



An
Bord
Pleanála

Inspector's Report

ABP-308399-20

Development	Permission for the construction of a single storey dwelling with site entrance, boundary walls and gate.
Location	Kilcash, Ballypatrick, Co. Tipperary.
Planning Authority	Tipperary County Council
Planning Authority Reg. Ref.	20/834
Applicant(s)	Bill O'Reilly
Type of Application	Permission
Planning Authority Decision	Refuse Permission
Type of Appeal	First Party v Refusal of Permission
Appellant(s)	Bill O'Reilly
Observer(s)	1. Deirdre Blackwell O'Reilly & Stanley O'Reilly and Edmond & Attracta O'Reilly
Date of Site Inspection	04.02.2021
Inspector	Anthony Kelly

1.0 Site Location and Description

- 1.1. The site is located approx. 1km east of Ballypatrick village and approx. 9km north west of Carrick-on-Suir in south east Co. Tipperary.
- 1.2. The site is a square-shaped field surrounded by a hedgerow on three sides and a low hedgerow and post and wire fence along the south boundary. It is accessed off a narrow, straight cul-de-sac roadway which leads to a house and farmyard. There is a two-storey detached house adjacent to the south west and another on the opposite side of the laneway to the south east. There is a slight drop in ground levels in a southerly direction. There are fields in the general vicinity, including to both north and south of the site.
- 1.3. The site has an area of 0.4046 hectares.

2.0 Proposed Development

- 2.1. Permission is sought for a single-storey house, vehicular entrance, wastewater treatment system and percolation area.
- 2.2. The proposed house has a floor area of 173sqm. It has a maximum height of 6.22 metres, but a general height of approx. 4.5 metres. The house is externally finished in render with some cedar cladding and zinc.

3.0 Planning Authority Decision

3.1. Decision

Tipperary County Council refused the application for the following reason:

1. Policy SS4 of the South Tipperary County Development Plan 2009, as varied seeks to facilitate individual dwellings in the open countryside for person(s) who are intrinsic to the area, have a demonstrated housing need and who meet certain eligibility criteria (inter alia):

- The applicant is a 'Local Rural Person' who has lived in the rural area within 10km of the proposed site for a minimum and continuous 10 year period.
- The applicant is a farmer of the land – defined as a landowner with a holding of >20 ha.

The Planning Authority considers that the applicant has failed to demonstrate a housing need, furthermore, the applicant has failed to demonstrate that they meet the eligibility criteria outlined under Policy SS4. The proposed development is, therefore, considered contrary to Policy SS4 of the South Tipperary County Development Plan 2009, as varied. The proposed development would contravene the stated policies and objectives of the Development Plan and would, therefore, be contrary to the proper planning and sustainable development of the area.

3.2. **Planning Authority Reports**

3.2.1. The Council's decision is based on the Planning Report which recommended that the application be refused for the stated reason.

3.2.2. **Other Technical Reports**

Area Engineer – Comments made in relation to sightlines, the roadside boundary and surface water disposal.

3.3. **Prescribed Bodies**

None.

3.4. **Third Party Observations**

Submissions were received from Shane & Andrea Ryan, Pearl House, Kilcash (opposite side of the cul-de-sac to the south east), Stanley O'Reilly & Deirdre Blackwell O'Reilly, Fernfield, Ballypatrick and Edmund & Attracta O'Reilly, The Well, Ballypatrick. The main points made can be summarised as follows:

- Overlooking to the rear of Pearl House.

- The proposed house would not follow the existing building line.
- The applicant owns his own house and does not comply with Policy SS4.
- Sightlines do not comply with standards.
- The eastern boundary ditch is owned by Edmond & Attracta O'Reilly and they will not be granting access for the proposed development through this ditch.

4.0 Planning History

None.

5.0 Policy Context

5.1. South Tipperary County Development Plan 2009-2015 (as varied)

- 5.1.1. This Plan is in place until such time as a single County Development Plan is prepared for Tipperary subsequent to the preparation of the Regional Spatial & Economic Strategy for the Southern Region (RSES).
- 5.1.2. Section 3.4 (Rural Housing in the Open Countryside) is relevant to the planning application. Policy SS4 facilitates individual houses in the open countryside for person(s) who are intrinsic to the area, have a demonstrated housing need and who are seeking to provide a home for their own occupation. The policy states a housing need should be demonstrated in accordance with local rural person, functional need to live in a rural area or exceptional medical circumstances categories.
- 5.1.3. Development management standards are set out in Chapter 10.

5.2. Sustainable Rural Housing Guidelines for Planning Authorities, 2005

- 5.2.1. These guidelines are relevant to the planning application. Circular Letter SP 5/08 was issued after the publication of the guidelines. Circular Letter SP 2/17 has been referenced in the grounds of appeal.

5.3. Natural Heritage Designations

- 5.3.1. The closest Natura 2000 site is Lower River Suir SAC approx. 3.1km to the south. The closest heritage area is Slievenamon Bog NHA approx. 2.2km to the north west.

5.4. EIA Screening

- 5.4.1. Having regard to the nature and scale of the proposed development and the nature of the receiving environment, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination stage, and a screening determination is not required.

6.0 The Appeal

6.1. Grounds of Appeal

The main points made can be summarised as follows:

- Category A of Policy SS4 makes no explanatory reference to housing need. It just defines what the planning authority considers a local rural person to be. This begs the question as to the meaning of housing need insofar as Category A is concerned. A logical interpretation of the policy must conclude that if a person is established as a 'local rural person', this is a de facto 'demonstration' of a housing need for Category A. Despite this, notwithstanding the applicant being unquestionably a local rural person, the refusal states the applicant has failed to demonstrate a housing need. The use of 'furthermore' in the decision appears to suggest that housing need is not a criterion covered by Policy SS4 and the planning authority seeks to rely on additional undefined eligibility criteria apart from Category A.
- The definition of housing need as a footnote in Policy SS4 allows for a degree of potential elasticity and the wording is linguistically and legally incomprehensible. The applicant, generally, sets out a number of concerns

about the wording, content and layout of the planning authority's Planning Report and the County Development Plan 2009.

- The three submissions received by the planning authority are addressed:

Stanley O'Reilly (applicant's nephew) and Deirdre O'Reilly – The planning authority did not consider it necessary to enquire as to what the numerous other aspects of concern the submitters had that were not included in the submission.

Edmond O'Reilly (applicant's brother) and Attracta O'Reilly – The site is surrounded on three sides by objectors' land. There is an historic ditch and public cul-de-sac to the east. The submission states they will not allow access through the eastern boundary ditch which is under their control. This ownership allegation is frivolous, vexatious and nonsensical. The site adjoins a public road. It is not, effectively, a marooned island. The Land Registry notes very clearly that red lines are not to be taken as conclusive, in terms of ownership boundaries. The applicant suggests the Board may wish to request the County Council to audit the submitters landholding for multiple potentially unauthorised developments.

Shane Ryan and Andrea Ryan – The applicant does not own the land that would allow the building line for a new house maintain the existing building line, and this would only contribute to ribbon development. Overlooking cannot occur from the proposed single-storey house.

- The Sustainable Rural Housing Guidelines for Planning Authorities (2005) is referenced with specific passages outlined which the applicant considers relevant to the application.
- The site is mere kilometres from the Waterford county boundary. The Waterford County Development Plan demonstrates a sympathetic interpretation of the concept of 'need'.
- The applicant is recorded as the owner of the property in Folio 5285. The farmhouse is 150-200 years old and has always been in the applicant's ancestral family. The applicant continues to expend money on the regular upkeep of the house, and it is reasonably adequate for one person. It has three bedrooms but there are certain deficiencies. The applicant has an affection for

the house and is only too aware of the fragility of the existence of such houses. The Council concluded the applicant does not have a housing need, likely based on the submissions. The Council did not seek to engage with the applicant to establish the veracity of statements made or the nature of the ownership of a house. The applicant outlines the occupation of the house, including occupation for a time by a late brother, upon his return from abroad in retirement and the internal layout and specifics of the property. The functional practicality of the house is a matter of more concern as the applicant advances in age.

- The applicant has a very restricted and limited 'ownership' of the property. It is not the property of the applicant in the sense that the term is normally understood. Third party entitlements are a significant curtailment. The applicant's late sister, who lived in the United States, had a right to residence in the house. A 56 year old brother, who currently lives abroad with his wife, also has a right of residence for the entirety of his life. He does not have another house in Ireland. This sibling can retire to the house. All of this information is known to the family objectors.
- The issue of 'housing need' is inextricably linked by the County Council with the need for a 'local connection'. In linking 'housing need' to a local connection the Council is in breach of Article 43 of the European Treaty (Flemish Case).
- The applicant refers to the constitution and a report produced by the Law Society's Law Reform Committee in 2005. The applicant has owned the land for over 40 years, and it has now been rendered a nullity by the Council.
- The applicant requests the Board to take a more temperate and nuanced approach.
- It is unclear if the reference in the Planning Report to the boundary ditch issue, that it 'would need to be resolved if permission is to be considered', is a ground for refusal or a throwaway comment. This issue has nothing to do with proper planning, per se.
- It is not clear as to the extent which the third party submissions formed part of the analysis of the application.

- A map is attached to the grounds of appeal identifying the site, the applicant's current residence and the properties under the control of the various submitters.

6.2. Planning Authority Response

None.

6.3. Observations

A joint observation was received from Deirdre Blackwell O'Reilly & Stanley O'Reilly, Fernfield, Ballypatrick (property adjacent to the west; Mr. O'Reilly is the applicant's nephew) and Edmond & Attracta O'Reilly, The Well, Ballypatrick (property adjacent to the west of Fernfield; Mr. O'Reilly is the applicant's brother). The main points made can be summarised as follows:

- It is noted from the planning authority Planning Report that the applicant claimed that the site was part of a family farm and that he needed to reside at the location. The 0.4 hectare site is to be developed as a house and garden. The applicant's existing house and outbuildings were connected with agricultural activity, but recent restoration and conversion of farm buildings suggest the entire 0.45 hectare site is residential. No detail of farmland has been submitted to support the case the house is needed to support the family farm.
- The applicant was resident in Geneva until five years ago when he returned and occupied the existing house. He would not qualify as a 'local rural person' in the context of the criteria. Policy SS4 states that persons who already own or have been permitted a house in the rural area will generally be considered to have no rural housing need. The applicant owns and lives in a house approx. 220 metres to the west. It was not the role of the planning authority to examine who had all the entitlements to reside in the house, only to establish ownership. Information in respect of property rights enclosed with the appeal does not alter the fact the applicant owns the house and therefore he does not have a housing need in accordance with rural housing policy.

- The Tipperary County Development Plan rural housing policy is the policy that anyone in Co. Tipperary has to comply with, not the Waterford Plan.
- The applicant makes no case as to why he needs another house. Recently, significant improvements and upgrades to the house and outbuildings have been carried out and the outbuildings are now habitable.
- The future use of the existing house has not been explained if the applicant is granted permission for a new house.
- The application site is currently for sale by the applicant, having previously had it on the books of two local auctioneers. The applicant's case is undermined by ongoing efforts to sell the only parcel of land in his ownership on which a house could be built.
- The full width of the L25014 (cul-de-sac) is within the registered title of the applicant's brother. The road surface is in public ownership and charge, but the applicant's brother is the owner of the road solum, the roadside margins and sections of ditches which he is obliged to maintain. Whether or not consent to breach the ditch is required need not concern the Board in its assessment. The observers are aware of section 34(13) of the Planning & Development Act, 2000 (as amended).
- Alleged unauthorised development is of no relevance to the subject of the appeal.
- The applicant appears to be of the view that by not being in line with existing housing, the proposed house does not constitute ribbon development. It is arguable the proposed house, on a gap site, will create a pattern of ribbon development which currently, by definition, does not exist. While accessed off a local road it will be seen within the context of existing housing either side. As there is no housing need, the applicant cannot avail of the relaxation provided for gap sites.
- The District Engineer made no assessment of sightlines at the junction of the cul-de-sac and local road. To achieve sightlines it would be necessary to set back roadside boundaries outside the applicant's control. Intensifying the use

of the junction without sightline improvements represents a serious traffic hazard. Precent in similar circumstances occurred with ABP Reg. Refs. PL 23.223276 and PL 24.216577.

- In relation to the current rural housing policy being in breach of Article 43 of the EU Treaty (Freedom of Movement), the County Development Plans are in the process of being reviewed and replaced and the appellant has an opportunity to make his views known on rural housing policies.
- Photographs of the exterior of the applicant's existing house are attached to the observation as well as a copy of the online advertisement in relation to the site being for sale (first listed 27.02.2020).

6.4. Further Responses

None sought.

7.0 Assessment

The main issues are those raised in the grounds of appeal and the Planning Report 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:

- Compliance with the Rural Housing Policy
- Site Layout and House Design
- Sightlines
- Ribbon Development
- Wastewater Treatment
- Unauthorised Development
- Appropriate Assessment

7.1. Compliance with the Rural Housing Policy

- 7.1.1. The applicant's compliance with the rural housing policy is a primary consideration in this application and was the basis for the planning authority's reason for refusal.
- 7.1.2. The grounds of appeal set out a number of concerns with the South Tipperary County Development Plan 2009 (as varied) in relation to rural housing. Notwithstanding the applicant's concerns, Appendix 1 (Statement of Compliance with Ministerial Guidelines) of the Plan states that Council policy to support the development of new housing accommodation is in line with the Sustainable Rural Housing Guidelines for Planning Authorities (2005). Section 3.4 (Rural Housing in the Open Countryside) of the Plan states that one of the key aims of the Plan is "To facilitate people who are from a rural community and who have lived for long periods within a rural community, and are in need of a dwelling, to construct that dwelling within their rural community". Policy SS4 is the relevant policy. Three categories of individuals are outlined. The applicant does not comply with Category B (there is no functional need to live in the area) or Category C (there are no exceptional medical circumstances). Therefore, Category A is the relevant category.
- 7.1.3. The grounds of appeal consider that when an applicant complies with Category A i.e. they are a 'Local Rural Person', they automatically demonstrate a housing need. Notwithstanding the applicant's concerns about the wording and layout of Policy SS4, I consider the rural housing policy in this regard to be relatively clear though the footnote does allow for elasticity, as noted by the applicant. Policy SS4 requires an applicant to be "intrinsic to the area". Given the fact the applicant currently resides in the original family home, the site originally formed part of the family farm and his brother and nephew live in houses adjacent to the west, I consider the applicant is intrinsic to the area. Category A defines a 'Local Rural Person' in the 'Open Countryside' as one who has lived in the rural area within 10km of the proposed site for a minimum and continuous 10 year period. The observation received on foot of the grounds of appeal consider that, because the applicant was resident in Geneva until five years ago, he would not qualify as a 'local rural person'. I do not consider that the intent of the Plan restricts the 10 year period to be the 10 year period immediately prior to the making of the planning application. I consider it would refer to a continuous 10

year period within a applicant's lifetime which, in this case, would presumably have occurred during childhood.

7.1.4. The second stipulation of Policy SS4 requires an applicant to have a demonstrated housing need. The applicant was a solicitor in Clonmel and then worked for the United Nations in Geneva. He retired back to Ballypatrick approximately five years ago. He has owned the site subject of the application for a number of years, and it originally formed part of the family farm. The applicant currently owns, and lives in, the original family home which is located approx. 220 metres to the west. The applicant and his late brother became joint-tenants of the house on the death of their mother and the applicant became the owner of the property in 2016 upon the death of his brother. While the house is in reasonable condition the applicant states that it is not his property "in the sense that that term is properly understood". There are Burdens on the property and, specifically with relation to the application, there is a right of residence for life for a brother of the applicant who currently lives abroad with his wife. This brother takes occupation of the house as and when he wishes, as he is legally entitled to do. While the applicant acknowledges that he cannot state whether or not his brother and wife will live in the house in his brother's retirement, it is a concern to the applicant. The footnote attached to this second stipulation states that "Persons who already own ... a house in the rural area will generally be considered to have no rural housing need ...". The third stipulation of Policy SS4 is that the applicant is seeking to provide a home for their own occupation. This is the case with this application.

7.1.5. I acknowledge the situation as set out in the grounds of appeal. One of the primary considerations in applications for one-off rural housing is the applicant's current living arrangements. In this application the applicant owns and lives in an existing house, which is in reasonable condition, approx. 220 metres away. Therefore, it is not the case that the applicant does not have a home, notwithstanding the Burdens attached. While the wording of the County Development Plan 2009 allows for a degree of flexibility in circumstances where an applicant already owns a house, I do not consider that such exceptional circumstances currently exist that it would be acceptable under the Plan for the applicant having a second one-off house in the rural area.

7.1.6. Having regard to the foregoing, I consider that permitting the application would be contrary to Policy SS4 of the South Tipperary County Development Plan 2009 (as varied).

7.2. Site Layout and House Design

7.2.1. The site is located on a cul-de-sac. Land to the north, west and south is under third party control. The house footprint is relatively central on site, set back approx. 17 metres from the roadside boundary. Separation distances to the other three boundaries are a minimum of 20 metres. There are hedgerows around the northern, western, and eastern boundaries with a low hedge and post and wire fence along the southern boundary. The site is grassed and there are tree saplings throughout the site. Additional tree planting is proposed on site, particularly in the south west area.

7.2.2. The proposed house has a floor area of 173sqm. It has a maximum height of 6.22 metres, but a general height of approx. 4.5 metres. It has a contemporary design, in both footprint and the exterior, and it is externally finished in render with some cedar cladding and zinc. I consider the design is acceptable at this location and would not be visually incongruous or obtrusive.

7.2.3. I consider the site layout and house design to be acceptable in principle.

7.3. Sightlines

7.3.1. The observation received on foot of the grounds of appeal consider that sightlines at the junction of the cul-de-sac (L25014) and the local road (L25013) are inadequate and intensification of this would result in traffic hazard.

7.3.2. The Area Engineer addressed the sightlines from the site onto the cul-de-sac in detail in his report to the planning authority. Though the 70 metres sightlines required were not achieved, the Area Engineer considered that, given the narrow width of the road, and the restriction this puts on speeds on the cul-de-sac, the sightlines that could be achieved were adequate. I concur with the Area Engineer's assessment in this regard and I do not consider these sightlines to be a concern given the physical layout of the cul-de-sac and the limited traffic on it.

- 7.3.3. Ownership of the eastern boundary ditch was brought up in a submission received by the planning authority and was addressed by the applicant in the grounds of appeal. I do not consider that the specific ownership of this ditch is a matter for the Board. I consider this issue is a civil issue and as noted in the observation received on foot of the grounds of appeal, the provisions of section 34(13) of the Planning & Development Act, 2000 (as amended) would apply.
- 7.3.4. The observation notes that the Area Engineer made no assessment of the sightlines at the junction of the cul-de-sac (L25014) and the local road (L25013). Given the relatively detailed analysis carried out for the proposed access onto the cul-de-sac it would be reasonable to conclude that if the Area Engineer considered that there was a significant concern with sightlines at the junction of the cul-de-sac and the local road, approx. 120 metres south of the site, this would have been mentioned in his report. The observation states that to achieve sightlines it would be necessary to set back the roadside boundaries to each side, and these are not in the applicant's control. Notwithstanding, the observation is not accompanied by any layout plan showing the existing situation at this junction and does not clarify what sightlines are available. The junction is of two public roads which can be accessed by anyone. Existing traffic can be considered to be low, given that there are only two existing houses/properties accessed off the narrow laneway. I do not consider that a third house would result in an intensification of use such that, without sightline improvements, it would represent a serious traffic hazard.
- 7.3.5. Having regard to the foregoing, I do not consider the proposed house would result in a serious traffic hazard at the junction of the cul-de-sac and local road.

7.4. Ribbon Development

- 7.4.1. The observation received on foot of the grounds of appeal considers it arguable that the proposed house would create a pattern of ribbon development where one does not currently exist.
- 7.4.2. Policy SS8 of the South Tipperary County Development Plan 2009 (as varied) states the Council will resist further development where 5 houses in total exist or are permitted within any continuous 250 metres of roadway. An additional house will only

be facilitated in certain circumstances. There are currently four houses between the applicant's current residence to the west and the Ryan property to the east (including both and noting the Ryan property is accessed off the cul-de-sac, a different road). This is a distance of approx. 400 metres. The proposed house would be the fifth in approx. 400 metres.

- 7.4.3. As the proposed house would not be the fifth house over a 250 metres section of roadway, it would not comprise ribbon development as set out in Policy SS8.

7.5. Wastewater Treatment

- 7.5.1. The site is in an area with a regionally important aquifer of high vulnerability. No groundwater was encountered in the trial hole. Bedrock was encountered at a depth of 1.4 metres. Soil in the trial hole was gravelly loam in the upper 250mm and sandy silt-clay with gravel and cobbles between 250mm and 1.4 metres. Table B.2 (Response Matrix for On-Site Treatment Systems) of the Code of Practice: Wastewater Treatment and Disposal Systems Serving Single Houses (p.e. ≤ 10) published by the EPA indicates that the site falls within the R2¹ response category where an on-site system is acceptable subject to normal good practice.
- 7.5.2. A T-test result of 40.14 was achieved. A P-test was also carried out and a result of 46.76 was achieved. The trial hole was not open for inspection, but I consider the results are consistent with the ground conditions observed during my site inspection.
- 7.5.3. The T-test results indicate, as set out in Table 6.3 (Interpretation of Percolation Test Results) of the Code of Practice, that the site is suitable for the development of a septic tank system or a secondary treatment system discharging to groundwater. Section 5 (Recommendation) of the Site Characterisation Form cites the installation of a packaged wastewater treatment system and polishing filter. The separation distances set out in Table 6.1 (Minimum Separation Distances in Metres) are/can be achieved. It appears a slightly larger percolation area than proposed is required but I do not consider this to be an issue given the size of the site.
- 7.5.4. Having regard to the foregoing, I consider a wastewater treatment system is appropriate on site.

7.6. Unauthorised Development

- 7.6.1. The grounds of appeal make a number of references to alleged unauthorised activity on the adjacent site.
- 7.6.2. The Board has no role or function in unauthorised activity, and it is not materially relevant to the application subject of the appeal.
- 7.6.3. Therefore, I do not consider this to be a matter for consideration in this assessment.

7.7. Appropriate Assessment

- 7.7.1. Having regard to the nature and scale of the development proposed and to the nature of the receiving environment, remote from and with no hydrological or ecological pathway to any European site, no appropriate assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.0 Recommendation

I recommend that the planning application be refused for the following reasons and considerations.

9.0 Reasons and Considerations

1. It is the policy of the planning authority, as set out in Policy SS4 (Housing in the Rural Countryside) of the South Tipperary County Development Plan 2009-2015 (as varied), to facilitate individual dwellings in the open countryside for person(s) who are intrinsic to the area, have a demonstrated housing need and who are seeking to provide a home for their own occupation. However, in this application the applicant already owns a house in the rural area and therefore is not considered to have a demonstrated housing need. Therefore, the proposed development would be contrary to Policy SS4 of the South Tipperary

County Development Plan 2009-2015 (as varied) and would be contrary to the proper planning and sustainable development of the area.

Anthony Kelly

Planning Inspector

03.03.2021