



An  
Bord  
Pleanála

## Inspector's Report

### ABP-306462-20

---

<b>Development</b>	Construction of floating pontoon boat berths, complete with entrance, access road, ancillary services and associated site works. This application is accompanied by a Natura Impact Statement (NIS)
<b>Location</b>	Marine Village , Ballina , Co. Tipperary
<b>Planning Authority</b>	Tipperary County Council
<b>Planning Authority Reg. Ref.</b>	19601200
<b>Applicant</b>	Sinead Gilmartin
<b>Type of Application</b>	Permission
<b>Planning Authority Decision</b>	Refuse
<b>Type of Appeal</b>	First Party v Refusal
<b>Appellant</b>	Sinead Gilmartin
<b>Observers</b>	(1) Bjorn Imhoff (2) David Gaughan
<b>Date of Site Inspection</b>	6 <sup>th</sup> , May 2020
<b>Inspector</b>	Paddy Keogh

## 1.0 Site Location and Description

- 1.1.1. The site of the proposed development which has a stated area of 0.1154ha, is located on the east bank of the River Shannon (Lough Derg) within the Marine Village housing development. Levels across the site fall away quite sharply initially in a westerly direction and then more gently towards the water's edge.
- 1.1.2. Access to the site is via a gated entrance located between No. 22 and 23 Marine Village. A track through the site finished in hardcore links the waterfront with the tarmacked road serving Marine Village. The site wraps around a site containing a sheet metal-clad shed located to the rear of No. 23. (This area is outlined in blue on the submitted documentation indicating it to be in the ownership of the applicant). Documentation on file states that this shed (152 sq.m. in area) was originally used as a hangar for the storage of a seaplane but has been used on an ad-hoc basis in more recent years for the storage and repair of boats.
- 1.1.3. The site is currently somewhat overgrown and unkempt.
- 1.1.4. The tarmacked road through Marine Village that serves the site terminates in a cul-de-sac to the north. A 50kph speed restriction applies in this area. A narrow footpath abuts the public road to the front of the site. There is new public lighting in place along the road.
- 1.1.5. Marine Village contains a mix of house types including single storey and two-storey/split level dwellings. No. 23 Marine Village and houses immediately to the north of the site are split-level. No. 22 Marine Village and houses immediately to the south immediately to the south of the site are single storey.
- 1.1.6. Derg Marina is located to the south of Marine Village. The land entrance to the marina is adjacent to Marine Village and the water entrance is a short distance to the south of the western boundary of the appeal site. The entire marina complex has been regenerated and redeveloped for use as a private commercial marina in recent years.

## 2.0 Site Inspection

- 2.1.1. I inspected the site of the proposed development and took the attached photographs. On that occasion the gated entrance to the site was secured by a padlock and chain. My site visit was conducted during the initial phase of government restrictions imposed

in response to the Covid 19 pandemic. I did not gain access to the site as to do so would have necessitated calling to and engaging with persons on site and in the adjoining dwellings. I am satisfied that my external inspection of the site (through the gates from Marine Village Road), viewed from Derg Marina to the south of the site and distant views of the site from the opposite (western side) of Lough Derg were adequate to facilitate my proceeding to complete an Inspectors Report and recommendation to the Board. Furthermore, the recent planning history of the site (see Section 5.0 below) includes photographs and details from a site inspection previously conducted on 14<sup>th</sup>, June 2019 (Appeal No. 303757-19). I am satisfied that there have not been any substantial changes on site since the time of the latter site inspection.

### **3.0 Proposed Development**

- 3.1.1. The proposed development is described per the submitted public notices as an application for planning permission for the construction of floating pontoon boat berths, complete with entrance, access road, ancillary services and associated site works.
- 3.1.2. The submitted documentation indicates that the proposed development includes a small pumping station for use in the emptying of boat holding tanks with connection to the public sewer running along Marine Village Road. Proposed water supply will be from the public main and it is proposed to discharge surface water directly into the River Shannon.

### **4.0 Planning Authority Decision**

#### **4.1. Decision**

- 4.1.1. Notification of a decision to refuse planning permission for the proposed development issued from the planning authority per Order dated 16<sup>th</sup>, December 2019. The single reason for refusal was as follows:

(1) The site is identified as part of an Opportunity Site for tourism, recreation and amenity as set out in the Ballina Settlement Plan which forms part of the North Tipperary County Development Plan 2010-2016, as varied. While the Opportunity Site is identified as being suitable for Tourism Facilities, Water-Based Recreational Facilities and Public Amenities, the subject site has a specific zoning for Open Space and Amenity. Having regard to this Specific Zoning, it is considered that the proposed

development would, by reason of its private use (non-commercial) materially contravene the objectives of the Development Plan and zoning for the site and would therefore be contrary to the proper planning and sustainable development of the area.

## 4.2. Planning Authority Reports

### 4.2.1. Planning Reports

4.2.2. A report from the planning authority Senior Executive Planner dated 9<sup>th</sup>, December 2019 includes the following:

- The site forms part of 'Opportunity Site 1' as designated in the Ballina Settlement Plan. Notwithstanding that the site of the proposed development forms only a small portion of the 2.6 hectare Opportunity Site, the proposed development (which involves a piecemeal approach to planning for the site – the provision of floating pontoons which have not been considered in the context of the overall Masterplan for the site) would be contrary to the proper planning and sustainable development of the area.
- The submitted application is accompanied by a letter from Waterways Ireland (*relating to the development previously proposed per Appeal No. 303757-19*) which states that the development of moorings at Cullenagh, Ballina does not impact on the navigation of Lough Derg and, therefore, Waterways Ireland has no comment to make in relation to the proposed development.
- It is proposed to excavate lands immediately adjacent to the riverbank which may have an impact on underwater archaeology. Underwater archaeology is specifically referenced in the Development Objectives for 'Opportunity Site 1' – Item 5 – 'To protect and enhance underwater archaeological heritage of the site, with particular reference to Lady Lansdowne'. However, this is located to the south of the opportunity site and not within the current appeal site.

### 4.2.3. Other Technical Reports

4.2.4. **Nenagh District Engineer** – Report from the planning authority Senior Executive Planner dated 9<sup>th</sup>, December 2019 states that the District Engineer has indicated a requirement that further information be requested from the applicant in relation to a lighting plan/design etc.

#### 4.3. Prescribed Bodies

- 4.3.1. **Department of Culture, Heritage & the Gaeltacht** – Report dated 9<sup>th</sup>, December 2019 indicates no objection to the proposed development to subject to conditions (strict adherence to recommendations of Construction Management Plan, Landscaping Plan and adherence to best practice in relation to impact of light spill on bats etc.).

#### 4.4. Third Party Observations

- 4.4.1. Observations from three separate third parties were received by the planning authority. Concerns expressed by third parties in these submissions are reflected in the observations from third parties received by the Board (see Section 7.4 below).

### 5.0 Planning History

**Appeal No. 303757-19** (Reg. Ref. 18600963) – Planning permission for the demolition of an industrial building and the construction of a two-storey detached house and floating pontoon boat berths etc. for Sinead Gilmartin was refused by the Board per Order dated 24<sup>th</sup>, June 2019. The single reason for refusal was as follows:

- (1) The proposed development would materially contravene the Settlement Plans section of North Tipperary County Development Plan 2010 (as varied), for Ballina, which indicates that the site is zoned for 'Open Space and Amenity' use, within 'Opportunity Site 1' – (Derg Marina). The proposed development, notwithstanding that it forms only a small part of the overall 2.6 hectare site, would not facilitate the realisation of the listed Development Objectives for 'Opportunity Site 1' (in particular

items 1 and 2), and would, therefore, be contrary to the proper planning and sustainable development of the area.

**Reg. Ref. 17/601024**: Planning permission refused by the planning authority per Order dated 13<sup>th</sup>, November 2017 for 4 reasons for the demolition of an existing industrial building and the construction of a two-storey dwelling for Sinead McNamara

**Reg. Ref. 16/600093**: Application for planning permission by Brian Cullen for a house at this location. Application WITHDRAWN.

*[These applications related to a c. 0.19 ha. site which incorporated the current c. 0.11 ha. site (together with the portion of site incorporating the industrial shed which is outlined in blue in the current application)].*

## 6.0 Policy Context

### 6.1. North Tipperary County Development Plan 2010 – 2016 (*'the Development Plan'*)

- 6.1.1. Tipperary Co. Council was established on 1<sup>st</sup>, June 2014 (amalgamation of North and South Tipperary). Following the establishment of Tipperary Co. Council the Development Plans for both North Tipperary and South Tipperary had their lifetimes extended and will remain in effect until a new Regional Spatial and Economic Strategy is made after which a new Tipperary County Development Plan will be prepared.
- 6.1.2. The North Tipperary County Development Plan 2010 – 2016, as varied, remains in force.
- 6.1.3. A Settlement Plan for Ballina is included with the Appendices of the Development Plan.
- 6.1.4. A variation to the Development Plan, made in December 2017, changed the zoning of the site. The subject site forms part of 'Opportunity Site 1' within the settlement of Ballina. The site is described as part of Derg Marina.
- 6.1.5. Section 9.0 (Opportunity Sites) of the Ballina Settlement Plan states:

'Ballina has a number of key sites in the town, which if developed have a role to play in the prosperity of the town. Proposals for development shall comply with the overarching policies and objectives of the North Tipperary County Development Plan 2010 (as varied). The Council will encourage

and support the development of these sites, subject to the principle of proper planning and sustainable development. Development briefs have been prepared for each site, as set out below to provide guidance in the development of designs and development proposals’.

**Site 1: Derg Marina – Tourism, Recreation and Public Amenity**

‘This site is located on the shores of Lough Derg, north of the town centre. The site encompasses a derelict marina. The development of the site presents an important opportunity to enhance tourism facilities and water based recreational facilities in the town and in particular to increase berthage and boating facilities’.

6.1.6. The zoning is for ‘Business and Enterprise / Open Space and Amenity’. The appeal site falls within the ‘Open Space and Amenity’ zoned area. Appropriate Uses are indicated as including ‘Tourism Facilities, Water-Based Recreational Facilities and Public Amenities’. The Development Objectives for this Opportunity Site are-

- 1 To develop a high quality tourism and amenity based development, which maximises the potential of the site, enhances tourism facilities and related activities.
- 2 To provide for infrastructure supporting water and marine based activities, boat servicing, public berthage and access.
- 3 To provide a high quality development which respect [sic] the lakeside setting and enhances public views to and from the lake.
- 4 To ensure the ecological integrity of the Lough Derg SPA/SAC and proposed NHA is protected and enhanced.
- 5 To protect and enhance of [sic] underwater archaeological heritage of the site, with particular respect to Lady Landsdowne.

Section 3.0 of the ‘Settlement Plan Guide’ included with the Development Plan indicates that the ‘Open Space’ zoning is covered by a stated objective ‘To provide, preserve and enhance open space and amenity uses’. The ‘Zoning Matrix’ included within Section 3.0 indicates that ‘Sports and Leisure’ facilities are ‘open for consideration’ on ‘Open Space’ zoned lands.

## 6.2. Natural Heritage Designations

6.2.1. The site immediately abuts the River Shannon. There are no natural heritage designations or Natura 2000 sites within the site.

- The site immediately abuts the Lough Derg proposed Natural Heritage Area (pNHA) (Site Code 000011).
- Lough Derg (Shannon) Special Area of Protection (SPA) (Site Code 004058) is c. 0.6 km from the appeal site.
- Slievefelim to Silvermines Mountains SPA (Site Code) 004165) is c. 9.2 km from the appeal site.
- Slieve Aughty Mountains SPA (Site Code 004168) is c. 14 km from the appeal site.
- The Clare Glen Special Area of Conservation (SAC) (Site Code 000930) is c. 14 km. from the appeal site.
- The Silvermine Mountains SAC (Site Code 000939) is c. 15 km from the appeal site.
- The Slieve Bernagh Bog SAC (Site Code 002312) is located c. 2.2 km from the appeal site.
- The Silvermine West Mountains SAC (Site Code 002258) is c. 10 km from the appeal site.
- The Keeper Hill SAC (Site Code 001197) is c. 13 km. from the appeal site.
- The Lower River Shannon SAC (Site Code 002165) is 1 km. from the appeal site.
- The Glenomra Wood SAC (Site Code 001013) is c. 10.2 km from the appeal site.

## 6.3. Environmental Impact Assessment (EIA)

6.3.1. The proposed development consisting of the construction of a floating pontoon for the berthing of boats is not a class of development included under Schedule 5 of the



*Planning and Development Regulations 2001*, as amended. Thus, no EIA or Screening for EIA is required.

## 7.0 The Appeal

### 7.1. Grounds of Appeal

7.1.1. The submitted grounds of appeal include:

- The proposed development is a non-commercial development. The fee submitted to the Board in support of this first party appeal reflects this position.
- The proposal is for an amenity-based development accommodating infrastructure, supporting water and marine based activities. The intention is to satisfy the need for affordable, berthing facilities on the lake with capacity to accommodate up to 4 no. boats. However, should the Board consider that the non-commercial nature of the proposal is a concern the applicant would consider a small commercial operation similar to Derg Marina whereby the proposed 4 berths could be rented out on long-term leases to members of the public (*this could be achieved by way of the attachment of a condition to a planning permission*).
- Having regard to the specific Development Objectives contained in the Ballina Settlement Plan relating to Opportunity Site 1 it is submitted that the proposed development does not materially contravene the zoning objectives for the site irrespective of the intended private use.
- Having regard to balanced consideration of all of the facts relating to the proposed development including the recent regeneration of Opportunity Site 1 as a private, commercial marina which excludes the subject site, it is submitted that the proposed development would enhance and make efficient use of a brownfield site.
- There has been significant planning history associated with the site and with adjoining neighbouring sites. There have been attempts to secure planning permission for a house on the site since 2016 and at a time when the site was zoned for 'mixed use' purposes. The zoning of the site was changed by virtue

of an amendment to the Development Plan in December 2017. The most recent proposal for the site was refused by the Board (Appeal No. 303757) – the single reason for refusal stated that the Board considered that the proposed development would not facilitate the realisation of the listed Development Objectives for ‘Opportunity Site 1’ (in particular items 1 & 2) and would, therefore, be contrary to the proper planning and sustainable development of the area.

- The current proposal is geared to overcome the previous reason for refusal (Appeal No. 303757) and focuses solely on the provision of ‘amenity-based’ development (in accordance with the development objectives for Opportunity Site 1 as set out in the Ballina Settlement Plan). In this regard, the proposed development for floating berthing pontoons will:
  - Develop a high-quality amenity based development, which maximises the potential of the site, enhances tourism facilities and related activities; and
  - Provide for infrastructure supporting water and marine based activities, boat servicing, public berthage and access.

Thus, the proposed development complies with and aids delivery of items 1 & 2 of the Development Plan Objective for Opportunity Site 1.

- The Inspector’s Report on Appeal No. 303757 highlighted concerns with the proposal for a house. The Inspector did not appear to have concerns with the pontoons.

*‘The development of a house on this site would not comply with the zoning objectives, notwithstanding the argument put forward by the applicant that the provision of four boat berths would help to achieve the objectives’.*

*(Section 7.2.1 – Appeal No. 303757)*

The proposed house has been omitted from the current proposal. Hence, the proposal is no longer in material contravention of the open space and the amenity objectives for the site.

- Opportunity Site No. 1 has undergone a process of renewal and regeneration in recent years that has delivered the objectives of the Ballina Settlement Plan to provide for recreational facilities and berthing spaces. However, these works excluded the appeal site which was divorced from the main body of Opportunity Site 1 by virtue of the water channel which provides access to the berthing facilities. The subject site is physically and visually disconnected from Derg Marina and, therefore, was functionally unable to contribute to the development objectives of the plan in the first instance.
- The subject site, which is in separate ownership, represents only 4% of the 2.6 ha. that comprises Opportunity Site 1. Unless developed for a purposeful function, such as that now proposed, the land is likely to remain unused and undeveloped into the future. The planning authority Senior Executive Planner has reported that the proposed development represents a piecemeal approach to development and that an overall Masterplan should be prepared for Opportunity Site 1. This approach fails to acknowledge that the site has already been regenerated and redeveloped and is to continue in use as a private commercial marina. Given that only 4% of the Opportunity Site remains undeveloped it is impractical to suggest that an overall Masterplan is required at this stage or that piecemeal development is occurring.
- The proposed development will advance the provision of amenity-based development accommodating infrastructure, supporting water and marine based activities.
- The proposed pontoons will be constructed fully within the application site and will not extend into the river channel. The Board's attention is drawn to the letter from Waterways Ireland dated 2<sup>nd</sup>, July 2018 (pertaining to the previous proposal per Appeal No. 303757) which indicates that the proposed development does not impact on the navigation of the water channel and that Waterways Ireland had no further comment to make (in relation to the previous proposal).
- It is proposed to retain the existing galvanised shed on site with its use continuing as a storage facility most likely related to activities associated with

the marine industry. The existing / future use of the shed does not form part of the current planning application.

## **7.2. Planning Authority Response**

7.2.1. A submission from the planning authority per letter dated 3<sup>rd</sup>, February 2020 indicates that the planning authority have no further comments to make in relation to the current appeal.

## **7.3. Observations**

7.3.1. Observations from two different third parties ((i) Bjorn Imoff & (ii) David Gaughan) objecting to the proposed development have been received by the Board. Grounds of objection include:

- The site of the proposed development is specifically zoned in the Development Plan for 'Open Space and Amenity'. The site forms part of a larger 'Opportunity Site' identified as being suitable for tourism facilities, water based recreational facilities and public amenities.
- The site is the only location in Ballina that allows public access to the water's edge for safely launching water sports activities such as canoeing, kayaking, windsurfing and stand up paddle boarding. The site is used by locals and by residents of numerous nearby holiday homes and by guests staying in the local hotel. The public boat ramp to the south of Ballina-Killaloe Bridge is entirely unsuitable and unsafe for these activities (being designed to facilitate the launching of boats from trailers only).
- The applicant does not appear to be registered as owner of the site with either Land Registry or Registry of Deeds. If the applicant claims to have acquired the site by adverse possession she does not appear to have made any effort to register her title in respect of such a claim. The site has been used (unchallenged) by many local residents for in excess of 12 years and a launching area for water and leisure activities. [There is an historic right of way registered as a burden on the title of TY24298F].

- The current proposal is similar to proposals that have already been refused on two separate occasions by the planning authority and the Board. The previous proposals incorporated the adjoining land containing the shed structure and included a proposal for a new dwelling.
- The proposed development lacks clarity in relation to whether or not the proposal is for a commercial or non-commercial development (an appeal fee has been paid in respect of a non-commercial development). The submitted grounds of appeal suggest that it should be left to the Board to determine whether the proposed development is commercial or non-commercial in nature. This is unsatisfactory.
- It is difficult to understand how the proposed development would not be regarded as a commercial venture. A commercial development would not be consistent with the zoning of the site as 'open space and public amenity'.
- It is contended that the proposed development is 'Part One' of a multi-part scheme (for the appeal site and adjoining site containing an industrial shed) attempting to secure planning permission for a private dwelling with private berthing on lands zoned for open space and public amenity.
- The submitted grounds of appeal suggest that the proposed pontoons do not extend into the River Shannon. Clearly they do extend into the river.
- No consideration has been given to the impact of the proposed development on the flow of the River Shannon.
- The appeal site and its right of way were always used by Derg Marina. There is an internal laneway linking the appeal site with Derg Marina. The site is not divorced from the main site of 'Opportunity Site 1' (as has been suggested in the submitted grounds of appeal). The site is not physically or visually disconnected from Derg Marina (as has been suggested in the submitted grounds of appeal).
- The site has been used by Swans rearing signets.

## 8.0 Assessment

8.1.1. The main issues in this appeal are those raised in the grounds of appeal and I am satisfied that no other substantive issues arise. The issue of appropriate assessment also needs to be addressed. The issues can be dealt with under the following headings:

- (1) Site Ownership
- (2) Zoning & Development Plan Policy
- (3) Other Matters
- (4) Appropriate Assessment

- (1) Site Ownership & Right of Way

### *Site Ownership:*

8.1.2. It has been submitted by a third party objector to the proposed development that the applicant might not be the registered owner of the appeal site. It is suggested that the applicant's legal interest, if any, in the site might be merely a claim to have acquired ownership of the site by way of adverse possession. If this is the case, it is stated that the site has not been legally registered in the applicant's name.

8.1.3. The applicant has not addressed this claim by the third party observer.

8.1.4. The submitted planning application indicates the applicant's legal interest in the site to be 'intention to purchase subject to planning permission'. The application documentation is accompanied by a letter dated 9<sup>th</sup>, September 2019 from Brian F. Cullen stating that he is the owner of the site and consents to the making of the current planning application.

8.1.5. The Supreme Court decision in *Frescati Estates v Walker ([1975] IR 177)* has established a very low threshold in respect of determining what constitutes 'sufficient legal interest' for the making of a valid planning application. An agreement to purchase the site constitutes sufficient legal interest. In the absence of any evidence to suggest that Brian F. Cullen is not the owner of the site, I consider that to dismiss the current appeal for reason of insufficient legal interest in the appeal site would be unwarranted.

*Right of Way:*

- 8.1.6. The submission received from a third party observer to the current appeal states that there is a burden on the title of lands at this location (TY 24298F) granting an historic right-of-way through the property to the waterfront. No further details of this alleged right-of-way have been submitted. It is not clear whether it is a public or private right-of-way. Furthermore, it is stated that this is the only location in Ballina that allows public access to the water's edge for safely launching water sports activities such as canoeing, kayaking, windsurfing and stand up paddle boarding. [The public boat ramp to the south of Ballina Killaloe Bridge has been designed only to facilitate the launching of boats from trailers and is entirely unsuitable and unsafe for these activities].
- 8.1.7. I note that Drg. No. 180318 that was included in the planning application documentation submitted with the previous proposal for a house and floating pontoon berths at this location (Appeal No. 303757-19) indicated a right-of-way between the entrance to the site from the public road at Marine Village (running to the rear of No. 22 Marine Village) and facilitating access to the water's edge and to a strip of land connecting with Derg Marina to the south of the site. This right-of-way has not been indicated on the drawings accompanying the current application.
- 8.1.8. In my opinion, planning permission should not be granted for any development that would obstruct any existing rights-of-way through the appeal site to the water's edge. However, it appears that any physical works included as part of the development now being proposed will not physically obstruct use of the site to gain access to the water's edge to facilitate water sports such as canoeing, kayaking, windsurfing and stand-up paddle boarding. Any existing private or public rights-of-way through the site cannot be extinguished merely by the granting of a planning permission.
- 8.1.9. In these circumstances, I consider that any dispute that may arise in respect of the any attempt to curtail or impede established rights-of-way constitutes a civil matter between the relevant parties and would not preclude the granting of planning permission for the proposed development if deemed otherwise appropriate to do so.
- 8.1.10. Having regard to the matters discussed above in relation to both ownership of the site and the possible existence of rights-of-way through the site, I recommend that a note be attached to any grant of planning permission that might issue from the Board

alerting the parties to the provisions of Section 34(13) of the *Planning & Development Act, 2000*, as amended.

(2) Zoning & Development Plan Policy

- 8.1.11. Third party observers objecting to the proposed development have raised the issue of whether or not the proposed development constitutes a private development or a commercial development. It is suggested that the level of investment required to deliver the proposed pontoon berthing facility would not justify it being operated on a non-commercial basis. The submitted grounds of appeal state that the proposed development is intended for private use and will not be operated as a commercial facility. However, it is also stated that, if the Board consider it appropriate that the proposed facility be operated on a commercial basis only, the applicant is happy to accept a condition attached to a grant of planning permission requiring that the facility be operated as a commercial facility. I note that the application to the planning authority was accepted on the basis that the proposal is for a non-commercial development and the appeal has been accepted by the Board on the basis that the proposed development is non-commercial. The appeal fee paid was on the basis of a non-commercial development. Indeed the planning authority decision appears to have been informed, at least in part, by the fact that the proposed development is non-commercial in nature. On the basis of the forgoing and on the basis of the documentation on file I see no reason to treat the assessment of the proposed development as being for development other than a non-commercial facility.
- 8.1.12. The appeal site forms (a small) part of a much larger site designated as 'Opportunity Site No. 1 – Derg Marina' in the Ballina Settlement Plan contained with the Development Plan and designated for 'Tourism, Recreation and Amenity'. The Development Plan highlights the fact that the site encompasses a derelict marina and that the development of the site presents an important opportunity to enhance tourism facilities and water based recreational facilities in the town and in particular to increase berthage and boating facilities.
- 8.1.13. 'Opportunity Site No. 1' is covered by two separate zoning objectives in the Development Plan, namely (i) Business & Enterprise and (ii) Open Space & Amenity. The northern portion of 'Opportunity Site No. 1' and the portion incorporating the appeal site is covered by the Open Space & Amenity zoning objective,



- 8.1.14. Section 3.0 of the Development Plan indicates that the 'Open Space' zoning is covered by a stated objective 'To provide, preserve and enhance open space and amenity uses'. The 'Zoning Matrix' included within Section 3.0 indicates that 'Sports and Leisure' facilities are 'open for consideration' on 'Open Space' zoned lands.
- 8.1.15. Development Objectives for 'Opportunity Site No.1, contained in the Ballina Settlement Plan include (i) to develop a high quality tourism and amenity based development, which maximises the potential of the site, enhances tourism facilities and related activities and (ii) to provide for infrastructure supporting water and marine based activities, boat servicing, public berthage and access.
- 8.1.16. The planning authority in deciding to refuse planning permission for the proposed development noted that while the site has been identified in the Development Plan as being suitable for tourism facilities, water-based recreational facilities and public amenities it is considered that the proposed development by reason of its private use (non-commercial) would materially contravene the objectives of the Development Plan and the zoning for the site.
- 8.1.17. The submitted grounds of appeal argue that the proposed development (whether considered as a non-commercial or commercial development) is for an amenity-based development accommodating infrastructure, supporting water and marine based activities. The intention is to satisfy the need for affordable, berthing facilities on the lake with capacity to accommodate up to 4 no. boats. On this basis, it is submitted that the proposed development is compatible with the zoning objectives for the site.
- 8.1.18. I note that (despite questions raised and addressed at paras. 8.1.2 to 8.1.5 above in relation to the nature of the applicant's legal interest/title to the appeal site and claims in respect of rights-of-way through the site addressed at paras. 8.1.6 to 8.1.10 above) none of the parties to this appeal including the planning authority have suggested that the site is in public ownership or has an established use as public open space. In this context, in my opinion, the planning authority have adopted a narrow interpretation of the wording of the Development Plan in relation to Open Space and uses open for consideration. It appears that, in contrast to the stance advocated by the appellant, the planning authority consider that the wording of Section 3.0 of the Development Plan '*to preserve and enhance open space and amenity*' and the suitability of a site for '*tourism facilities, water-based recreational facilities and public amenities*' together

with the wording of Items No. (i) and (ii) above of the Specific Zoning Objective for 'Opportunity Site No. 1' is confined solely to activities with a commercial or public use dimension. However, I would share the appellant's view that the approach to interpretation adopted by the planning authority is unduly narrow and that the wording of these provisions is open to a broader interpretation which would allow for developments incorporating the provision of tourism facilities and water-based recreational facilities for private and non-commercial use – potential users could include locals or visitors to the area supporting local tourism. On balance, I consider that a broader interpretation of the Development Plan provisions is reasonable in all of the circumstances of the case including the established (private) use of the site in conjunction with the shed/boat repair building on the adjoining site.

8.1.19. A report on file from the planning authority Senior Executive Planner dated 9<sup>th</sup>, December 2109 suggests that planning permission for the proposed development should not be granted prior to the preparation of a masterplan to guide the future development of the entire of 'Opportunity Site No.1'. The appellant has highlighted the fact that the appeal site forms a very small portion (c. 4% only) of the entire (c. 2.14 ha.) opportunity site. Furthermore, a substantial portion of the opportunity site comprises Derg Marina which has been recently refurbished and regenerated. In these circumstances, I would share the argument contained in the submitted grounds of appeal that to refuse planning permission on the grounds of prematurity pending the completion of a masterplan in respect of the entire opportunity site would be unwarranted.

8.1.20. Observations from third parties objecting to the proposed development highlight the recent planning history relating to the site including recent proposals for a dwelling on a larger site that incorporated the site of the proposed development that were refused by both the planning authority and the Board. It has been submitted that the granting of planning permission for the development currently being proposed will help to bolster a future proposal for a dwelling on the remaining portion of the site (i.e. the site containing the shed/boat repair building). I consider that the current proposal must be assessed on its own merits. Future proposals, if any, on the site containing the shed/boat repair building must be assessed on their own merits. Nonetheless, in the interests of clarity, I consider that it would be appropriate to attach a condition to any grant of planning permission that might issue from the Board stipulating that the

shed/boat house should not be used for residential purposes without the benefit of a prior grant of planning permission.

### (3) Other Matters

#### *Roads & Traffic:*

8.1.21. The proposed development involves the provision of 4 car parking spaces on site. The use of these spaces may generate additional traffic turning movements into and out of the site in excess of those already generated by the shed/boat repair building on the adjoining site (served by a shared access from Marine Village Road). However, I consider that any intensification in turning movements into and out of the site generated by the proposed development will be marginal in nature and would not interfere with traffic safety or traffic flow along the lightly trafficked Marine Village Road or result in injury to the residential amenities of the area. Furthermore, while the planning authority Area Engineer requested additional information in relation to lighting etc. there was no objection in principle to the proposed development. I consider that the requirements of the Area Engineer can be satisfactorily addressed in the context of a Construction Management Plan which can be required by way of the attachment of a condition to a grant of planning permission.

8.1.22. It is unclear from the submitted documentation if it will be necessary to lift boats from the proposed pontoons (for maintenance or other purposes) and transport them from the site via the existing access to Marine Village Road. However, given the limited scale of the proposed facility it is reasonable to conclude that such movements will occur on an infrequent basis if at all. Furthermore, having regard to the established use of the site I consider that such activity would not impact unduly on other road users or on the established residential amenities in the vicinity of the site.

#### *Financial Contribution:*

8.1.23. In circumstances where the planning authority issued a notification of decision to refuse planning permission for the proposed development there is no record of what financial contribution(s), if any, it would be appropriate to levy in respect of the proposed development.

8.1.24. The Tipperary County Council Development Contribution Scheme 2020 (effective from 1<sup>st</sup>, January 2020) makes no specific reference to marina, pontoons, berthing facilities

etc. as a class of development in respect of which development contributions will be levied. However, 'Class 16' of the scheme refers to '*The provision of pipes and/or ducts for the distribution of gas and/or wastewater*'. Thus, it appears that the levying of a financial under this class might be applicable in respect of the proposed connection from the proposed pumping station for the emptying of boats to the public foul sewer running along Marine Road.

*Material Contravention:*

8.1.25. The planning authority have cited 'material contravention' of the Development Plan in their stated reason for refusal of planning permission for the proposed development. The conclusion that the proposed development constitutes a 'material contravention' of the Development Plan is based on the belief that a private non-commercial use of the site is not compatible with the Specific Zoning Objective covering the site for use for 'Open Space and Amenity'. If the Board agrees that this is the case, then planning permission can only be granted in the limited circumstances set out in S. 37(2)(b) of the *Planning and Development Act, 2000*, as amended. In my opinion, the proposed development does not fall within any of the exceptions contained within S. 37(2)(b). However, (for the reasons already set out at paragraph 8.1.18 above) I do not share the conclusion of the planning authority that a private non-commercial use of the site is incompatible with the Specific Zoning Objective for the site, Therefore, I consider that the proposed development would not materially contravene the Development Plan zoning for the site.

(4) Appropriate Assessment

8.1.26. An Appropriate Assessment Screening Report and a Natural Impact Assessment Report (Both documents, prepared by MKO Planning & Environmental Consultants, accompanied the application lodged with the planning authority).

8.1.27. The planning authority conducted an Appropriate Assessment Screening and concluded (per report dated 4<sup>th</sup>, December 2019) that significant effect on any Natura 2000 site was unlikely. Thus, it appears that the planning authority screened out the need for Stage 2 Appropriate Assessment (and the need for the preparation of a Natura Impact Statement (NIS)).

### **Stage 1 : Screening**

- 8.1.28. The Appropriate Assessment Screening Report submitted by the applicant identified 10 Natura 2000 sites (SPA's and SAC's) located within 15 km of the appeal site. These sites are listed at Section 6.2 above. One further designated European site located c. 24.5 km from the appeal site was identified as being within the likely zone of impact of the proposed development (namely River Shannon & River Fergus Estuaries SPA (Site Code 004077)).
- 8.1.29. It was deemed that 9 of these 11 European designated sites could be 'screened out' in terms of a requirement for Stage 2 Appropriate Assessment (NIS). These sites were screened out for reasons including (i) The proposed site is designated for upland habitats that are located hydrologically upgradient of the appeal site with no pathway or effect identified (Slieve Bernagh Bog SAC; Silvermines Mountains West SAC; Keeper Hill SAC; Silvermine Mountains SAC), (ii) The European site is designated for terrestrial habitats – with no pathway or impact identified (Glenomra Wood SAC; Clare Glen SAC, (iii) Whilst there is a direct link by surface water, the SPA is hydrologically upstream of the site and given the nature and scale of the proposed development no pathway for impact was identified (Lough Derg (Shannon SPA), (iv) The European site is designated for the Hen Harrier. The development site is located outside the core foraging range for the Hen Harrier. There is no suitable habitat for this species at the site or in the surrounding area (Slievefelim to Silvermines SPA) and (v) The European site is designated for the Hen Harrier and Merlin. The designated site is located outside the core foraging range for the Hen Harrier and Merlin. There is no suitable habitat for either species at the site or in the surrounding area.
- 8.1.30. The Screening Report concluded that the remaining 2 (The Lower River Shannon SAC and the River Shannon & River Fergus SPA) of these 11 sites could not be 'screened out'. The Lower River Shannon SAC has been identified as having a number of Conservation Interests including the presence of Annex II species (Atlantic Salmon, Fresh water Pearl Mussel, Sea Lamprey, Brook Lamprey, River Lamprey, Bottlenose Dolphin and Otter). The Screening Report concluded the proposed development site is located entirely outside the SAC boundary and no potential pathway for direct impact exists. However, the development site has hydrological connectivity to the SAC (via surface water – downstream of the development site). Further assessment (Stage 2 Appropriate Assessment) is, therefore, required. The proposed development site is

located totally outside the River Shannon & River Fergus SPA and no pathway for direct impact exists. However, the site has potential for indirect impact via hydrological connection (c. 24 km downstream via surface water connection. A potential for deterioration of water quality during construction works was identified with respect to the supporting wetland habitat for sites of community importance within the SPA. Further assessment (Stage 2 Appropriate Assessment is, therefore, required).

8.1.31. I consider that the analysis provided in the submitted screening is robust and I concur with the analysis, conclusions and reasons for these conclusions in relation to the 9 designated sites that have been 'screened out' and, therefore, can be regarded as not requiring Stage 2 Appropriate Assessment. I agree that there is a hydrological pathway connecting the proposed development site with both the Lower River Shannon SAC and with the River Shannon & River Fergus SPA and that this pathway (The River Shannon in each case) is within the likely zone of impact and that there is potential for indirect impact on both these sites. Accordingly, Stage 2 Appropriate Assessment is required in relation to these 2 designated sites.

***Stage 2 : NIS***

8.1.32. Having regard to the proposal to excavate a portion of the river bank to provide for the boat berths, there was concern that release of sediment during the construction phase could have an indirect impact on the downstream on both the Lower River Shannon SAC and the River Shannon & River Fergus SPA. These concerns are addressed in the submitted NIS.

8.1.33. Proposed 'preventative measures' to avoid impacts from the proposed development on the SAC and SPA as set out in the NIS include:

- Implementation of standard best practice environmental control measures during the construction phase of the proposal,
- Instream works will take place only following the installation of permanent sheet piles using a mechanism whereby no ongoing watering will be required,
- Temporary sheet piles will be driven to the outer perimeter of construction,
- The internal face of temporary sheet piling will be lined with geotextile membrane which has been weighed down/anchored to the river bottom,
- Permanent sheet piles will be driven to the finished level of the existing ground,

- Material will be excavated from the area enclosed by both the temporary and permanent sheet piling,
- The water in the enclosed area will be allowed to settle for one week,
- A 300mm layer of 50mm clean broken stone bottom of the excavated area will be put in place to stabilise any loose material and/or silt.
- A further settlement period of one week will be allowed, following which the geotextile membrane and temporary sheet piles will be removed.

8.1.34. The NIS includes analysis of the cumulative impacts and in-combination effects of the proposed development based on other permitted and completed developments in the vicinity of the appeal site. These include 7 developments permitted over the 10-year period prior to the lodgement of the current application. 6 of these developments were of relatively modest scale (houses and house extensions). The final case relates to the regeneration and refurbishment of the Derg Marina located to the south of the appeal site. The NIS concludes that no European site are endangered due to cumulative or in-combination impacts. Based on the supporting information contained in the NIS, I consider that this conclusion is reasonable.

8.1.35. Having regard to the preventative measures to avoid impact on the SAC and SPA including measures to be put in place during the construction phase in relation to the excavation required to create the boat berths, I consider it reasonable to conclude on the basis of the information on the file, which I consider adequate in order to carry out a Stage 2 Appropriate Assessment, that the proposed development, individually or in combination with other plans or projects would not adversely affect the integrity of the Lower River Shannon SAC (Site Code 002165) and the River Shannon & River Fergus SPA (Site Code 004077), or any other European site, in view of the site's Conservation Objectives.

## 9.0 Recommendation

9.1. I recommend that planning permission for the proposed development be GRANTED for the reasons and considerations and subject to the conditions set out below.

## 10.0 Reasons and Considerations

Having regard to the nature and limited scale of the proposed development, the riverside location of the site, the existing and historic use of the site, the established character and pattern of development in the vicinity of the site and the zoning of the site for 'Open Space and Amenity' in the North Tipperary County Development Plan 2010 – 2016 (as extended), within which zoning 'Appropriate Uses' indicated in the Development Plan include water based recreational facilities, it is considered that the proposed would comply with Development Plan policy, would not seriously injure the amenities of adjoining and adjacent property or the land or water based amenities of the surrounding area and would be in accordance with the proper planning and sustainable development of the area.

## 11.0 Conditions

- (1) The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

**Reason:** In the interest of clarity.

- (2) This grant of planning permission relates to the development of a private 4 floating pontoon boat berthing facility, car parking, associated and ancillary works as described in the submitted public notices and as indicated in the documentation lodged with the planning application and appeal. No part of the existing shed/boat repair facility (former hangar building for a seaplane) shall



be used for residential or associated purposes without the benefit of a prior grant of planning permission for such change of use.

**Reason:** In the interest of clarity.

- (3) The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme.

**Reason:** It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.

- (4) Water supply and drainage arrangements, including the disposal of surface water, shall comply with the requirements of the planning authority for such works.

**Reason:** To ensure adequate servicing of the development, and to prevent pollution.

- (5) Details of the materials, colours and textures of all finishes to the proposed floating pontoon berths and of external finishes to the proposed pumping station

shall be submitted to, and agreed in writing with, the planning authority prior to the commencement of development.

**Reason:** In the interest of visual amenity.

- (6) The construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall provide details of intended construction practice for the development, including hours of working, noise management measures and off-site disposal of construction/demolition waste.

**Reason:** In the interests of public safety and residential amenity.

- (7) Construction waste shall be managed in accordance with a construction waste management plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall be prepared in accordance with the “Best Practice Guidelines on the Preparation of Waste Management Plans for Construction and Demolition Projects”, published by the Department of the Environment, Heritage and Local Government in July 2006

**Reason:** In the interest of sustainable waste management.

**Note:** *The applicant is advised of the provision under Section 34(13) of the Planning and Development Act, 2000 which stipulates that a person shall not be entitled solely by reason of a planning permission to carry out any development.*

---

Paddy Keogh  
Planning Inspector

21<sup>st</sup>, May 2020