



An
Bord
Pleanála

S. 4(1) of Planning and Development (Housing) and Residential Tenancies Act 2016

Inspector's Addendum Report ABP-308790-20

Strategic Housing Development

179 no. apartments, creche and all associated site works.

Location

Bessboro, Ballinure, Blackrock, Cork.
(www.gatewayviewshd.ie)

Planning Authority

Cork City Council

Applicant

MWB Two Ltd.

Prescribed Bodies

1. Transport Infrastructure Ireland.
2. National Transport Authority.
3. Irish Water.
4. Development Applications Unit,

Observer(s)

1. Ann Harris

2. Cllr Fiona Ryan and Mick Barry TD.
3. Cllr Kieran McCarthy.
4. Cllr Lorna Bogue and Others.
5. Cork Survivors and Supports Alliance.
6. Donnchadh O'Laoghaire TD and Others.
7. Estuary View Enterprises 2020 Limited of Glandore.
8. Gerard O'Mahoney.
9. Holly Cairns TD.
10. Minister Michael McGrath TD.
11. Peter Horgan.
12. Sandra McAvoy.
13. Tom O'Sullivan
14. Roderic O'Gorman TD, Minister for Children, Equality, Disability, Integration and Youth.
15. Peter Horgan.
16. Joanne Goodyear.

Date of Site Inspection

17th February 2021.

Inspector

Karen Kenny

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1.0 Introduction

- 1.1. This addendum report should be read in conjunction with the previous Inspector's Report prepared in respect of the proposed strategic housing development ABP-308790-20, dated the 12th March 2021 and submitted to the Board.

1.2. Oral Hearing Agenda

- 1.2.1. Board Direction BD-007722-21 dated 15th March 2021 directed that a Limited Agenda Oral Hearing be held. Pursuant to the Board Direction, an Oral Hearing was held on 21st, 22nd and 23rd of April 2021 based on the following limited agenda:

1. The applicant is requested to address outstanding matters or provide further clarification in respect of the areas identified as potential children's burial ground, in particular the area to the north west of the folly and within the SHD site, noting that the southern parts of Blocks A, B and C may encroach onto this potential burial ground, in the form of survey and documentary evidence. The Board notes the comments of the Commission that 'The only way that this (i.e. existence of burial grounds) can be established is by an excavation of the entire property including those areas that are not built on (Para's 38.12-38.17).
2. The applicant is requested to address any outstanding matters or provide further clarification in respect of the appropriateness of excavation, surveying, and monitoring during construction, as opposed to prior to construction or prior to the grant of a permission. The applicant is further requested to address the issue as to the viability / feasibility of the proposed development (in full or in part) were remains to be found within areas identified for development. To this end, the applicant's attention is drawn to comparable site investigations required and carried out in similar circumstances. Excavations were permitted by warrant issued by the judicial Chairperson of the Commission. Forensic control was maintained so that, should it become necessary in the future, all evidence was collected to a standard that is required by forensic casework that is submissible in a court of law. An Garda

- Mr. Walsh set out an overview of the proposed development.

Mr. David Holland SC Statement of Position

- Applicant wants to respect the sites history. Grateful for CSSA view that they are not opposed to principle of development. Understand the opposition to development on an area that they believe to be a children's burial ground. The applicant is strongly of the view that no such prospect arises.
- Single factual issue relates to whether there is a Childrens Burial Ground in the field north of the folly. The applicant's mapping expert has reviewed the 1950 trace map and will say that there is no mapping evidence of a burial ground in that field. The advice is that the words 'Childrens' Burial Ground' refers to the rectangular area just above the folly. Two significant things happened in the trace revision. A new rectangular area was drawn on the trace and within millimetres of this the words "Childrens' Burial Ground" were written on the map. The aerial photograph dating from 1951 shows no disturbance in the area north of the folly. The Commission of Investigation's Fifth Interim Report states that one would expect to find disturbance if there were a burial ground. There is no more likelihood of burials in this field than anywhere in the 200 acres which formed the Bessborough estate.
- Out of respect for survivors and to give reassurance the applicant suggests a mechanism for site investigations. Aidan Harte, a forensic archaeologist who was part of the team at Tuam and Sean Ross Abbey excavations and co-author of the Report submitted to the Commission of Investigation on forensic excavations at Sean Ross Abbey will address this.
- Applicant's written response sets out what is suggested by way of condition. HW Report details the location of a proposed memorial at southern boundary of the field where it abuts the folly enclosure.

Mr. John Cronin, Archaeologist and Cultural Heritage Consultant

- Mr. Cronin's submission sets out detail of archaeological investigations undertaken on the landholding in December 2019 and responds to the 1949/50 OS Revision Tracing Map.

- 8 no. test trenches (under NMS licence) were excavated within the landholding and a metal detector (under licence) and targeted sieving was used. No evidence of human remains were found.
- Mr. Cronin contends that the alignment of the text "Children's Burial Ground" on the OS trace map is significant and suggests that the text is referring to an area to the right. He argues that text labels or annotations on OS historical maps are placed in convenient and uncluttered areas adjacent to the point, feature or area that they refer to.
- Mr. Cronin claimed that archaeological investigations do not support the assertion made by the CSSA in relation to the existence of a children's burial ground. OS maps do not represent the children's burial ground as extending outside of the enclosure that is located to the south of the application site. Aerial photographs produced for the Irish Air Corps in 1951 (broadly contemporary with the 1949/50 OS survey) displays no evidence of ground disturbance in the area in question.

Mr. Michael Flynn Cartographer and former member of OSI Staff

- Mr. Flynn stated that on the clear balance of probabilities and based on the mapping evidence, a children's burial ground existed in the area and that contemporaneous mapping evidence clarifies that the burial ground was established between 1932 and 1950.
- Mr. Flynn stated that the reference to a "Childrens' Burial Ground" on the trace map refers to a fenced area beside the folly and not to the area outside of the enclosure. Mr. Flynn disagrees with the suggestion that the text and its size determined the importance of the feature. Mr. Flynn argues that the fact that the text and the enclosure to the immediate north of the folly appear on the field trace during the same survey is not a coincidence. Could not envisage that a reviser would survey what we now know to be a burial ground and not identify or label it as a burial ground and not mark it on the map. Mr. Flynn stated that he never seen the text "Children's Burial Ground" printed on an OSI map without observing a defined area printed adjacent to it. In his view the location of the children's burial ground is the fenced area northwest of, and contiguous with the folly (south of the application site).

- The lines on an OS map represent fixed detail and text is descriptive and is movable depending on space available. The text on the 1950 trace is placed as close as possible to the fenced enclosure without obscuring the original red outer fence. In the later 6 inch map the text is positioned south east of the folly and as close to the enclosure as possible.

Mr. Paudie Barry Surveyor

- Mr. Barry's evidence relates to the position / location of a burial ground described as 'Children's Burial Ground' and the 1951 Aerial Image of the area. Mr. Barry stated that text never has a spatial component and that it shrinks and expands according to scale.
- Mr. Barry used a GPS system to confirm that the 1950's trace map, the 1950 25 inch map, the 1956 6 inch map and the current 2021 1:2500 scale OSI map and current PRAI Map all show the position of the mapped rectangular area to the north of the folly. At the various scales and on the different OSI maps the text "Childrens' Burial Ground" is shown to move around.
- In relation to the 1951 aerial image Mr. Barry notes that it is of remarkable quality for its era. Using GIS, at maximum zoom, Mr. Barry looked for evidence of ground disturbance, scanning for both excavated material and patterns of soil disturbance on the 1951 image. Mr. Barry saw no evidence of excavation or soil disturbance in the area to the north of the enclosure.

Mr. Colm Chambers, Archaeologist

- Mr. Chambers set out details of licenced archaeological testing undertaken within the proposed development area between the 9th and 11th December 2019 (Licence 19E0740). The testing sought to identify any potential archaeological remains, or osteological remains associated with the former Mother and Baby Home. His written submission is contained on the file and the conclusions contained therein are generally as set in Mr. Cronin's submission above.

Ms. Niamh Daly Osteoarchaeologist

- Ms. Niamh Daly's submission sets out details of a targeted sieving programme undertaken as part of the archaeological investigations of the site.

Mr. Aidan Harte Forensic Archaeologist

- Mr. Harte's written and oral submission sets out a proposed forensic approach for forensic investigations within 'priority areas' to the north of the folly.
- Mr. Harte stated that should potential human remains be identified in situ, the coroner would be notified, and all groundwork would cease. Similarly, if fragmentary or disarticulated human remains are identified ex-situ, then that area of excavation will stop. Outside of priority areas, the removal of topsoil should be monitored at all times by both a Forensic Archaeologist and an Osteoarchaeologist.
- Mr. Harte understands that forensic recovery of remains would only happen where directed by the Coroner, and in all likelihood, supported by An Garda Síochána and that there are numerous standard operating procedures for the forensic excavation of graves. It is noted that the nature of a burial, and sometimes the remains within, can be assessed in situ with minimal disturbance to the burial.
- Mr. Harte's submission to the Hearing states that in the absence of a predefined oversight structure (Coroner / An Garda Síochána / Commission etc.) it is necessary that the Local Authority and Survivors groups be regularly updated as to the progress of the investigation and search and that these entities nominate a representative to inspect the forensic search programme on-site at arbitrary intervals and without prior notice.

Mr. Ross Loughnane, AECOM

Oral evidence relating to the location and design of a memorial.

Mr. David Holland SC

- The suggestion of a children's burial ground does not provide a reasonable legal basis for a refusal of permission.
- Applicant has offered a condition in relation to site investigation including a provision prohibiting construction directly over locations containing a large extent of human remains. Reference to case law relating to conditions.

- Site investigations will not involve removal of remains found.
- The Board cannot speculate on the terms of the proposed Certain Institutional Burials Bill or that there will be legislation within a reasonable timeframe. Legally unreasonable to frustrate development on that basis.
- Development would not go ahead in the event that substantial human remains are found. All permissions are at risk of not being capable of being delivered. This is addressed in the 2016 Act under Section 10 (6) and in 2000 Act under Section 34(13). Viability and feasibility is not a basis for a planning refusal.

2.4. Submissions by the Planning Authority

Cork City Council was represented by Mr. P. O'Maolchalain BL, who made an oral submission to the Hearing and responded to various queries throughout the Hearing on behalf of Cork City Council. Key points made are summarised below:

- PA do not have any jurisdiction in relation to the matter of potential human remains associated with the Mother and Baby Home. Matter for ABP as decision maker to address the legacy issues and any planning and legal implications arising. View expressed in the CE Report that the proposed development would be consistent with CDP, NPF and Rebuilding Ireland needs to be read in light of comments in Section 9 of the Report.
- Investigations at other locations were not carried out in the context of Planning and Development Acts. Applicant's submission envisages a direct and hands on role for Cork City Council.
- If the Board is minded to grant permission ask that the Board have regard to the Development Management Guidelines, which set out the criteria for conditions. If the proposed condition requires agreement with the PA, it is possible that there may not be an agreement reached and that the Board may ultimately have to decide the matters.
- Conditions for agreement usually apply to technical aspects of development. Such conditions should be avoided where they relate to a fundamental matter and where third parties could be affected. Considerable ambiguity at the heart of the proposed condition.

- The methodology for investigation shows that the areas to be investigated overlap with the development blocks. If remains are found in this area what is to become of the blocks.
- Proposal to use S47 agreement entirely inappropriate.
- Were remains to be uncovered it may be a case that the European Commission of Human Rights Act 2003 would be engaged.
- Mr. Holland SC refers to supreme court judgement in Boland v ABP (3IR435 1996) and provision to leaving technical matters and matters of detail to be agreed with the PA. Matters discussed today are of a different nature to those addressed within this judgement.

2.5. Submissions by Observers

2.5.1. A number of observers also made submissions as detailed below.

Submission by Roderic O’Gorman TD, Minister for Children, Equality, Disability, Integration and Youth

The Minister read his written submission into evidence and it is also contained on the file. I have summarised the key points below:

- Made a written submission to ABP following publication of the Final Report of the Commission of Investigation into Mother and Baby Homes. Purpose of submission was to draw attention to key findings of the Final Report and Fifth Interim Report of the Commission concerning Bessborough.
- From engagement with survivors aware of importance many of them place on the appropriate and dignified memorialisation of burial sites for those who died in Mother and Baby and County institutions. Particularly in the case of Bessborough where uncertainty remains in relation to the location of burial sites. Acknowledge detailed work done by survivors which has led to the identification of a potential burial site.
- Proposal if granted in its current form would have a very significant impact on that potential location of a burial site. This possibility has caused real distress for survivors.

- Fifth Interim Report and Final Report of the Commission of Investigation addresses the location of burials at Bessborough. The Final Report concludes that “the Commission recognised then and still recognises that it is highly likely that burials did take place in the grounds of Bessborough. The only way that this can be established is by an excavation of the entire property including those areas that are now built on”.
- Final Report outlines efforts commission undertook to establish if the children who died in Bessborough were buried at other locations away from this site. While they were able to find burial records for some children the resting place of hundreds of children and babies are unaccounted for.
- Clear that there are unresolved questions in relation to the location of burial of hundreds of babies and children who died in Bessborough.
- Body of documents, material and oral testimony, significant enough for Commission to assert in final report that it is highly likely that there were unrecorded burials within the lands around the institution.
- Government and previous governments have recognised that what was allowed to happen in Mother and Baby Homes is a grievous wrong. Part of the suite of actions that the State has set out to address these wrongs is to achieve appropriate and dignified memorialisation.
- Vital in Board making its decision under Planning and Development Act, that the Board takes account of the information that is contained in the Final Report and Fifth Interim Report of the Commission of Investigation.
- If the Board does take the decision to grant planning permission, invite it to use its powers under Section 9(4) to attach conditions to make modifications or to only grant partial permission to the extent that the Board feels necessary, to firstly ensure that there is a comprehensive and appropriate investigation of the entire application site prior to any works taking place, secondly that any burial site identified by this investigation would be appropriately protected, and finally that permanent access and appropriate memorialisation be provided for.

Submission by Mr. Peter Horgan

- Mr. Peter Horgan read his submission into evidence, and it is also contained on the file. The submission refers to the findings of the Commission of Investigation into Mother and Baby Homes, local knowledge in relation to burials and the proposed Institutional Burials Bill and pre-legislative scrutiny that has been ongoing in respect of same.

Submission by Ms. Carmel Cantwell

- Ms. Cantwell read her written submission into evidence and it is also contained on the file. The submission referred to the historical legacy which must be respected and to the significance of the area around the folly as a memorial place and place of commemoration. She stated that the "Children's Burial Ground" must be preserved. Other items raised did not relate to the limited agenda for the Hearing.

Submission by Mr. Thomas Walsh

- Mr. Walsh referred to his written submission contained on the file and made a number of additional comments. Refers to use of OS mapping as an army officer and to the reliability of OS mapping. His interpretation is that if an area was named the name was covering the area, rather than to the left or right or below.
- Refers to the view among survivors that the area around the Folly is where babies were buried and to its significance as an area of commemoration.

Submission by Ms. Mary Slattery

- Ms. Slattery's read her written submission into evidence and it is also contained on the file. The submission states that the proposal to build on lands identified on an OS map as a burial ground is an act of desecration to the memories of babies and their mothers. Suggested that area be preserved as a heritage site in public ownership. Reference to international examples of this. Submission also refers to commemorative significance of the area.

Submission by Mr. David Dodd BL, on behalf of the Cork Survivors and Supports Alliance

- ABP governed by Section 3 of the European Convention of Human Rights.

- CSSA not opposed to residential development on the site. Recognise applicant's interest in the lands. Simply want no development / apartment blocks on children's burial ground as identified in the OS tracing map.
- Full agreement among parties that the OS trace map is reliable, and that it clearly indicated a children's burial ground existed in this area at this time. Agreement that there was no children's burial ground on grounds at Bessborough prior to 1932.
- Wrong to conclude that there was not a Children's Burial Ground because you can't see it in an aerial photograph. Least reliable evidence.
- Question of whether the children's burial ground is in 'nun's cemetery as put forward by the applicant or whether it is in the field to the north of this as put forward by CSSA.
- Fifth Interim Report of Commission of Investigation in its summary of findings and under the heading of 'where are the children buried' sets out findings in relation to burials at Bessborough. Applicant asks the Board to accept that the Commission was wrong and find that the Children's Burial Ground is in the nun's cemetery. The congregational cemetery is not large enough to accommodate all of the unrecorded burials. It is unlikely that children would be buried with members of the congregation. At comparable locations, the congregation were buried separate to women and children. Commission spent 5 years reviewing this matter.
- Mr. Clarkin will provide independent evidence as part of the OSI's function of assisting the public. Mr. Clarkin is of the view that the burial ground is in the field to the north of the folly (within the application site boundary).
- Concerns about accuracy of Mr. Flynn's evidence. Commission found that burial ground in rectangular area was not there until 1956 so would not have been recorded as a burial ground. Revisor would only have delineated / marked an outline to the children's burial ground if there was one. Sacred Heart did not put up a fence or mark graves. The ink colours used indicate that the senior revisor marked the burial ground (black ink revisor, green ink is senior revisor and blue ink examiner) not the revisor. Reference to a burial ground tends to suggest an open area where bodies are being disposed.

- Mr. Dodd reviewed a number of reports prepared by John Cronin and Associates, namely the reports titled Cultural Heritage Legacy of the Subject Lands; Archaeological Assessment; and Architectural Heritage Impact Assessment. He referred to incorrect labelling / dating of maps and the failure to refer to the 1949/50 OS trace map that was in circulation since March 2020. A Method Statement prepared by John Cronin and Associates and submitted to the NMS in 2019 as part of the application for an archaeological testing licence was submitted in evidence by the CSSA. Mr. Dodd notes that the statement refers to disturbance and states that it is unlikely that any burials that may have existed here would survive.

Submission by Mr. John Clarkin

- Mr. Clarkin OSI expert witness attended the Hearing at the request of the CSSA. Mr. Clarkin has worked for the OSI for over 40 years. His submission to the Hearing deals with the interpretation of the tracing map and details contained thereon. Mr. Clarkin was questioned by Mr. Dodd on his written submission which is available on the file. The written submission sets out a history of OS mapping for the area and of the mapping practices that led to the inclusion of the annotation "Childrens' Burial Ground" on the subsequent 25 inch map.
- Mr. Clarkin stated that the size of text to annotation 'Childrens' Burial Ground' relative to other text relates to size of feature and that there is a hierarchy of text.
- Children's Burial Ground appears on 25 inch map at same position as it does on the trace map and at a large scale. In Mr. Clarkin's opinion this infers that the item recorded covers a large area. Reference to burial ground is addressed in OSI naming convention. In Mr. Clarkin's experience burial ground is an undefined area, a graveyard is attached to a church and cemetery is a cemetery. These works are listed in the OSI red book. There are no definitions.
- Ticks on the map come from process called trace examination that takes place in the office once trace completed and before maps go to be updated on the manuscript. The process tests boundaries, names and other features

within the trace. In the instance of “Childrens’ Burial Ground” the blue circle relates to the wording and position of this wording which was queried. Fact that it’s ticked indicates that its correct position and description was confirmed.

- 6 inch map – name ‘Childrens’ Burial Ground’ has moved. No field revision on 6 inch map. 1956 6 inch map was derived from 25 inch. Its office based and nobody would use 6 inch map where 25 inch is available.
- Mr. Clarkin under questioning by Mr. Dodd confirmed that there is a children’s burial ground in the locus, and that if there is an aerial image which does not show it this does not mean that it does not exist. There were no marks or no permeant features at this location, just a piece of ground where people are buried.
- In Mr. Clarkin’s view if the Children’s Burial Ground was in the rectangular area the revisor would have written over detail and written in this area.
- The children’s burial ground is in the field. If you look where the “C” is placed, it’s the furthest away from the folly. Most important words is ‘Childrens’ and it should be closest to the feature.

Submission by Ms. Terri Harrison

- Ms. Harrison’s submission is contained on the file. The submission referred to Ms. Harrison’s experience at Bessborough and to the impact of this. The submission refers to the redevelopment of other similar institutional sites in Ireland, where in other jurisdictions they were deemed to be part of the Country’s history.

Submission by Councillor Lorna Bouge

- Cllr. Bogue’s written submission is contained on the file. The oral submission to the Hearing varies from the written submission and is available in full on the recording of the Hearing.
- Scale of unknown burials associated with the site and evidence presented compelling. Cannot provide a way to build on this site that does not carry the risk of inappropriate disturbance to burial sites.

- The investigations outlined are based on excavations carried out for the Commission at other comparable sites. Different reasons for investigation. Purpose in this instance is for development.
- In Sean Ross Abbey there were 239 deaths. Recorded deaths at Bessborough far exceeds this. Will the same rigour be applied to investigations? Unclear what applicant will do if remains are found. What is meant (in proposed condition) by substantial remains? Who has the authority to authorise exhumation of remains in this case?
- Put it to the Hearing that an exhumation licence could not be granted for the purpose of building on this site. Developer cannot remove any human remains that are found. Building must cease in its entirety should human remains be found. Applicants' proposals are unsatisfactory and not in line with expert evidence given by Mr. Harte. Not feasible for development to continue if any remains whatsoever are found.
- ABP as decision making body should have due regard to cultural heritage implications of site and to international human rights law.
- View of Cork City Councillors that this development should not be allowed to go ahead.

Submission by Deputy Donnachadh O'Laoghaire

- Deputy O'Laoghaire's written submission is contained on the file. The submission refers to legacy issues and findings of the Commission of Investigation into Mother and Baby Homes. View that Children's Burial ground should have been identified and fully examined before any plans were made. The burial ground must be accepted.

Submission by Councillor Dan Boyle

- Concerns of persons with a connection to the Mother and Baby Home should inform the Board's decision.
- Evidence indicates that it is certain that there is no certainty in relation to the matter of burials. At best elements of likelihood in relation to what exists.
- Seek more certainty than what is being described. Question use of SHD legislation for an application of this nature.

Siochana were in attendance for the duration of the excavations, specifically when human remains were exposed. The Coroner was notified of the potential to find modern human remains that would be considered from a time relevant to his jurisdiction. A protocol for communication was agreed.

3. The applicant requested to address any outstanding matters or provide further clarification in respect of detailed proposals as to how remains would be dealt with were they to be found on site, in respect of each scenario, and to consider whether there may be instances that development even if it were permitted in principle could not proceed, and in such instances, the legality / enforceability of any permission for the site.

2.0 Oral Hearing Report

- 2.1.1. The Board retained the services of Artane Audio to record proceedings. This record forms the official record of the proceedings. Due to public health restrictions arising from the Covid-19 pandemic the Hearing was undertaken virtually via Microsoft Teams.
- 2.1.2. The Hearing, in the main, comprised of verbal presentations and written submissions on behalf of the applicant and observers and questioning of expert witnesses. A written response from the National Monuments Service to a request from An Bord Pleanála to attend the Oral Hearing was also read into evidence.
- 2.1.3. In response to the limited agenda for this Oral Hearing, presentations were made on behalf of the applicant by Mr. David Holland SC; Mr. Harry Walsh Planner of HW Planning; John Cronin, Archaeologist and Cultural Heritage Consultant of John Cronin and Associates; Michael Flynn, Cartographer; Paudie Barry, Surveyor; Colm Chambers, Archaeologist of John Cronin and Associates; Niamh Daly, Osteoarchaeologist; Aidan Harte, Forensic Archaeologist; and Ross Loughnane of AECOM.
- 2.1.4. Cork City Council was represented by Mr. P. O'Maolchalain BL, who made a verbal submission to the Hearing and responded to questions and queries throughout the Hearing on behalf of Cork City Council.

2.1.5. Submissions to the Hearing were also made by a number of observers namely, Minister Roderic O'Gorman, Minister for Children, Equality, Disability, Integration and Youth; Mr. Peter Horgan; Ms. Carmel Cantwell; Mr. Thomas Walsh; Ms. Mary Slattery; Mr. David Dodd BL on behalf of the Cork Survivors and Supports Alliance; Mr. John Clarkin Cartographer of OSI at the request of the Cork Survivors and Supports Alliance; Ms. Terri Harrison, Cllr. Lorna Bogue; Deputy Donnachadh O'Laoghaire TD, Cllr. Dan Boyle; and Ms. Anne Marie Flanagan.

2.2. Submission from National Monuments Service (NMS)

Correspondence received from the NMS on 14th April 2021 was read into evidence. The key points are summarised as follows:

- Twentieth Century burials of the nature of those in question, and in particular the forensic investigation of same would be outside of the remit and expertise of the NMS.
- The NMS issued an excavation licence (under Section 26 of the National Monuments Act 1930) in 2019 for test excavations on the site. The licence was issued in error and subsequently withdrawn.
- The Committee on Children and Equality is examining a Bill to legislate for the examination and possible exhumation of mass graves at mother and baby homes. Any process established by statute will have available to it the forensic competence required for any necessary investigation or excavation of such burials, just as the Commission had through its expert group.
- Against that background, it would not seem that the NMS would have any capacity in this case to either add to, or supplement, any evidence or advice of the Commission's expert team, or to usefully assist An Bord Pleanála in its deliberations.

2.3. Submissions on behalf of the Applicant

Key points made in the submissions made on behalf of the applicant are summarised below. Full details are contained in the audio recording of the Hearing and in written statements submitted to the Hearing.

Mr. Harry Walsh

- Minister's presentation indicates that government policy is predicated on the Report of the Commission of Investigation and the need to introduce legislation for investigation of grounds to find information about which children have been buried where and under what circumstances.
- Process of legislating has already started through Oireachtas hearings. Legislation will be on statute books in months. Not honest to suggest that because legislation is not completed that it should not inform the Board's decision. Precedent of Board making decision based on existence of government policy.

Submission by Ms. Anne Marie Flanagan

- Ms. Flanagan's written submission is contained on the file. Submission refers to a wish that the grounds are checked by a non-invasive procedure. Feels that excavation is not necessary and that babies should rest in peace at this location.

Submission by Bessboro Mother & Baby Home (facebook group)

- Written submission to the Hearing. Submission refers to groups connection to the Mother and Baby Home, annual commemoration event held around the folly, commemorative significance of the area and impact of development on this area. Object to planned redevelopment of the land until such time as areas of concern are fully and independently investigated.

2.6. Questioning

Following submissions there was an opportunity for questioning between parties on matters raised in submissions. Key issues arising from questioning are addressed in Section 3.0 below on a thematic basis.

3.0 Assessment

- 3.1.1. Having considered all of the documentation on file, the PA's Chief Executive Report, the submission from prescribed bodies and third party submissions, and the information submitted and presented to the Oral Hearing I consider that the issues arising from the Limited Agenda can be addressed under the following headings:

- Documentary and Survey Evidence
- Site Investigations
- Viability and Feasibility
- Planning Condition

3.2. Documentary and Survey Evidence

Mapping Evidence

- 3.2.1. The applicant has argued that there is no more likelihood of burials in the field to the north of the folly and enclosure than at any other location in the 200 acres which formed the Bessborough estate and that it would be unreasonable to refuse permission for development on this basis.
- 3.2.2. There was significant focus at the Hearing on an OS revision trace map produced in 1949/1950. Ordnance Survey revisors surveyed the lands on dates in 1949 and 1950 and marked two new features onto the tracing map in the area around the folly and the enclosure that surrounds it. A small broadly rectangular fenced area that sits contiguous to and immediately north of the folly was included for the first time. In the field to the north of this (which includes the application site) the label “Childrens’ Burial Ground” was added. The CSSA’s evidence to the Hearing includes a clear copy of the trace map and an enlarged extract relating to the area in question.
- 3.2.3. There was agreement between parties in relation to the reliability of OS mapping generally and in relation to the reliability of the trace map, to the fact that the map provides evidence of a children’s burial ground in this general area (as a revisor would not record something that did not exist) and to the fact that this burial ground was not shown on earlier mapping and that the burial ground was therefore established sometime between 1932 and 1949. There was agreement in relation to the function of a blue line around the annotation “Childrens’ Burial Ground” as a means of alerting examiners to a proposed change to the map and that a corresponding tick indicates that this change had been checked and agreed. Mr. John Clarkin, OSI expert witness, confirmed at the Hearing that this line has no geographic significance. I would draw the attention of the Board to the fact that this interpretation differs from the view put forward in the CSSA’s initial written

submissions to the Board which argued that the blue line was the delineation of the children's burial ground.

- 3.2.4. There remained a significant difference of view in respect of the location of the "Childrens' Burial Ground" referenced on the trace map. The applicant's cartographic witness Mr. Flynn advised that the words "Childrens' Burial Ground" on the trace map relate to the rectangular fenced area just above and immediate contiguous to the folly (to the south of the application site). This view is also put forward in the submission of Mr. John Cronin, the applicants Archaeological and Cultural Heritage Consultant. The Fifth Interim Report of the Commission of Investigation refers to this area as a congregational burial ground and states that there was only one child buried in this area. Mr. Holland SC questioned the basis for the Commission's findings in relation to this matter stating that they never excavated the area. It is the view of Mr. Clarkin, OSI expert witness, that the placement of the wording in the field to the north of the folly indicates that the "Childrens' Burial Ground" is in the field to the north of the folly. Key points made by the various parties in relation to the mapping are summarised below.
- 3.2.5. Mr. Holland SC suggested during questioning that it was beyond coincidence that the annotation "Childrens' Burial Ground" was simultaneously introduced on the tracing map at the same time as the rectangular area within the enclosure. He also suggested that it would be a coincidence that the revisor failed to label the rectangular area. Mr. Clarkin in response agreed that this was a coincidence. In his opinion if the revisor had found a burial ground in the rectangular area an annotation or label would have appeared within the enclosure. Mr. Clarkin advised that revisors had no inhibition in writing across detail on trace maps and pointed to another example of this on the trace map. He did acknowledge under questioning that the practice was variable. Mr. Dodd BL on behalf of the CSSA highlighted the fact that the Commission of Investigation concluded that the congregational burial ground that now sits within the rectangular area was established in 1956. Mr. Clarkin argued that the font size of the annotation "Childrens' Burial Ground" is relevant and indicates a big area. Mr. Flynn (Cartographer) on behalf of the applicant disputed this claim suggesting that there is no convention in relation to the size of lettering. Mr. Barry (Surveyor) for the applicant suggested that the size could denote the importance of the feature. Mr. Holland SC asked Mr. Clarkin to comment on Mr.

Flynn's view that in 28 years of field revision and survey at every scale and mapping level he has never seen the text children's burial ground printed on an OS map without observing a defined area adjacent to it. Mr. Clarkin did not accept Mr. Flynn's view and stated that if there is no permanent feature the OSI's Red Book (rule book) indicates that you cannot record one. Mr. Clarkin was asked to comment on examples of this appended to Mr. Flynn's submission. In respect of two of three maps presented he clarified that the outline referred to by Mr. Flynn was not a delineation of a burial ground but related to other features, namely a 'nunnery site of' and a 'ring fort'. In relation to the placement of the annotation to the south west of the folly in a subsequent 6 inch OS Map Mr. Clarkin advised that this map was derived from the 25 inch map and that there was no further field examination undertaken in the preparation of that map. The submission of Mr. Cronin at paragraph 1.1 states that the label "Childrens' Burial Ground" is at other locations in subsequent published OS maps but in all instances adjacent to the sub-circular enclosure that contains the known burial ground. Mr. Clarkin advised in relation to the moving of the text that it's a matter of scale and that you cannot compare the trace map to a 6 inch map as they have differing levels of accuracy. It was noted that the annotation "Childrens' Burial Ground" was in the field to the north of the folly in the published 1950 25 inch map. Mr. Holland queried why the reference to "Childrens' Burial Ground" has not appeared on more recent OS maps. Mr. Clarkin advised that the OSI had moved to a new survey method and that a lot of text has been lost. Mr. Holland noted that text has been put back but not the reference to Children's Burial Ground.

Mr. Dodd BL on behalf of the CSSA clarified that the CSSA contacted the OSI to request relevant mapping evidence for the area. The OSI responded in March 2020 with the 1949/50 trace map. The CSSA wrote to the Commission of Investigation and provided the new mapping evidence. Mr. Dodd BL stated that the Commission was at the end of its investigations and that they accepted the map but did not take evidence from Mr. Clarkin. He noted that the Commission in its Final Report indicated that they were aware of the area and of the need to do excavation. Mr. Dodd suggests that the Board is in an advanced position having had access to the map and Mr. Clarkin's evidence.

A number of observers highlighted the size of the rectangular area stating that it would not have been large enough to accommodate all of the burials associated with the Mother and Baby Home. Mr. Holland SC on behalf of the applicant did acknowledge the size of the rectangular area and that it would not have been large enough to accommodate all burials. Observers also argued that it would be unlikely that children or women associated with the Mother and Baby Homes would have been buried within a congregational burial ground. It was noted that this did not occur at other comparable sites.

Aerial Photography

- 3.2.6. Mr. Holland SC on behalf of the applicant read an extract from the Fifth Interim Report of the Commission of Investigations into evidence (paragraph 4.26) which relates to vertical aerial photography taken for the Irish Air Corps in 1951. The Commission notes that the series includes high resolution aerial photography of the Bessborough Estate. It concludes that it would be reasonable to expect that, if there were burials there, an aerial photograph taken in February 1951 would show up some ground disturbance, or anomaly on the landscape. The photographs were examined by forensic archaeologists who determined that no visible features on the Bessborough landscape were indicative of any obvious site hosting the remains of such a large number of children.

Mr. Flynn (Cartographer) and Mr. Barry (Surveyor) responded to questions put by Mr. Holland SC on behalf of the applicant in relation to an aerial photograph submitted to the Hearing on 21st April 2021 (Image No. 73). They both stated that the image shows no disturbance in the area to the north / north west of the folly. Mr. Clarkin of the OSI was asked to comment on the photograph. He advised that he is not an expert on aerial photography. On questioning he suggested that the aerial photo would not necessarily have shown a burial ground as the children's burial ground as surveyed in 1949/50 had no delineation and no features. In response to a question raised by Mr. Clarkin which questioned the date of the aerial image, on Friday 23rd copies of two additional images were submitted to the Hearing (No. 72 and No. 74). The Inspector asked Mr. Barry, the applicants aerial imagery expert to comment on a white mark shown on image No. 72 in the area north of the folly. Mr. Barry clarified that the white mark is not shown on the original image and that he suspects that the image submitted to the Board 'is a jpeg or screen shot' and that the

anomaly was introduced in that way. He indicated that he could draw attention to areas that shows patterns possibly of an old forest on image no. 72, however, this line of enquiry was not pursued. In view of the non-original nature and quality of the images submitted to the Board, it is not possible in my view for the Board to verify or investigate the views put forward by the expert witnesses. I would suggest that there may be some slight change in colour and tone at locations within and adjacent to the site, however, this could result from the quality of imagery submitted to the Board and on this basis, I consider that no real conclusion can be drawn.

Archaeological Excavations

- 3.2.7. Mr. John Cronin, Archaeologist and Cultural Heritage Consultant of John Cronin and Associates, Mr. Colm Chambers, Archaeologist of John Cronin and Associates and by Ms. Niamh Daly Osteoarchaeologist gave written and oral evidence detailing archaeological test investigations that were undertaken on foot of the licence issued by NMS in 2019 and prior to the suspension of that licence. A total of 8 no. test trenches were excavated across the applicants landholding. 3 no. test trenches were in the field to the north of the folly. Mr. Chambers advised during questioning that the depth of the trenches averaged between 20 cm and 30 cm with a maximum depth of 50 cm. A metal detector was used during testing and a targeted sieving programme was undertaken by the osteoarchaeologist. No evidence of human remains were noted. Mr. Chambers advised that the excavated material was characterised by heavily disturbed topsoil to level of subsoil / glacial deposits. In trenches 2 and 3 (the area of the annotation "Childrens' Burial Ground") a linear feature shown on a 1st edition OS map was identified. It is noted that this feature would have predated the Mother and Baby Home era. Mr. Chambers stated that he would have expected evidence of burials within those deposits. Mr. Aidan Harte, Forensic Archaeologist, confirmed that he had reviewed the submission of Mr. Chambers. When asked if he would have approached the investigations in a different way, he indicated that in a forensic search sieving would have been directed as much at the topsoil or disturbed soil as it would the in-situ remains. When asked what in his view can be derived from the investigations Mr. Harte advised that not a lot can be derived and that the investigations would not, on their own, be sufficient to conclude whether there are or are not remains on the site. I would note that the test

excavations undertaken in December 2019 pre-date the discovery of the OS revision tracing map in March 2020.

3.3. Site Investigations

The applicant's submission to the Hearing states that although unlikely it cannot be ruled out that the SHD site contains human remains. In the hope of reassuring stakeholders, the applicant is happy to conduct further site investigation. The applicant's response to notification of the Oral Hearing dated 19th April 2021 has offered the basis for a condition in relation to site investigation. The applicant proposes that site investigation would occur after the grant of planning permission and before development on that part of the SHD site mistakenly identified as a Children's Burial Ground. Ground works on the remainder of the site would be subject to monitoring. The proposed condition is discussed in more detail in Section 3.5 below. Mr. Holland SC on behalf of the applicant stated that site investigations will not involve removal of remains found, noting that the Board has no power to authorise exhumation and that no one can exhume human remains without legal authority.

- 3.3.1. Mr. Aidan Harte, Forensic Archaeologist, was engaged by the applicant to provide expert advice in relation to a 'Proposed Forensic Approach to Establish the location of Unrecorded Burials' on the site. Mr. Harte's experience includes involvement in comparable excavations at the Tuam and Sean Ross Abbey Mother and Baby Homes as detailed in Appendix 1 of his written submission. Mr. Harte's submission sets out a proposed forensic approach to locate unrecorded burials within the area north and north west of the folly. He acknowledges that most of the site would not be suitable for Geophysical Survey due to previous disturbance but suggests that this is reviewed for liminal areas that may not have been impacted by previous ground works, such as adjacent to boundaries. Figure 2 of Mr. Harte's submission shows priority areas for searches based on their proximity to the only known burial ground in the area. It is suggested that these priority areas would be searched to a forensic standard monitored by at least one Forensic Archaeologist and one Osteo-archaeologist / Forensic Anthropologist. It is submitted that this combination of specialisms is an appropriate method of evaluating disturbed (and possibly very small fragments) skeletal remains. It is suggested that where items of evidential

value are noted in situ, a complete record should be made prior to their being logged and removed. Should potential human remains be identified in situ, the scene should be secured, the coroner would be notified, and all groundwork would cease.

Similarly, if fragmentary or disarticulated human remains are identified ex-situ then that area of excavation will stop. Mr. Harte clarified that the Coroner must decide the forensic relevance of remains discovered. He understands that forensic recovery of remains would only happen where directed by the Coroner, and in all likelihood, supported by An Garda Síochána. He stated that there are numerous standard operating procedures for the forensic excavation of graves. It is noted that the nature of a burial, and sometimes the remains within, can be assessed in situ with minimal disturbance to the burial. It is further noted that this has been the preferred approach in similar circumstances where evaluation of the nature and extent of burials has been sought. Mr. Harte's submission to the Hearing states that in the absence of a predefined oversight structure (Coroner / An Garda Síochána / Commission etc.) it is necessary that the Local Authority and Survivors groups be regularly updated as to the progress of the investigation and search; it is essential that these entities nominate a representative to inspect the forensic search programme on-site at arbitrary intervals and without prior notice. In terms of potential outcomes Mr. Harte's submission states that if it is found that the site has been heavily and extensively disturbed by previous groundworks, then it is possible that no burials remain in situ. However, even then some indication of burials having previously been located here should survive in the reinstated disturbed ground and should be identifiable from the methods outlined. If it is found that previous disturbance was not as deep as the original full depth of burials, then these burials would be evident as graves within the subsoil. If no evidence of human remains or burials is identified, having applied best practice and the most up-to-date and appropriate techniques for locating such evidence, then it must be accepted that no burials were located at this specific part of the former Mother and Baby Home.

- 3.3.2. The Inspector asked Mr. Harte on the basis of the information presented to the Hearing, if he was tasked with investigation of a site of this nature what would this entail, noting observer comments in relation to the purpose of testing and the findings of the commission in relation to the potential for burials within the grounds of the Bessborough estate. Mr. Harte stated that there are a lot of unknown elements.

He advised that at this location, as it is not a known burial ground, forensic investigations would have to be a bit more systematic. It would start with areas of higher probability. Priority areas 1 and 2 are highlighted as by anyone's standard they are areas of importance. Systematic testing would start at one end of the site and work in a continuous way to the other side. If human remains are encountered in situ or ex situ work must stop. In terms of timeframe, he estimates that systematic forensic investigation of the entire site would take months, but by its nature it is exploratory, so this is hard to quantify. He would use the least intrusive option firstly and that's why the geophysical methodology was mentioned. In relation to potential outcomes, the Inspector asked if following a systematic review of the site you did not encounter any remains what level of certainty does this give you? Mr. Harte replied that in terms of potential outcomes, there are multiple techniques that can be used to forensically assess a site. The goal is not to exhume or disturb those remains further but to establish extent. Where that extent cannot be established procedure can be reviewed but there would have to be confidence in it (the procedure) and that is why the point of oversight being critical was raised. There is no pre-existing legal framework at the moment so that oversight would be crucial. The Inspector asked is there a scenario where the report of the Forensic Archaeologist is inconclusive? Mr. Harte stated that they would be rarely inconclusive but there can be reasons or explanations for why remains don't survive. It is rarely the case that there is no evidence at all. It's a forensic science principle of every contact leaves a trace.

3.4. Viability and Feasibility

Mr. Holland SC on behalf of the applicant responded in relation to the agenda item of feasibility and viability of the development stating that the development would not go ahead in the event that substantial human remains are found. He stated that all permissions are at risk of not being capable of being delivered and that this is not a basis for refusal of permission. This is addressed under Section 10(6) of the 2016 Act and under Section 34(13) of the 2000 Act.

3.5. Planning Condition

- 3.5.1. The applicant's response to the notification of Oral Hearing has indicated that there is no statutory permission required to allow for site investigations. One observer referred to a lacuna in legislation in this regard.

3.5.2. The applicant in a response to notification of Oral Hearing dated 19th April 2021 offered the basis for a condition in relation to site investigations. The applicant proposes that further site investigations include the following elements:

1. *The identification, in consultation with stakeholders, of that area of the site North and North West of the Folly to which the site investigation will apply.*
2. *A Scope of Work and Method Statement – with particular regard to ascertaining whether modern human remains are buried in that area.*
3. *The Scope of Work shall reflect the objective of the site investigation which shall be to confirm and quantify the presence, absence and/or location of human remains in the study area.*
4. *The Method Statement shall be informed by the methods used in the forensic archaeological investigation of Sean Ross Abbey Burial Ground and provide, inter alia, for:*
 - a. *Timely liaison with stakeholders and public authorities during site investigation - including, but not limited to, Survivors Groups, the Planning Authority, the Coroner and An Garda Síochána.*
 - b. *More generally, a protocol for communication with all relevant persons and authorities.*
 - c. *Invitation to An Garda Síochána to attend at Site Investigation and make such records thereof as they may require.*
 - d. *Forensic site investigation - including recording and preservation of potential evidence.*
 - e. *Direction and supervision of such site investigation by a professional archaeologist to be an appointee approved by the Planning Authority.*
 - f. *The site investigation team to include expertise in Osteoarchaeology and Forensic Archaeology as approved by the Planning Authority.*
 - g. *Timely reporting of all findings of human remains to relevant public authorities including, but not limited to, the Planning Authority, the Coroner and An Garda Síochána.*

5. *For the avoidance of doubt, site investigation shall seek to identify the presence of modern human remains, but shall not exhume them.*
6. *The Archaeologist shall prepare a report on the results of the site investigation - with particular reference to the presence or absence of buried human remains.*
7. *The following shall occur before any other development of the study area pursuant to this permission:*
 - a. *Completion of the site investigation to the reasonable satisfaction of the Planning Authority.*
 - b. *Publication of Archaeologist's report on website www.gatewayviewshd.ie and publication of notice thereof in media organs.*
 - c. *Notification of relevant public authorities of the Archaeologist's report - including, but not limited to, the Planning Authority, the Coroner and An Garda Siochana.*
 - d. *Compliance with any lawful directions and requirements of such public authorities as they may relate to the presence of human remains on the site.*
 - e. *Such exhumation of human remains as may be lawfully directed by any public authority and/or the subject of an exhumation licence under S.46 of the Local Government (Sanitary Services) Act 1948 or otherwise permitted or required by lawful authority.*

The response stated that Board could require agreement with the PA pursuant to S.9(8) of the 2016 Act or with a view to a S.47 Agreement with the Planning Authority.

- 3.5.3. In response to matters raised over the course of the Hearing the applicant submitted a memorandum to the Hearing on 23rd April 2021 in relation to the proposed condition. The memorandum included the following revisions:

- The memo stated that the applicant would welcome any reasonable condition regarding the appropriate memorialisation of the legacy of the Mother and Baby Home to include accepting costs associated with providing a memorial, requirement to consult with stakeholders and requirement for public access.

- In relation to the condition relating to site investigations a number of points were added or amended. This included amendments to part 4 and part 7 to include a reference to any State body charged with addressing the state's legacy of Mother and Baby Homes, in addition to the Planning Authority, the Coroner and An Garda Síochána for liaison and reporting purposes. A new part 4(b) was added to provide for the nomination by stakeholders and public authorities of a representative to inspect the forensic search programme at arbitrary intervals. Point 7 (e) relating to exhumation of human remains was omitted. Point 8 stating that "no development shall take place on foot of this permission over any children's burial ground with human remains in situ" was added.

3.5.4. The applicant's response indicates that the applicant accepts that construction directly over locations containing a large extent of human remains would be inappropriate. The memorandum submitted to the Hearing on 23rd April remained focused on the area to the north and north west of the folly and would appear to allow for development to proceed in other sections of the site subject to monitoring of ground works. The wording remained focused on the presence or absence of "buried human remains". Given the concerns raised over the course of the Hearing in relation to previous disturbance and in relation to the nature of evidence that might be found the Inspector asked Mr. Holland SC to offer a view in relation to what would occur if there was not a clear result following investigation and indicate how it might be addressed in a condition. Mr. Holland SC advised that it was unlikely that an inconclusive result would arise and that a planning condition cannot cater for all matters or eventualities. He stated that it would be legally disproportionate to prevent development in the event of an inclusive result.

3.5.5. Mr. O'Maolchalain BL on behalf of the Planning Authority expressed concern in relation to the subject matter of the proposed condition given the absence of a legislative framework and the Planning Authority's lack of expertise in this area. He highlighted the fact that other investigations of a comparable nature took place under the direction of an enquiry. He expressed the view that the matters arising are not planning matters. It was also noted that there are elements of the proposed condition that leave items to be clarified and that are vague and ambiguous.

- 3.5.6. Mr. Holland SC on behalf of the applicant argued that matters relating to cultural heritage are planning matters and are matters that the Board can consider under the Planning and Development Act.
- 3.5.7. Mr. Dodd BL on behalf of the CSSA noted that the Board is asked to apply a condition under the general powers of Section 34(4) of the Act of 2000 (redirected by Section 9 (7) of the 2016 Act) to address matters (roles and responsibilities) that are set out in the Heads of Bill for the Certain Intuitional Burials Bill, which is currently being debated by the Oireachtas. The Board is being asked to legislate for this through a planning permission. Mr. Dodd suggests that it would be premature to grant permission and to condition matters that are under debate by the Oireachtas; and that the proposed development is premature on the basis that the applicant has not demonstrated that there are no human remains on site. He argues that the proposed condition would have the effect of suspending the entire permission. Mr. Dodd highlights the need to consider the common good in this case because of the historic context, noting that there are alternatives open to the developer to move away from the burial ground. He advised that in the minds of the CSSA the area marked as a "Childrens' Burial Ground" is the last resting place of deceased children and this is where the survivors (he represents) want to go to celebrate the lives of their children. Mr. Dodd also set out the Board's obligations to have regard to the findings of the findings of the Commission of Investigation into Mother and Baby Homes.

4.0 Conclusion

- 4.1.1. Having regard to the documentation and information submitted to the Hearing and based on the examination of this information during the Oral Hearing, I consider that no definitive conclusion has been reached in relation to the matter of unrecorded burials. I concluded in the initial Inspector's Report that there is a reasonable concern in relation to the potential for unrecorded burials within the SHD site. The Board now has a greater body of information before it in relation to this matter. While the applicant disputes the fact that there is a burial ground in the field to the north of the folly and enclosure, all parties to the Hearing agreed that the OS trace map dating from 1949/50 provides evidence that a children's burial ground was established in this general area between 1932 and 1950. This coincides with the

operation of a Mother and Baby Home and Maternity Hospital at this location. The applicant argues that the burial ground is in the rectangular area to the north of the folly. However, Mr. Clarkin, the OSI expert witness, argues that the trace map refers to a children's burial ground in the field to the north of the folly (and within the SHD site). While Mr. Clarkin's evidence may not provide a definitive conclusion in relation to the matter, the OS trace map coupled with the submission of Mr. Clarkin raises a substantial concern in relation to the possible presence of modern era burials within the western section of the SHD site. Having regard to the findings of the Commission of Investigation into Mother and Baby Homes in its Final Report that it is highly likely that burials did take place within the grounds of Bessborough (Paragraph 38.17) I also consider that the potential for unrecorded burials on other parts of the site cannot be excluded.

- 4.1.2. Given the level of uncertainty that pertains in relation to the potential for unrecorded burials within the site and in relation to the nature and extent of any such burials (including the possibility of disturbance), it remains my view that a full investigation of the site would be required prior to any works commencing on site. This is consistent with the view put forward by the Minister for Children, Equality, Disability, Integration and Youth (the designated Minister) at the Oral Hearing.
- 4.1.3. A key question that arises is whether this matter could be satisfactorily address by way of planning condition. This was teased out in considerable detail over the course of the Oral Hearing. I accept the argument put forward on behalf of the applicant that the matters to be addressed relate to cultural heritage matters and that it is open to the Board to consider attaching a condition in relation to cultural heritage matters. However, it became clear during the Oral Hearing that significant uncertainty pertains in relation to the matter of unrecorded burials at this location, including uncertainty in relation to the presence of unrecorded burials, the nature and extent of any such burials, the risk of previous disturbance and uncertainty in relation to the condition of remains and nature of evidence that might be found. It also became clear that there is a need for further investigation of the site to a forensic standard and that the oversight of these investigations is important. Section 9(7) of the Planning and Development (Housing) and Residential Tenancies Act 2016 provides that conditions attached to a permission may provide that points of detail relating to the grant of the permission may be agreed between the planning authority

and the person carrying out the development. I consider that the forensic investigation of a site on the basis that there is evidence to support the possible presence of modern human remains and the oversight of such investigations goes beyond what is provided for under Section 9(8) of the 2016 Act. The matters arising are beyond points of technical detail. Furthermore, I consider that the matters arising are too complex and the level of uncertainty too great to be addressed, to a satisfactory standard, by way of condition. There is also a risk depending on the outcome of the forensic investigations that any such condition would have the effect of nullifying or suspending the entire permission. I recommend that permission is refused on the basis that it would be premature to grant permission for development on this site prior to establishing if there are unrecorded burials within the site associated with the former use of the lands as a Mother and Baby Home, what the nature and extent of any such burials is and what the implications of this would be for the future development of the lands.

- 4.1.4. I note that a number of parties suggested that the proposed development would be premature pending the enactment of the proposed "Certain Institutional Burials (Authorised Interventions) Bill". One observer also referred to precedent of decisions being made based on government policy. However, I accept the argument put forward by the applicant, that the Board cannot speculate on the terms of proposed legislation or that there will be legislation within a reasonable timeframe or on the form of any subsequent policy that may be issued on foot of this legislation.

5.0 Recommendation

- 5.1.1. I recommend that permission be refused for the reasons and considerations set out below.

6.0 Recommended Draft Board Order

Application for permission under section 4 of the Planning and Development (Housing) and Residential Tenancies Act 2016, in accordance with plans and particulars, lodged with An Bord Pleanála on the 30th November 2020 by MWB Two Ltd, care of HW Planning, 5 Joyce House, Barrack Square, Ballincollig, Co. Cork.

Proposed Development: The development will consist of the construction of a strategic housing development of 179 no. residential units to be provided in 3 no. apartment buildings ranging in height from 5 to 7 storeys and all ancillary site works. The proposed development includes the construction of 88 no. 1-bedroom apartments, 85 no. 2 bedroom apartments and 6 no. 3-bedroom apartments. The development will include step-down housing and facilities for the elderly in Building A, a creche at ground floor level in Building B and building management facilities including plant and storage areas across all 3 no. apartment buildings. Ancillary site works will include the provision of a substation and switch room and an upgrade of the existing sewer line. The proposed development will provide for new pedestrian and cyclist entrances onto the Passage West Greenway and vehicular access will be via an existing access road off the Bessboro Road. The proposed development also includes communal open space areas, landscaping, under-podium and on-street car parking spaces, bicycle parking spaces, bin stores, public lighting and all ancillary site development works. The application contains a statement setting out how the proposal will be consistent with the objectives of the Cork City Development Plan 2015 - 2021 and the Mahon Local Area Plan 2014. A Natura Impact Statement has been prepared in respect of the proposed development.

Decision

Refuse permission for the above proposed development based on the reasons and considerations set out below.

Matters Considered

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

7.0 Reasons and Considerations

1. Having regard to the conclusions of the Fifth Interim Report (2019) and the Final Report (2020) of the Commission of Investigation into Mother and Baby Homes and to the mapping information submitted to the Board during the course of the application and at the Oral Hearing, the Board considers that there are

reasonable concerns in relation to the potential for unrecorded burials within the application site, associated with the former use of the lands as a Mother and Baby Home over the period 1922-1998. The Board considers that it would be premature to grant permission for the proposed development prior to establishing if there are unrecorded burials within the site, the extent of any such burials and what the implications of this is this for the future development of the lands. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.



Karen Kenny

Senior Planning Inspector

13th May 2021

