup>1</sup> I will generally refer to the lands as the Keelings lands in the interests of brevity.

- The lack of consideration and visibility negatively affects the FoodCentral Food and Drink Business Park.
- The FoodCentral Business Park is growing and developing with up to 2,000 people working there. A planning application for a park entrance upgrade was lodged in November 2018.
- There is an existing 1967 watermain running across some of the affected lands which is described as ageing and fragile. Irish Water is requested to replace this pipe with a larger pipe to cater for future capacity of FoodCentral. This would avoid pipe repair or replacement costs in the future.
- As an alternative, Irish Water is asked to consider laying a second pipe adjoining the proposed pipe to replace the 1967 pipe.
- If the new pipeline proceeds under the CPO, agreement is sought to replace/repair the existing 1967 pipe within 18 months of the new pipe becoming operational.
- Any works to the existing 1967 pipeline or the proposed pipeline should first commence on the FoodCentral lands as a matter of priority to enable its development and sales.
- Ongoing discussion with Irish Water is requested regarding the exact location of the new pipeline and wayleave to allow objectors to evaluate same in the design and construction of their new entrance to FoodCentral.
- It is proposed to place the new pipeline on the objectors' lands along the public road which are zoned for development. The DAA lands across the road will never be developed and it is requested that the pipeline is placed on the DAA side of the road. This would result in cost savings for Irish Water and the permanent airside fence can be located so that the wayleave does not encroach on airside lands.
- The area of the wayleaves is excessive and impinges on development. It is requested that the width of the permanent wayleave be reduced to 5m and the temporary take be reduced accordingly.
- Two years is a very long period of uncertainty. The construction period on objectors' lands should be contained to six months.

- Irish Water is requested to provide a plan for the provision of adequate water pressure to FoodCentral.
- The presence of the existing pipeline without a formal wayleave is causing serious difficulties regarding title matters.

## 6.0 Oral Hearing

- 6.1. An Oral Hearing was held on 13<sup>th</sup> February 2019, in An Bord Pleanála's offices. A digital sound recording was made of the Oral Hearing and should be consulted for a full representation of proceedings, however a summary of the Hearing is included in Appendix 1 of this report.
- 6.2. The Board should note that Irish Water proposed a series of modifications at the Oral Hearing, which entail the omission of a number of plots of land, and a reduction in the extent of other plots that it is seeking to acquire an interest in. These proposed modifications appear to arise from discussions between Irish Water and the objectors.
- 6.3. A revised CPO Schedule and associated series of drawings (Ref. IW/10001081/CPO/101 to IW/10001081/CPO/115, inclusive) incorporating the proposed modifications was submitted at the Oral Hearing.

## 7.0 Assessment

### 7.1. Overview

- 7.1.1. For the Board to confirm the subject CPO, it must be satisfied that Irish Water has demonstrated that the CPO "is clearly justified by the common good"<sup>2</sup>. Legal commentators<sup>3</sup> have stated that this phrase requires the following minimum criteria to be satisfied:

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<sup>2</sup> Para. 52 of judgement of Geoghegan J in *Clinton v An Bord Pleanála* (No. 2) [2007] 4 IR 701.

<sup>3</sup> Pg. 127 of *Compulsory Purchase and Compensation in Ireland: Law and Practice*, Second Edition, by James Macken, Eamon Galligan, and Michael McGrath. Published by Bloomsbury Professional (West Sussex and Dublin, 2013).



- There is a community need that is to be met by the acquisition of the site in question,
- The particular site is suitable to meet that community need,
- Any alternative methods of meeting the community needs have been considered but are not demonstrably preferable, and
- The works to be carried out should accord with or at least not be in material contravention of the provisions of the statutory development plan.

7.1.2. At the Oral Hearing, the objectors' Barrister disputed the legislative basis upon which Irish Water is seeking to compulsorily acquire interests in land and contended that there are no 'tests' set out in legislation under which the application can be assessed, and that the case law relating to CPOs which was referred to by Irish Water's Barrister is not relevant or applicable in this instance.

7.1.3. I note, however, that section 93(1) of the Water Services Act 2007, as amended, states that "subject to sections 95 and 96, a water services authority may acquire land for the purpose of performing any of its functions under this Act, and section 182 [i.e. laying of cables, wires and pipelines with owner/occupier consent] and Part XIV [i.e. acquisition of land] of the Act of 2000 shall apply to a water services authority as it applies to a local authority".

7.1.4. The functions conferred on 'water services authorities' were transferred to Irish Water under section 7(1) of the Water Services (No. 2) Act 2013, and I am satisfied that Irish Water is entitled under legislation to seek to compulsorily acquire lands or interests in lands. Furthermore, I consider that the appropriate minimum 'tests' to be applied in determining whether or not to confirm the CPO should be those commonly utilised for Local Authority acquisition as outlined above. I would note that the Board has previously confirmed a number of CPOs in respect of land acquisition by Irish Water having applied these same 'tests', and I am not aware of any successful judicial review proceedings that would militate against their use in the context of compulsory acquisition by Irish Water rather than a Local Authority.

7.1.5. I will therefore address each of the four criteria in turn below, together with the issue of proportionality and other issues arising from the objections.

## 7.2. Community Need

7.2.1. The community need for the project was set out by Irish Water in the documentation submitted with the CPO and at the Oral Hearing and can be summarised as follows:

- The majority of drinking water for Fingal is sourced from Leixlip Water Treatment Plant with strategic storage at Ballycoolen, however the existing 1960s trunk watermain is operating c. 20% beyond its capacity.
- The rated capacity of the existing watermain is 52 million litres per day whereas current average demand is 62 million litres per day.
- The project which would be facilitated by the CPO would increase the capacity of the strategic water supply network to cater for existing and future development in Fingal and would improve infrastructure resilience through increased security of supply.
- The additional pipeline would facilitate future inspection and repair/improvement works to the existing pipeline.

7.2.2. I note that the objectors did not challenge the fundamental community need outlined by Irish Water and that their concerns primarily relate to matters of route selection with respect to their lands, issues with the existing pipeline and legal aspects of the scheme and CPO process.

7.2.3. Having reviewed the information submitted and having conducted an Oral Hearing, I am satisfied that the existing trunk watermain represents aged infrastructure and is operating beyond its capacity and I am further satisfied that there is a clear need for additional water supplies to meet existing and future demand in the Fingal area and to provide increased security of supply, given the age of the existing pipeline and the heavy reliance placed upon it in supplying the entire Fingal area with drinking area. I am therefore satisfied that Irish Water has demonstrated a clear and pressing community need that would be met by the project that would be facilitated by the acquisition of rights over the lands in question, should the Board confirm the CPO.

## 7.3. Suitability of the Lands

7.3.1. At the outset, the Board will note that Irish Water is not seeking to permanently acquire any lands. It is, however, seeking to acquire permanent wayleaves and

temporary working areas along the proposed pipeline route, as well as a number of permanent rights-of-way.

- 7.3.2. The lands that are the subject of this CPO are currently used for a variety of purposes, including roadways, road verges, industrial/employment, ancillary quarry lands and agricultural lands. I do not consider the lands to be of any particular sensitivity in terms of Development Plan designations, landscape character, cultural or natural heritage value or scenic qualities, and in any event note that the pipeline would be installed underground, with the surface reinstated. The majority of the area surrounding the proposed alignment is relatively sparsely populated and I note that it is not proposed to acquire any residential dwellings.
- 7.3.3. With regard to land use zoning objectives, I have addressed this in Section 7.4 below, however in brief I consider that the proposed pipeline, as a utility installation, would be acceptable within the various zoning objectives applying to the lands affected by the CPO.
- 7.3.4. As noted in Section 2.0 above, the proposed route generally follows the route of the existing 900mm pipeline, albeit at an offset to minimise the risk of damage to this pipeline. It therefore generally affects lands that are already burdened by public infrastructure and which are consequently demonstrably suitable for such pipelines. In areas where the proposed pipeline route diverges from the existing pipeline, it is clear that Irish Water has generally sought to locate the pipeline under roads or road verges, and I consider that these are suitable locations for public infrastructure to be located.
- 7.3.5. Having regard to the nature of the proposed pipeline project, the installation methodology as set out in the submissions given by Irish Water at the Oral Hearing, and noting the presence of an existing pipeline parallel to much of the proposed route, I am satisfied that the lands that are the subject of the CPO are suitable to meet the aforementioned community need.

#### 7.4. **Accordance with Development Plan**

- 7.4.1. As outlined in Section 4.1 above, the Fingal Development Plan 2017-2023 contains numerous provisions that seek to support the provision of improved infrastructure, including water services, in order to facilitate economic and residential development

in the County. This includes a Strategic Policy to “work with Irish Water to secure the timely provision of water supply...and facilitate the sustainable development of the County and the Region”. A Key Economic Challenge identified for the County is ‘water supply and drainage issues’, and the Development Plan states that “Fingal need to work closely with Irish Water to ensure that adequate provision of infrastructure is provided to ensure that wastewater and water services will not be a limiting factor in achieving forecasted growth targets in the future”.

- 7.4.2. Section 7.2 of the Development Plan states that “the sustainable growth of the County is dependent on the provision of services and infrastructure”, that Fingal County Council will “liaise and cooperate with Irish Water to ensure the delivery of the proposed Capital Investment Plan 2014 -2016 (or any updated plan) or any other relevant investment works programme of Irish Water that will provide infrastructure to increase capacity to service settlements...” and that Fingal County Council will “liaise and cooperate with Irish Water to ensure that an adequate supply of water fit for human consumption is provided”.
- 7.4.3. This is supported by Objective DW02, which is to “liaise with Irish Water to ensure that an adequate supply of drinking water for domestic, commercial, industrial and other uses is available for the sustainable development of the County”.
- 7.4.4. With particular regard to the lands that Irish Water is seeking to compulsorily acquire rights over, I note that they are subject to a variety of land use zoning objectives, including ‘General Employment’, ‘Heavy Industry’, ‘High Technology’, ‘Warehousing and Distribution’, ‘Green Belt’ and ‘Food Park’. The laying of a watermain would come within the ‘utility installation’ use class, in my opinion, which is a ‘permitted in principle’ use under all of the abovementioned land use zonings with the exception of ‘Green Belt’, where it is not referred to. The Development Plan does, however, note that “uses which are neither ‘permitted in principle’ nor ‘not permitted’ will be assessed in terms of their contribution towards the achievement of the Zoning Objective and Vision and their compliance and consistency with the policies and objectives of the Development Plan”.
- 7.4.5. Given that the proposed watermain would be located underground, with the ground above reinstated and generally maintained clear of development as a wayleave, I consider that it would be consistent with the Objective and Vision for the ‘Green Belt’

zoning, which seeks, inter alia, to create a rural/urban Greenbelt zone, prevent unrestricted sprawl of urban areas and coalescence of settlements, and retain attractive landscapes and retain land in agricultural use.

7.4.6. In conclusion, therefore, I am satisfied that the project that would be facilitated by the compulsory purchase order, should it be confirmed by the Board, would accord with the provisions of the Fingal Development Plan 2017-2023 and that the acquisition of the lands or interests therein would not materially contravene any specific policies or objectives of the Plan.

#### **7.5. Use of Alternative Methods**

7.5.1. The use of alternative methods of meeting the community need was addressed by Irish Water in terms of the various pipeline route options that were considered. Given the nature of the community need (i.e. the need to get additional water from Ballycoolin to Forrest Little) and the resultant fixed tie-in points at the start and end of the route, as well as fixed tie-in points at the sleeved N2 crossing and the connection to the existing main at Kingstown, it is clear that Irish Water faced constraints in terms of the alternative routes that were available. Constraints also resulted from existing areas of residential, commercial and industrial development at various points along the route.

7.5.2. The various route options considered were set out in the Route Selection Report submitted with the application as well in the submission by Mr Paul Coleman (Nicholas O'Dwyer Engineers, on behalf of Irish Water) at the Oral Hearing. Mr Coleman stated that the general route of the proposed 1200mm pipeline follows the existing 900mm pipeline corridor in order to minimise the extent of land to which wayleave restrictions would apply. At points where it diverges from the existing pipeline, the Route Selection Report outlines the options that were considered and the basis upon which the preferred route option was chosen. The information set out in the report was elaborated upon at the Oral Hearing.

7.5.3. With regard to the option of acquiring the wayleaves by agreement, Mr McKnight of Irish Water stated at the Oral Hearing that landowners had been consulted, but due to the urgent need for the project and the risk of any one landowner declining to agree and causing delay to the overall project timeframe, it was decided to use the

CPO process. Notwithstanding this, I note that Irish Water proposed a number of modifications to the extent of acquisition at the Oral Hearing including the omission of certain plots of land that it is no longer intended to compulsorily acquire interests in and that a number of objections relating to said lands were subsequently withdrawn.

- 7.5.4. With regard to the remaining objectors (i.e. the Keelings lands), I note that a number of alternative routes were considered. Irish Water contends that the optimal engineering solution would be to lay the pipeline parallel to the existing pipeline, through the Keelings lands, but that this option was discounted due to the sterilising effect it could have on the lands which are in agricultural use but zoned 'Food Park' and following consultation with Keelings. The objectors contend that a preferable option would be for the existing and proposed pipelines to be routed through the DAA lands on the southern side of the L3132 road, rather than through the Keelings lands. Irish Water contends that this option was considered for the new pipeline but that it is not feasible as it would require works on the airside of Dublin Airport and be inconsistent with DAA's permitted runway development, which includes a 2.4m fence along the L3132, an airside access road on the inside of the fence and crash gates for emergency access<sup>4</sup>. Should the proposed pipeline be located on the landside of the fence, Irish Water contends that it would require closure of the L3132 which they state would not be acceptable to DAA, local residents or Fingal County Council as the road is a Category 1 Traffic Control Route.
- 7.5.5. Having regard to the strategic importance of Dublin Airport, the proximity of any pipeline routing to the permitted northern runway development and the likely requirement to either undertake works on the airside of the airport which would complicate future access to the pipeline for maintenance/repair purposes, or to close the L3132 Category 1 road, I do not consider that the objectors' proposal is demonstrably preferable to the route chosen by Irish Water. The chosen route results in the pipeline being primarily located along the northern verge of the L3132 road, with relatively minor incursions into the currently undeveloped Keelings lands for permanent wayleaves. There would be a more substantial temporary acquisition of the Keelings lands to facilitate the proposed temporary working areas, however this

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<sup>4</sup> Irish Water note that there is a current planning application (Reg. Ref. F19A/0023) to amend the runway layout, but contend that it does not materially amend the permitted internal road layout along the airport boundary.

would be for a limited period and I note that, at the Oral Hearing, Irish Water undertook to complete the works within the Keelings lands within the first 12 months of the construction contract. They also proposed to omit the proposed temporary working area (plot 076) along the proposed permanent wayleave which would run alongside the entrance road to the FoodCentral development.

- 7.5.6. While the chosen route alignment for the proposed pipeline will impact on a number of land owners/occupiers to varying degrees, I consider that the proposed route represents a reasonable and proportionate proposal to meet the identified community need. I further consider that a relatively robust route selection process was undertaken by Irish Water, noting that they faced numerous constraints on the alternatives available due to issues such as topography, the presence of the existing pipeline, the requirement to meet fixed tie-in points and the presence of existing development at various locations.
- 7.5.7. Having reviewed the information submitted by Irish Water, the objections made and having inspected the lands and conducted an Oral Hearing, I do not consider that there is a demonstrably preferable method of meeting the identified community need.

#### **7.6. Proportionality and Necessity of Level of Acquisition Proposed**

- 7.6.1. The CPO is based upon a typical corridor width of 30m, which comprises a 16m wide permanent wayleave and a 14m wide temporary working area. A typical cross-section of this corridor indicating the construction methodology is provided in Figure 3-1 of Mr Coleman's submission to the Oral Hearing, together with a justification for the width proposed. The 16m width of the permanent wayleave is stated to be necessary to accommodate a large diameter pipeline and to facilitate future access for repair, renewal or maintenance, while the 14m width of the temporary wayleave is stated as being necessary to facilitate the pipeline construction, including soil and construction material stockpiling and temporary haul roads.
- 7.6.2. Having regard to the large diameter of the proposed pipeline (1200mm), the extent of excavations and stockpiling that will be required and the need to mitigate the risk of accidental damage to the pipeline, given its strategic importance in terms of providing drinking water to Fingal, I consider the proposal for a 16m wide permanent wayleave to be reasonable.

- 7.6.3. As noted above, Irish Water stated at the Hearing that they wished to reduce the level of acquisition in respect of certain plots, and a revised Schedule and drawings were submitted to the Hearing. This included a reduction in the width of the permanent wayleave at plots 007 and 014, and the omission of the temporary working area in a number of areas.
- 7.6.4. Having reviewed the information submitted by Irish Water and the objectors, and having inspected the lands and conducted an Oral Hearing, I am satisfied that the width and extent of the proposed permanent wayleaves, rights-of-way and temporary working areas are necessary and proportionate in the context of meeting the identified community need.

## 7.7. **Additional Issues Raised by Objectors**

### 7.7.1. Existing Pipeline

- 7.7.2. As noted above, there is an existing 900mm (or 36") concrete pipeline which traverses the Keelings lands and which dates from the 1960s. The objectors' written submissions, as elaborated upon at the Oral Hearing, raise various issues with this pipeline, including its condition, water pressure issues and uncertainties with regard to the legal basis upon which the pipe was laid. They have sought that this existing pipe be replaced as part of the trunk main project.
- 7.7.3. The case that is before the Board is for confirmation of a CPO that would give Irish Water sufficient legal interest in the affected lands to facilitate development of a new watermain to supplement this existing watermain. There is no project before the Board for assessment and I do not consider that issues relating to the existing pipeline are of direct relevance to this assessment, since the Board is limited to either confirming, confirming with modifications, or refusing to confirm the CPO.
- 7.7.4. Where the existing pipeline is relevant, in my opinion, is with regard to the option of co-locating the proposed pipeline parallel to the existing pipeline in order to minimise the extent and/or the impact arising from acquisition of the wayleave. In the case of the Keelings lands, Irish Water stated at the oral hearing that a route parallel to the existing pipeline was the preferred solution from an engineering perspective, but that this option had been discounted at the behest of Keelings and that a route primarily located along the road verge was therefore identified as the preferred option.



- 7.7.5. I consider Irish Water's proposed routing in the vicinity of the Keelings lands to be consistent with the principle of proportionality, in that they have chosen a route that is less preferable from an engineering perspective, in order to minimise the extent and impact of intrusion on the objectors' property rights while still fulfilling the community need represented by the pipeline.
- 7.7.6. Interaction with Permitted Junction Upgrade Development
- 7.7.7. Planning permission was granted to Food Central Development UC (Reg. Ref. F18A/0643) in February 2019 for the upgrade of the L3132 junction with the Food Central access road to include addition of traffic signals and left and right turn lanes. The objectors contend that there is a fundamental conflict between the Irish Water proposal and this permission.
- 7.7.8. I note that Irish Water stated at the Hearing that they would undertake to complete the works on the Keelings lands within 12 months of commencement and that it was intended to commence in Q1 2020. They also stated that, following discussions with the objectors, a tunnelling methodology was now proposed at the Keelings lands in order to ensure that access to the Food Central site is maintained at all times.
- 7.7.9. Insofar as this application for confirmation of a CPO is concerned, I do not consider that the extant Keelings permission and the proposed pipeline route are fundamentally in conflict, and I do not consider that the permanent wayleave and temporary working areas would prevent the permitted Keelings junction development from proceeding. Irish Water gave undertakings regarding certain construction methodologies and timings at the Oral Hearing in order to minimise the impact on the Keelings lands, and these are ultimately a matter for agreement/arbitration between the parties.
- 7.7.10. Planning Status of the Project
- 7.7.11. The objectors' Barrister queried the planning status of the proposed pipeline development and also raised the issues of Environmental Impact Assessment, Appropriate Assessment and the de-exemptions under article 9 of the Planning and Development Regulations 2001, as amended ('the Regulations').
- 7.7.12. Irish Water stated at the Hearing that their current position is that the proposed pipeline would comprise exempted development under Class 58 of Schedule 2, Part 1 of the Regulations. As noted by the objectors' Barrister, should the project result in

a requirement for EIA or AA, or should the article 9 de-exemptions apply, then the proposal would require planning permission. Notwithstanding this, I concur with Irish Water's position, as articulated at the Hearing, that the planning consent process is separate to the CPO process. This application for confirmation of a CPO relates solely to the acquisition of interests in land and should the Board confirm the CPO, this will not result in any form of consent for development.

7.7.13. It is therefore Irish Water's responsibility to ensure that they obtain any necessary permissions or consents prior to undertaking the development which the CPO is intended to facilitate. I consider that they have provided sufficient information regarding the nature of the proposed trunkmain scheme to allow the Board to consider the merits of the CPO, and the community need that it would serve, and I do not consider that the issue of planning consent, should it be necessary, places any constraint on the Board's consideration of the case.

7.7.14. Nature and Use of Wayleaves

7.7.15. The objectors' Barrister contended that as Irish Water is proposing to install a pipeline with associated foundations and bedding materials which will remain in their ownership, they are placing a permanent structure on the objectors' lands, which is inconsistent with the purpose of a wayleave and that the burden placed on the land would be so onerous as to amount to the taking of the land under the guise of a wayleave.

7.7.16. The Board will be aware that the acquisition of wayleaves, either by agreement or compulsorily, is often the basis upon which new pipelines are laid, and I do not consider that the approach taken by Irish Water in this instance is novel or a departure from what could be deemed standard practice for such infrastructural projects. I note that it is proposed to reinstate the lands once the pipeline is installed, and that Irish Water noted at the Hearing that there is an entitlement to seek to build over a wayleave and that the lands would not therefore be permanently sterilised. I therefore do not consider that this matter constrains the Board from confirming the CPO, should it be deemed appropriate.

7.7.17. The objectors' Barrister also contended that there was a lack of precision in the CPO, and that the extent of the proposed acquisition was not defined. I consider that the description of the wayleaves and rights set out in sub-part A of Parts 2,3 and 4,

respectively, of the Schedule are sufficiently detailed to allow for a proper understanding of the nature and extent of the proposed acquisition and to inform the assessment of the merits of the application before the Board.

## 7.8. Proposed Modifications

7.8.1. As noted above, Irish Water proposed a series of modifications at the Oral Hearing, and submitted a revised Schedule and drawings. These modifications reduce the extent of acquisition in respect of a number of plots, and omit other plots entirely. For clarity, the Board is advised that the proposed modifications relate to the following plots:

- **Plot 007:** Permanent wayleave reduced in width.
- **Plots 009 and 010:** Temporary working areas removed.
- **Plots 018-024:** Permanent wayleaves and temporary working areas removed.
- **Plot 014:** Permanent wayleave reduced in width.
- **Plot 051-A:** Permanent right-of-way removed.
- **Plot 075:** Permanent wayleave slightly reduced.
- **Plot 076:** Temporary working area reduced.
- **Plot 077:** Temporary working area slightly reduced.

7.8.2. With regard to Plot 014, the Board should note that the revised drawing No. IW/10001081/CPO/102 incorrectly shows the wayleave width as 16m, while the following revised drawing in the sequence (IW/10001081/CPO/103) shows the reduced width.

## 7.9. Conclusion

7.9.1. In conclusion, I am satisfied that the process and procedures undertaken by Irish Water have been fair and reasonable, that Irish Water has demonstrated a pressing community need that would be facilitated by the acquisition of wayleaves and rights in respect of the lands identified in the revised Schedule and drawings submitted to the Oral Hearing, that said lands are both suitable and necessary to meet the

community need and that the extent of acquisition is proportionate to the objective being pursued. I therefore consider that the proposed acquisition of permanent wayleaves, permanent rights-of-way and temporary rights relating to the working areas would be in the public interest and the common good and would be consistent with the relevant provisions of the Fingal Development Plan 2017-2023.

## **8.0 Recommendation**

8.1. I recommend that the Board confirm the Compulsory Purchase Order with modifications to reduce the extent of acquisition as set out in the revised CPO Schedule and associated drawings (Ref. IW/10001081/CPO/101 to IW/10001081/CPO/115, inclusive) submitted at the oral hearing held on the 13<sup>th</sup> February 2019, based on the reasons and considerations set out below.

## **9.0 Reasons and Considerations**

9.1. Having considered the objections made to the Compulsory Purchase Order, and not withdrawn, the report and recommendation of the Inspector who conducted the oral hearing into the objections, the purpose for which the lands are to be acquired as set out in the Compulsory Purchase Order, and having regard to the following:

- (a) The deficiencies of the existing water supply trunk main and the need for greater security of supply in the Fingal area;
- (b) The strategic nature of the scheme in the context of providing increased water supply to meet existing and future demand in the Fingal area;
- (c) The community need, public interest served and overall benefits to be achieved from the proposed development;
- (d) The chosen route alignment for the Ballycoolen to Kingstown/Forrest Little trunk main scheme which constitutes a design response that is proportionate to the identified need;
- (e) The policies and objectives of the Fingal Development Plan 2017-2023;
- (f) The submissions and observations made at the Oral Hearing held on the 13<sup>th</sup> day of February 2019

It is considered that, subject to the modifications set out below, the acquisition of permanent wayleaves, permanent rights-of-way and temporary working areas by Irish Water on the lands in question, as set out in the order and on the deposited maps, are necessary for the purposes stated and the objections cannot be sustained having regard to the said necessity.

### **MODIFICATIONS TO SCHEDULE**

The compulsory purchase order schedule shall be modified as follows, in accordance with the proposed modifications submitted by Irish Water to the Board at the oral hearing held on the 13<sup>th</sup> day of February 2019:

#### **Part 2, Sub-Part B:**

The permanent wayleaves in respect of the following plot numbers shall be modified:

- (a) Plot number 007 shall be reduced in width such that its area is reduced to 0.5465 ha.
- (b) Plot number 014 shall be reduced in width to 8m such that its area is reduced to 0.0731 ha.
- (c) Plot numbers 018, 021 and 023 shall be omitted.
- (d) Plot number 075 shall be reduced in width such that its area is reduced to 0.6799 ha.

#### **Part 3, Sub-Part B:**

The permanent right-of-way at plot number 051-A shall be omitted.

#### **Part 4, Sub-Part B:**

The temporary workings areas in respect of the following plot numbers shall be modified:

- (a) Plot numbers 009, 010, 019, 020, 022 and 024 shall be omitted.
- (b) Plot number 076 shall be reduced in area to 0.1395 ha.
- (c) Plot number 077 shall be reduced in area to 0.1095 ha.

**Reason:** To take account of submissions made by Irish Water at the oral hearing proposing modifications to reduce the extent of acquisition, which is considered reasonable in the context of the scheme.

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Niall Haverty

Planning Inspector

12<sup>th</sup> March 2019

## 10.0 APPENDIX 1: ORAL HEARING SUMMARY

**Case Reference: ABP-302903-18**

**Development: Ballycoolen to Kingstown/Forrest Little Trunk Main Scheme  
CPO**

**Venue of Oral Hearing: An Bord Pleanála Office**

**Date: 13<sup>th</sup> February 2019**

**Commencement Time: 10:00**

### 10.1. Attendees

10.1.1. Representation on behalf of each Party was as follows:

- **Irish Water:**
  - Rory Mulcahy SC – Barrister.
  - Alan Dodd BL – Barrister.
  - William McKnight – Asset Delivery Infrastructure Regional Lead.
  - Olwyn James – Project Planning Manager.
  - Paul Coleman – Lead Designer and Project Manager, Nicholas O’Dwyer Engineers.
- **Objectors:**
  - Glanmore Foods Limited
    - Micheal O’Connell SC – Barrister.
    - Barbara Ceillier – Solicitor.
    - John Mooney – Glanmore Foods Ltd.
    - Noel Dillon – Engineer.
    - Tom Corr - Valuer.
  - Noreen Mulligan (Mulligan family), Therese Renee Nuytten, Alan Fitzachary
    - Tom Corr – Chartered Surveyors.

- **Keelings**
  - Michael O'Donnell BL.

## 10.2. **Withdrawal of Objections**

10.2.1. Letters were received during the course of the hearing withdrawing the objections of South Dublin Routing 4 Limited, Noreen Mulligan (Mulligan family), Therese Renee Nuytten, Alan Fitzachary and Glanmore Foods Limited.

10.2.2. Irish Water provided responses to these objections, and submissions were also made to the hearing by and on behalf of Glanmore Foods Limited. However, as the abovementioned objections were subsequently withdrawn, I will not address them further in this report.

## 10.3. **Submission of Irish Water**

10.3.1. Mr Mulcahy made an opening statement (Item 1), which can be summarised as follows:

- Irish Water is responsible under the Water Services Act 2007 for the provision and development of water services.
- Pursuant to subsection 93(1) of the 2007 Act, Irish Water, as a water services authority, may acquire land for the purpose of performing any of its functions under the Act.
- That subsection also provides that section 182 (including laying of pipelines) and Part XIV (acquisition of land) of the Planning and Development Act 2000, as amended, apply to Irish Water, thereby providing for a power of compulsory purchase.
- Section 213 of the 2000 Act is also applicable.
- General principles for land acquisition are established in case law.
- The lands and interest sought to be acquired are necessary to enable Irish Water to construct an additional 1200mm pipeline to supplement the supply of drinking water to North County Dublin.



- The additional capacity is required to meet projected growth and ensure improved security of supply.
- Irish Water is satisfied that the route selected is suitable to meet the need identified and any alternatives proposed are not demonstrably preferable or superior.
- Any encroachment of the property rights of the landowners is proportionate and necessary for the exigencies of the common good.
- CPO is necessary in that it advances the common good, including the objective of enabling the long-term social and economic development of the Fingal region.
- The purpose for which the lands and interest in lands are being acquired is lawful.
- The CPO is proportionate to the legitimate aim being pursued.

10.3.2. Mr Mulcahy stated that it had been possible to identify lands that it would no longer be necessary to compulsorily acquire and that details would be provided to the Hearing in due course. These would include the Roadstone lands and that the extent of the permanent wayleave through the Glanmore lands would be reduced, and certain plots of the Keelings lands would be omitted.

10.3.3. Mr McKnight then read from a written statement with accompanying slides (items 1(a) and 1(d)), which can be summarised as follows:

- The majority of drinking water for Fingal is sourced from Leixlip Water Treatment Plant with strategic storage at Ballycoolen.
- The rated pipe capacity of the existing 1960s 900mm concrete watermain is 52Mld, however current average demand is 62 Mld and the pipe is c. 20% beyond its capacity.
- Operation of the pipeline beyond its rated capacity has resulted in effective filling of the downstream reservoir in Skerries and the emergency installation of a pumping station to boost pressure.

- The main objective of the project is to increase capacity of the existing strategic network to cater for existing and future development and to develop infrastructure resilience.
- The reasons for acquiring wayleaves, rights of way and temporary working areas compulsorily can be described under the headings of community need, time constraints and potential delays.
- The timeframe for delivery is of critical importance considering the community need.
- Due to previous experience and the potential difficulty caused to the project by any one landowner declining to agree, it was determined that there was significant risk in continuing to try and acquire the wayleaves by agreement. The CPO process is considered to be the most appropriate process.
- Financial provision has been made for the project in Irish Water's Investment Plan 2017-2021 and the procurement process for a Works Contractor is currently underway.

10.3.4. In response to a question from the Inspector regarding the construction programme, Mr McKnight stated that Irish Water were in a short-listing process, and that tender documents would be issued in March/April 2019, with works contract by the end of 2019, subject to Board and Government approval. Works to start in Q1 2020, with a two year programme and a further one year window to address any defects. Delivery by the end of 2022.

10.3.5. Ms James then read from a written statement (item 1(b)) regarding planning policy, which can be summarised as follows:

- Irish Water has a statutory obligation to provide wholesome and clean water.
- Improvement of water services infrastructure is supported in National Planning Framework, Capital Investment Plan, Regional Planning Guidelines, Draft Regional Spatial and Economic Strategy, and Fingal Development Plan.
- Improvement of water services infrastructure is supported by National Planning Framework, Capital Investment Plan, Regional Planning Guidelines, Draft Regional Spatial and Economic Strategy, Fingal Development Plan, Irish Water's Water Services Strategic Plan.

- The route of the proposed water main will be through lands primarily used for agriculture, industry and employment, and open space, and is a use class (utility installation) that is permitted in principle or is considered compliant with the zoning objective (Green Belt).
- The project is included in Irish Water's Capital Investment Plan 2017-2021.

10.3.6. Mr Coleman then read from a written statement (item 1(c)) regarding route selection, wayleave requirements and responses to the written objections. His statement can be summarised as follows:

- In general, the route follows that of the existing 900mm diameter pipeline. There are three cross-connections at the N2, at Kingstown and at Forrest Little.
- Optioneering exercise was undertaken. Proposed route is the most appropriate to meet the community need. It is generally parallel to, and 8m away from the existing main, however due to areas of development along this alignment, there are areas where it deviates from the existing alignment.
- 16m wayleave with a 14m temporary construction wayleave is required.
- With regard to the Keelings/Food Central objections, Mr Coleman stated:
  - Replacement of the existing main is a separate issue to concerns regarding the proposed wayleaves.
  - Irish Water has provided detailed drawings showing the proposed route to Keelings.
  - Irish Water considered four route options at the Keelings lands. Keelings advised Irish Water during the design phase that their preferred route was to follow the L3132 at the boundary of the site, rather than follow the route of the existing trunk main.
  - Optimum route is through the Keelings lands, parallel to the existing main, however this has been discounted at the request of the landowner.
  - Next best route is along the road verge mainly outside of Keelings lands. Sections of Keelings lands will be required during construction.

- Route through DAA lands is not compatible with DAA plans for the new runway. An alternative option of placing the pipeline in the narrow road margin outside the airport fence would involve closure of the L3132 during construction which is not permitted as it is a Category 1 road.
- It is proposed to complete the works within the Keelings lands in the first 12 months of the construction contract.
- The request for increased water pressure is not directly relevant to the route of the new trunk main.
- The formalisation of the existing pipeline wayleave is not directly relevant to the route of the new trunk main.

10.3.7. In response to a request from Mr O'Donnell regarding what exactly Irish Water were seeking to acquire, Mr Mulcahy stated that a revised Schedule and associated drawings would be submitted to the Hearing, and he outlined the proposed amendments.

10.3.8. Mr O'Donnell stated that while objections could be withdrawn, he had never heard of a situation where someone would seek to withdraw part of a scheme which they have sought to be confirmed or to modify parts of a scheme. He stated that precision was required, and it was not satisfactory to deal with matters on your feet. The Board is being asked to confirm the entire scheme, and he is not clear what it is sought to acquire.

10.3.9. Copies of the revised drawings and CPO schedule were circulated prior to the lunch break. In the afternoon, following the withdrawal of the three objections represented by Mr Corr, and prior to cross-questioning, Mr Mulcahy also stated that Irish Water was no longer asking the Board to confirm the permanent right of way represented by Plot 051-A.

#### 10.4. **Submissions of Objectors**

10.4.1. Food Central Development UC Landowners, Keelings UC Landowners (CPO Ref. for Keelings Food Central: 075, 076, 077, 082, 083, 086, 087, 118, 119, 120, 121) and William P Keeling & Sons UC Landowners (CPO Ref. 088, 089, 090, 091, 098, 099)

10.4.2. Michael O'Donnell's submission can be summarised as follows:

- It would appear that the acquiring authority is seeking to amend the application that they are seeking be confirmed.
- It is not open to modify the terms on which the document is presented to the Board. It would be inappropriate to do so, as these are matters that people are aware of.
- People may take positions on foot of the published proposal, it is unfair to amend this and would be contrary to fair procedures and constitutional justice and would not vindicate the objectors' property rights.
- They identified lands as suitable and necessary, and now they are saying that they are not suitable or are not necessary.
- On the basis of this concession, the scheme is not suitable nor necessary and the Board cannot confirm the scheme. That is the consequence of the modifications proposed. This is a fatal flaw and procedural impossibility.
- It is intolerable to seek to acquire his Clients land and then amend it at the oral hearing. Mr O'Donnell has not had an opportunity to consider the revised drawings and schedule. The Board cannot confirm the scheme.
- If Irish Water has identified lands that are not suitable or not required, then it should be republished and re-served and the Board should be asked to confirm that scheme.
- Irish Water is confused between the withdrawal of an objection and the confirmation of a scheme. It is not possible to modify the scheme on foot of private agreements or understandings that his client does not know about.
- Mr Mulcahy refers to the acquisition of a permanent wayleave, permanent right of way and temporary working area/right of entry, which is a term unknown to Mr O'Donnell.
- There is no definition of the extent of the interest that is sought to be acquired. A wayleave could refer to any number of rights. The CPO cannot be confirmed without identifying the limits of the interest to be acquired.

- There are gradations of rights of way. How can it be confirmed without clarification? Irish Water require precision so that his Client is clear what rights it is sought to acquire.
- This is not like a straightforward acquisition of land, where the Local Authority acquire all rights over the land and acquire an unencumbered freehold. This is not the case here, where there are ambiguous rights and interests to be acquired.
- It is uncertain what the statutory basis of Irish Water's acquisition is? Compulsory purchase is almost always grounded under the Housing Act. This appears to be grounded under the Water Services Act or possibly the Planning Act. The jurisdiction has not been set out.
- There is no test contained in the Act which outlines how the Board should consider whether to confirm the CPO. The statute cannot be used to ground the compulsory acquisition of land or an interest in land in the absence of such tests.
- There is no relevant guidance in the case law referred to by Mr Mulcahy.
- It is unfair and not appropriate for the Board to have to set a series of tests for determining whether or not to confirm the CPO.
- The tests should be matters that Irish Water considered before drafting the Order.
- No evidence of compliance with statutory consents. Regard was only had to the Fingal Development Plan. This is a task Irish Water has set itself and is bound by. It is a misreading or misunderstanding of legislation. The reason why a Development Plan is relied upon in a compulsory acquisition context is that a Local Authority cannot act in contravention of their Plan, and must seek to comply with it and that any such acquisition is not in contravention of the Plan. Similar provisions do not apply to Irish Water. There is no provision preventing Irish Water from contravening a Development Plan.
- Where is the planning permission which authorises this development? How can one confirm a scheme which hasn't been through the planning process.

- Mr Coleman's report refers to an AA Screening Report. This has not been furnished. This was formulated as part of a route selection process, but it appears that no AA Screening was undertaken for the final route.
- If Habitats Directive has not been complied with, then the CPO cannot be confirmed.
- Was there any screening for EIA? No evidence of this. Project has implications for the entire City Centre. The bar has been set extraordinarily high.
- Irish Water has already stated engaging with contractors and going to tender, treating this as a rubber-stamping exercise.
- His clients' constitutionally protected property rights are to be taken from them by compulsion. That is not a small thing and CPO powers have to be construed in a strict manner.
- Mr Mulcahy asserted that this is the best option, however Mr Coleman indicated that the best option was to lay the pipe along the existing 900mm pipeline through the Keelings lands. This is either the best option or it's not. On the evidence of Irish Water it is not the best option and therefore the CPO cannot be confirmed.
- Keelings want both pipelines laid side by side along the public road. This is the best option but this is not before the Board.
- The existing pipe appears to have no legal basis for its location on Keelings lands. It is appropriate that regard be had to the burden that is placed on Keelings lands.
- It is a bizarre situation that you would have two pipes carrying similar quantities of water a couple of hundred metres apart, rather than laying them together.
- There is an opportunity to create a proper and sustainable layout that would be of benefit to all parties. You cannot deal with one pipe at a time. Some level of oversight is required by the Board.

- The reasoning in respect of the Airport lands is not convincing. There is no reason why both pipes couldn't be laid on Airport lands on the other side of the road. Those lands are criss-crossed by pipes and services. There is a current planning application for those lands, and this is an ideal opportunity to co-locate the pipes.
- The planning process is an administrative process, but this is at a far higher level of gravity. This is taking compulsorily the citizen's land and requires a level of thoroughness, precision and care that is absent from the information before the Board.

## 10.5. Objector Questioning of Irish Water

### 10.5.1. Food Central Development UC Landowners, Keelings UC Landowners and William P Keeling & Sons UC Landowners

- Mr O'Donnell asked Mr McKnight when the decision was taken to adopt the overall route. Mr McKnight stated that there was an acceptance of the NOD design, and that a decision was made by Irish Water prior to the commencement of the CPO process. In response to further queries, Mr McKnight outlined the workshop structure and engagement with landowners.
- Mr O'Donnell asked if the final decision had been made before Irish Water engaged with landowners. Mr McKnight stated that he didn't think so, and that in the case of Keelings the route had been modified.
- Mr O'Donnell noted that the Route Selection Report was dated August 2018 and asked when the decision was made. Mr McKnight stated that this was the final revision. Mr Mulcahy stated that a Managing Director's Order dated 10<sup>th</sup> September 2018 was submitted with the CPO documentation, and that the decision was based upon the Engineer's Report.
- Mr O'Donnell asked if the Engineer's Report included AA Screening. Mr McKnight stated that screening had been undertaken. Mr O'Donnell asked if screening had been carried out for the route that was ultimately selected. Mr McKnight confirmed that it had. Mr O'Donnell then asked for a copy of the AA Screening Report. Mr Mulcahy stated that it was unclear what purpose that



would serve in the compulsory purchase scenario, and that this is not an application for approval of a scheme or development consent.

- I asked if the project would require planning permission or other consent. Mr Mulcahy stated that Irish Water's view was that the development would comprise exempted development under Class 58, and that development consent is not a prerequisite for confirmation of a CPO as described by Mr O'Donnell.
- Mr O'Donnell asked if Irish Water accepted that if development required AA it would not be exempt. Mr Mulcahy agreed. Mr O'Donnell again asked for the AA Screening Report. Mr Mulcahy stated that it could be provided if Mr O'Donnell could explain why it was relevant.
- Mr O'Donnell asked if it was intended to subject the scheme to any other consent process. Ms James stated that the CPO process and planning process were separate procedures, and that the CPO process had to be gone through first to establish legal interest. Irish Water would then satisfy themselves if the project was exempted development.
- Ms James stated that Irish Water was of the opinion that the project came under Class 58 and could be undertaken as exempted development, but that this would be considered in due course.
- Mr O'Donnell stated that it was necessary to establish if planning permission was required. If planning permission were refused, then there would be a series of burdens created on the land in perpetuity.
- Mr O'Donnell asked Mr McKnight and Mr Coleman a number of questions regarding the water distribution network in Dublin, the nature of the connection to the existing pipes and the construction process for the pipeline laying. Mr Coleman responded.
- Mr O'Donnell asked if the excavated material would be re-used. Mr Coleman stated that it depended on further testing, but it was unlikely to be re-used and that it would be removed to a licenced landfill. Mr O'Donnell asked what volume of material would be removed. Mr Coleman stated that he didn't have the figures to hand.

- Mr O'Donnell asked if the management of excavated material would be left to the contractor to decide. Mr McKnight stated that a Construction Environmental Management Plan would be prepared. Mr O'Donnell stated that heaps of spoil would be left adjacent to Keelings high-tech Food Park for indefinite periods. Mr McKnight stated that if this was Keelings concern then it could be addressed.
- Mr O'Donnell asked if the pipe and surrounding material would be in the ownership of Irish Water as it was unclear what interest was sought to be acquired. Mr Mulcahy stated that Part 2 of the Schedule to the CPO outlines the extent and nature of the wayleave. Mr Mulcahy stated that all physical elements, including materials necessary to support the waterworks would be owned by Irish Water.
- Mr O'Donnell stated that this was inconsistent with a wayleave. This is a structure that is more than a conduit through land. This is in effect an acquisition of the totality of the interest in the land and the CPO cannot be confirmed.
- Mr Mulcahy stated that the wayleave is for the purpose of laying a pipe. Mr O'Donnell stated that a wayleave does not give you the right to occupy the land permanently with a structure.
- Mr O'Donnell then asked a series of questions in relation to the cross-connection with the existing pipeline at the Keelings lands.
- Mr O'Donnell asked Mr McKnight a number of questions regarding the condition of the existing watermain. Mr McKnight stated that there was a lack of information regarding the existing asset and that he couldn't confirm if it was leaking.
- Mr McKnight stated that to properly assess the pipeline it would have to be closed. In response to Mr O'Donnell he stated that it was likely that it would be upgraded in the future.
- Mr O'Donnell asked if there was a Masterplan for Irish Water's development. Mr McKnight stated that the current investment programme covered the period 2017 to 2021 (Capital Investment Plan). Mr O'Donnell asked if other

connected pipelines were covered in the CIP as part of an integrated plan and if there would be significant improvements in supply throughout Dublin. Mr McKnight stated that it would improve security of supply.

- Mr O'Donnell asked what analysis had been carried out to determine if the pipe could be accommodated on the road side of the fence on the DAA lands. Mr Coleman stated that the verge is 5-6m wide with a drainage ditch and that installing the trench would be difficult. Ms James stated that given the strategic importance of Dublin Airport, and the runway development, it was not appropriate to interfere with Dublin Airport.
- Mr O'Donnell asked if Irish Water were aware of the extent of existing pipelines and services on the DAA lands. Ms James stated that she was aware of the nature and extent of the DAA application and that it would not be appropriate to place the pipeline there. Mr Mulcahy stated that extensive lands were being acquired from DAA in other areas to facilitate the project.
- Mr Coleman stated that constructability issues and large planning permissions were issues considered in the route assessment.
- A series of questions followed regarding the DAA lands and whether the pipeline could be located on DAA lands.
- Mr O'Donnell again sought a copy of the AA Screening Report for the project and stated that if it was not sought, then I and the Board would be determining that it was not a relevant matter and would be acting unlawfully and inappropriately. Mr Mulcahy stated that the AA Screening was not relevant to the Board's consideration. I advised both parties that their positions in relation to this matter were noted.
- I asked Mr O'Donnell if the recent permission for junction upgrade works at the Keelings lands would be affected by the proposal. Mr O'Donnell stated that the permission would be rendered unimplementable.
- Mr O'Donnell asked how Irish Water were now proposing to access the Keelings lands. Mr McKnight stated that following discussions with Keelings it was proposed to utilise a tunnelling technique to ensure access to the

Keelings Food Park is maintained at all times. A discussion followed regarding rock depth, groundwater and tunnelling methodology.

#### 10.6. **Irish Water Questioning of Objectors**

10.6.1. Mr Mulcahy indicated that he had no questions for the objector. He stated that there would be no impact on the Keelings permission and that they had not given any evidence in this regard.

#### 10.7. **Inspector's Questions**

10.7.1. I asked Mr O'Donnell if Keelings were opposed to both the original Schedule and the proposed modifications tabled at the hearing. Mr O'Donnell stated that he had not had an opportunity to consider these and that the modifications should not be accepted by the Board.

10.7.2. I asked Mr Mulcahy if the revised drawings had been provided to Keelings before the date of the hearing. Mr Mulcahy stated that they had been, and that they were not a surprise to Keelings. Mr McKnight stated that the modifications had been made at the behest of Keelings. Mr O'Donnell stated that there was no concluded agreement in relation to any matters. Mr Mulcahy stated that all the modifications contained was less acquisition of lands compared with the original drawings. Section 217C of the Planning and Development Act gives the Board the power to confirm a CPO in respect of some or all of the lands and to confirm the CPO with any modifications deemed appropriate. He stated that the lesser land take would have a lower impact on Keelings and facilitate the scheme.

10.7.3. Mr O'Donnell responded that the power to modify the scheme is with the Board, not Irish Water.

#### 10.8. **Closing Statements**

10.8.1. Food Central Development UC Landowners, Keelings UC Landowners and William P Keeling & Sons UC Landowners

10.8.2. Mr O'Donnell made a closing statement which can be summarised as follows:

- Concerns have been intensified by what he has heard during hearing.

- The Board is being asked to confirm the CPO in respect of a statutory provision which assigns no tests to the considerations to be applied. This could never be an appropriate procedure.
- This is a significant scheme. It is 10km long with consequential impacts on North County Dublin with significant impacts, positive or negative.
- There has not been any engagement with any regulatory process, other than the CPO. This is a bizarre approach.
- It is unprecedented that this application should be made in this form at this time.
- There has been no screening for AA in respect of this project. Obligations under the Habitats Directive are clear. The Board has a duty to comply with European law.
- This is a scheme that interacts with several EIA classes. No consideration of EIA, which is fatal to the process.
- Land will be burdened in advance, before any planning requirement is considered. Section 5 procedure should have been used if considered to be exempted development.
- Irish Water see this as a rubber-stamping administrative exercise.
- Failure to identify the nature of the interests to be acquired. The schedule states that no lands are to be acquired, however permanent structures are proposed on the Keelings lands. How can these be covered by a wayleave, which is a statutory easement, a right to pass and re-pass. They ought to have sought the acquisition of the land if this is the case.
- The burden sought to be placed on the land will be so onerous it will amount to the taking of the land under the guise of a wayleave.
- Will the permitted Keelings development be required to be removed as structures located on an easement? There is a fundamental conflict between the Keelings permission and the Irish Water proposal. You cannot revoke a permission by confirming the CPO.

- The scheme will constrain the access road in the Keelings lands and undermine the zoning. If it's not possible to widen and improve the road, then that is a conflict with the zoning.
- Keelings' proposed solution is to combine the two pipes, which Irish Water have confirmed is the optimal solution. It could be located on the DAA lands with relatively minor alterations. This option would deal with all of the concerns raised and prevent the burden from being placed on Keelings.
- Unheard of for a scheme to be modified on the day. It is a flawed document and the Board should refuse to confirm it. It cannot be confirmed in its present state.

### 10.8.3. Irish Water

10.8.4. Mr Mulcahy made a closing statement on behalf of Irish Water, which can be summarised as follows:

- This isn't an application to the Board to confirm a scheme. It is an application to confirm a CPO. There is no scheme before the Board for approval and many of Mr O'Donnell's arguments fall away.
- Irish Water's powers to acquire lands are set out in section 93 of the Water Services Act, which incorporate Part XIV of the Planning Act. Compulsory acquisition by Irish Water under s93 becomes a compulsory acquisition for the purpose of the Planning Act and the purposes of the Housing Act. There is no difference between this acquisition and acquisition under the Housing Act.
- A wayleave is an interest in land, which is adequately described in the Order.
- There is an entitlement to seek to build over a wayleave. There is no permanent sterilisation of lands.
- Irish Water is asking the Board to confirm the CPO but in light of agreements with landowners, the Board is asked to confirm it in slightly lesser extent.
- Irish Water has sought to limit the impact on Keelings. The modified extent of acquisition being sought is what Irish Water are seeking.
- It is not sought to acquire any additional lands.

- Irish Water are relying ultimately on the Housing Act which is relied upon in every CPO, and there is no test in that Act. The tests for compulsory acquisition are established in case law. In the Reid case, McKechnie, J. in introducing the general principles, states that these are applicable to compulsory acquisition across a range of statutes by a range of public authorities.
- The relevant tests are whether it is in the interests of the common good, whether the lands sought to be acquired are required to give effect to the scheme proposed and is the proposed acquisition proportionate to the aims sought to be achieved. One means of assessing this is whether alternatives have been considered.
- The choice does not have to be the best alternative, just that there are no demonstrably better alternatives.
- The demonstrably better route referred to by Mr O'Donnell is only if his Client's interests are disregarded.
- There is no requirement to have planning permission in place, and the Oireachtas has seen fit to make such development exempted development. Wymes v An Bord Pleanála is the authority for the proposition that there is no requirement to get development consent prior to getting a CPO.
- All that the CPO does is give Irish Water a right to acquire an interest in lands. It is not a development consent and does not permit Irish Water to undertake any development.
- The question as to whether EIA or AA is required don't fall for consideration as part of the CPO hearing. If the Board consider otherwise, one can be requested.
- Mr O'Donnell has sought to portray this as a profound interference with his Clients' rights. The impact on their lands is minimal and a less favourable engineering solution has been chosen to reduce the impact on their lands.

10.8.5. Mr O'Donnell sought to respond to a number of issues raised in Mr Mulcahy's closing statement:

- The test formulated by Mr Mulcahy has never been stated before. Mr Mulcahy has made up a test. He has pick and mixed from various cases and Mr O'Donnell has not seen the test formulated in that way before. The Board cannot be asked to proceed on the basis that Irish Water decide the test.
- It is an absurd proposition to state that there is no difference between acquisition under the Planning Act and the Housing Act.
- Wymes v An Bord Pleanála is to the opposite effect. Wymes concluded that because the planning process had been concluded before the CPO was initiated, no regard could be had to the planning process.

10.8.6. I then read a closing statement, and the Oral Hearing closed at 17:40.