



An  
Bord  
Pleanála

## Inspector's Report ABP-309508-21

<b>Development</b>	Importation of soil & stone for the raising of an agricultural field to improve the output of the field and construction of farm trackway.
<b>Location</b>	Ballymorisheen, Grenagh, Co. Cork.
<b>Planning Authority</b>	Cork County Council
<b>Planning Authority Reg. Ref.</b>	204522
<b>Applicant(s)</b>	Mallow Contracts Ltd.
<b>Type of Application</b>	Permission.
<b>Planning Authority Decision</b>	Grant Permission with conditions
<b>Type of Appeal</b>	First Party v Condition 44 (Special Contribution)
<b>Appellant(s)</b>	Mallow Contracts Ltd.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	18 <sup>th</sup> May 2021.
<b>Inspector</b>	Bríd Maxwell

## **1.0 Site Location and Description**

- 1.1. The appeal site is located within the rural townland of Ballymorisheen circa 2km to the northwest of Grenagh Village and circa 14km south of Mallow in North County Cork. The site comprises one large triangular shaped field sloping gently to the east. The long /western boundary adjoins the public road and is defined by a stone and earth field boundary and deep internal drain. There is a deep drain running east west through the centre of the field. The site has a stated area of 10.43 hectares and is within a rural predominantly agricultural area. The site has been extensively drained and reclaimed in recent years. The Cork/Dublin railway line and N20 run on a north south axis within 3.5km to the east of the site.
- 1.2. Access to the site is via a local primary road L2771 between Ballymorisheen North Crossroads and the Cross of Four Winds. The site incorporates recorded monument C0051-083 Fulacht Fiadha located towards the south-eastern part of the site. Notably during the course of the application to Cork County Council following archaeological text excavation over the whole site a second fulacht fiadha was uncovered circa 50m southwest of the recorded fulacht fiadha.

## **2.0 Proposed Development**

- 2.1. The application as initially submitted sought permission for the importation of soil and stone for the raising of an agricultural field in order to improve agricultural output of the field and the construction of a farm trackway / haul road. Initial application details indicated intended importation of 126,903m<sup>3</sup> of material requiring approximately 12,700 road traffic movements. The appeal site is 10.43hectares and area of fill is 10.904hectares. Depth of fill will range from 0.01m to a maximum of 1.4m. A minimum of 0.3m of topsoil is proposed will be required and land will be grassed initially.
- 2.2. In response to a request for additional information and clarification of additional information it was outlined that it is intended to import 113,187m<sup>3</sup> of soil and stone. This equates to 169,781 tonnes. The applicant does not intend to fill at a rate greater than 25,000 tonnes per annum and the proposal will be completed over 7

years with an average of 24,254 tonnes or 16,170m<sup>3</sup> per annum. During the course of the assessment of the application by the local authority the proposed haul road element was omitted from the proposal.

### 3.0 Planning Authority Decision

#### 3.1. Decision

By order dated 28<sup>th</sup> January 2021 Cork County Council issued notification of its decision to grant permission and 44 conditions were attached which included the following of particular note.

Condition 1. Permission for the importation of soil and stone. Farm trackway / haul road along the southwestern boundary shall be omitted. Permission duration 7 years.

Condition 11 Any part of the public road damaged during the proposed works shall be resurfaced by the developer to the satisfaction of Cork County Council

Condition 13. "Prior to development commencing the developer shall carry out a road condition survey on public roads LP-1203. The results of this survey will be submitted and agreed with the Planning Authority before development commences. Upon commissioning of the development, a second road condition survey shall be carried out on the roads in question and submitted to the planning authority."

**Condition 44** (subject of this appeal). *"At least one month before development or at the discretion of the Planning Authority within such further period or periods of time as it may nominate in writing, the developer shall pay a special contribution of €53299.00 to Cork County Council, updated monthly in accordance with the Consumer Price Index from the date of grant of permission to the date of payment, in respect of specific exceptional costs not covered in the Council's General Contributions Scheme, in respect of works proposed to be carried out for the provision of future road improvements which will be required as a result of damage to the public road due to the operations of the site. The payment of the said contribution shall be subject to the following: (a) where the works in question – (i) are not commenced within 5 years of the date of payment of the contribution or final instalment if paid by phased payment, (ii) have commenced but have not been*

*completed within 7 years of the date of payment of the contribution (or final instalment if paid by phased payment), or (iii) where the Council has decided not to proceed with the proposed works or part thereof, the contribution shall, subject to paragraph (b) below, be refunded to the applicant together with any interest which may have accrued over the period while held by the Council. (b) Where under subparagraphs (ii) or (iii) of paragraph (a) above, any local authority has incurred expenditure within the required period in respect of proportion of the work proposed to be carried out any refund shall be in proportion to those proposed works which have not been carried out. (c) payment of interest at the prevailing rate payable by the Council's Treasurer on the Council's General Account on the contribution or any instalments thereof that have been paid, so long and in so far as it is or they are retained unexpended by the Council.*

*Reason: It is considered appropriate that the developer should contribute towards these specific exceptional costs, for works, which will benefit the proposed development."*

## **3.2 Planning Authority Reports**

### **3.2.1 Planning Reports**

- Planner's initial report notes concerns raised with regard to archaeological impact and ecological impact including the extent of hedgerow removal. EIAR screening would need to be informed by a more complete habitat survey. A request for additional information issued seeking a number of items including a detailed agricultural report and justification for the proposed development. Details of the source of the proposed material noting that C&D waste would not be permitted. Entrance details / sightlines to be demonstrated with a view to protection of existing hedgerows. Details of haul road. Reinstatement plan. Flood risk assessment. Applicant was advised that infilling of Ballymorisheen Watercourse which runs through the centre of the site will not be permitted. Ecological impact assessment report and hedgerow appraisal report. EIAR screening assessment. Archaeological impact assessment. Revised site plan showing all watercourses drains and all hedgerows trees. No material to be deposited within 5m of a watercourse.

Proposals to prevent soiled water runoff from entering watercourses and details of best practice to minimise discharges of silt suspended solids to watercourses.

- Senior Executive Planner's report concurs with recommendation to seek additional information.
- Second planner's report sought clarification of additional information noting certain discrepancies with regard to the amount of fill to be imported and a schedule of annual volume over the lifetime of the permission in cubic metres and tonnes.

A request for clarification of further information issued advising the applicant that stated volume of fill 113187m<sup>3</sup> and 118187m<sup>3</sup> (equating to 169760.5 tonnes and 177280.5 tonnes respectively) if spread evenly over a five-year period would amount to circa 33,956 tonnes or 35,456 tonnes per annum, both breaching the threshold of 25,000 tonnes per annum set out in Schedule 4 Part 2.11b of the Planning and Development Regulations 2001 as amended. Applicant was requested to clarify the amount of fill, noting threshold for mandatory EIAR. Applicant was also requested to clarify the nature of works undertaken on the site between 2018 and 2020. Details of silt fence to be outlined in light of location of the haul route and proposals for replacement hedgerow and existing hedgerow protection. The applicant was also requested to outline proposals to avoid importation of invasive species.

- Final planner's report recommends permission subject to conditions.

### 3.2.2 Other Technical Reports

- Archaeologist's report notes that the site contains recorded monument C0051-093 Fulacht Fiadha. A detailed archaeological impact assessment required.

Second report noted additional fulacht fiadh identified during the course of the archaeological test trenching. Concur with recommendations for buffer zone to be graded back to the new material. All topsoil stripping to be archaeologically monitored.

- Area Engineer's initial report outlines that while the existing public road is in a satisfactory condition concerns arise that the number of truck movements will cause damage to the road surface and verges therefore a before and after condition survey should be carried out and bond put in place to cover cost of damage caused. Bond

shall cover cost of fully reinstating road at the entrance.  $180\text{m} \times 55\text{m} = \text{€}9,900$ . No special development contribution is required in this instance as the bond shall cover any works necessary to repair and rectify road damage caused by the development construction.

- In response to additional information the second report asserts that the structure of the road network servicing the site will deteriorate as a result of the heavy vehicles associated with this type of development, therefore a special contribution shall be levied towards the future upgrading of roads leading to the site which will be required because of the inevitable damage this development will cause. In the recent past CCC has imposed a Special development charge for local roads of €0.70 per m<sup>3</sup>/km from the nearest main road. For the proposed site this equates to : Local Road =  $\text{€}0.70 \times 126.903 \times 0/6\text{km} = \text{€}53,299$ . The proposal to impose a bond of €9,900 as outlined in original report no longer applies.
- Initial Environment report noted discrepancies within the documentation and sought an independent agricultural report and detailed justification for need for land improvement. A temporary benchmark to be maintained on the site. No C&D waste to be permitted. Second Environment report indicates no objection subject to conditions.
- Ecology report notes that there are a number of drains running through the site. Notably the Ballymorisheen watercourse is identified as being of poor status and at a risk of not achieving good status under the Water Framework Directive. Site may support wetland habitats and species. Mature hedgerows transecting the site should be retained. An ecological impact assessment of the proposal should be carried out. Second report notes from review of Ecological Impact Assessment and review of aerial photography the site has been highly modified between 2018 and 2020 including the infilling of drains. The extent of works should be outlined. Quantities of the habitat on site which resembled wetland habitat have been altered over the years and the current habitat does largely comprises of improved grassland, drainage ditches, spoil and bare ground which are not of high biodiversity value. Setback of 5m from Ballymorisheen River rather than 10m from watercourse as required in County Development Plan is acceptable in this case as an earthen bund and silt fence provided to protect the watercourse from pollution. Further clarification required

regarding prevention of invasive species and measures to demonstrate hedgerow protection and replacement. Measures to protect breeding birds during hedgerow clearance. Final Ecology report indicates no objection subject to conditions including prevention of cutting of trees and hedgerows outside the bird breeding season and biosecurity measures to prevent introduction of invasive species.

### **3.3 Prescribed Bodies**

3.3.1 Inland Fisheries Ireland. Details to be provided on how soiled water runoff is to be prevented from entering adjacent watercourses. Only inert materials should be used. Fence to ensure 5m buffer strip from all watercourses. No interference with bridging drainage or culverting on the adjacent stream or any watercourse is banks or bankside vegetation to facilitate the development without prior approval from the Inlands Fisheries Ireland. A 100-year flood plain to be established to ensure no lands below this contour are filled.

### **3.4 Third Party Observations**

No submissions

## **4 Planning History**

No planning history on the appeal site.

## **5 Policy Context**

### **5.1 Development Plan**

The Cork County Development Plan 2014 and Blarney Macroom Municipal District Local Area Plan 2017. The site is located within a rural are under strong urban influence.

### **5.2 Natural Heritage Designations**

The site is not within a designated area. The Blackwater River (Cork /Waterford) SAC 002170 occurs within 5.5km.

### **5.3 EIA Screening**

**5.3.1** I note the EIA Screening report submitted in response to the request for additional information by Cuthbert Environmental which concluded that the characteristics of the proposed development are not significant due to the nature size and location of the development and characteristics and sensitivities of the receiving environment and the design measures to be implemented and that an EIAR is not required for the project. The final Area Planner's report stated that the proposed development does not trigger mandatory EIAR.

## **6 The Appeal**

### **6.1 Grounds of Appeal**

**6.1.1** The first party appeal is taken under Section 48(13) of the Planning and Development Act 2000 and relates to condition 44 requiring payment of a special development contribution of €53,299 and is summarised as follows:

- Condition 44 does not outline the particular repair works to be carried out by Cork County Council.
- There is no clear breakdown in the Area Engineer's report as to what exact works are needed in order to justify the imposition of condition 44. It is unclear how it is exceptional to the proposed development given the rural location and agricultural nature of the surrounding area.
- Other users will benefit from any improvement to the local road.
- Condition 44 is at odds with the spirit of the development contributions as outlined in the Development Management Guidelines, the need to find a balance between funding infrastructure and encouraging economic development.
- Planning authority has placed a disproportionately high level of development charge relative to the nature of the proposed development which is to raise land for agricultural purposes.



- Contribution will render the development unviable and unimplementable.
- The Cork County Council General Contribution Scheme clarifies that a charge is levied per m2 for roads and amenities. No general contribution applies to the proposed development. A special contribution has been applied in this instance appearing to seek to replicate a charge that would ordinarily have been attached as a general contribution.
- Notably the initial report of the Executive Engineer 16<sup>th</sup> June 2020 recommended a bond to the value of €9,900 which is considerably less than the disproportionate amount of €53,299.
- The works specified in condition 44 cannot be considered as specific exceptional costs not covered in the general scheme and these works would not solely benefit the proposed development.
- Financial contribution as attached does not come within the scope of Section 48(2)(c) of the Planning and Development Act 2000 as amended and is unwarranted.

## **6.2 Planning Authority Response**

6.2.1 The Board invited the submission of comments and a breakdown of the fees calculated from the Planning Authority by letter dated 29<sup>th</sup> March 2020. The Planning Authority did not respond to the ground of appeal.

## **6.3 Observations**

No submissions

## **7 Assessment**

- 7.1 As the appeal is solely against the contribution condition (condition 44), the Act provides that the Board shall not determine the relevant application as if it had been made in the first instance but shall determine only the matters under appeal, in effect the condition being appealed against and to considering the proper implementation of the Cork County Council's adopted scheme. In general terms, Development Contribution Schemes apply as a general levy on development and Special Contributions apply to particular developments where, for example, a specific exceptional cost would arise for the authority, which is not covered by a Scheme or a Supplementary Scheme, resulting from the carrying out of the development in question.
- 7.2 The specific requirements which justify the imposition of a special contributions are set out in Section 48(2)(c) of the Planning and development Act 2000 as amended, which provides that :

*"A planning authority may, in addition to the terms of a scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority in*

*respect of public infrastructure and facilities which benefit the proposed development.”*

and

*(12) Where payment of a special contribution is required in accordance with subsection (2) (c), the following provisions shall apply—*

*(a) the condition shall specify the particular works carried out, or proposed to be carried out, by any local authority to which the contribution relates,*

*(b) where the works in question—*

*(i) are not commenced within 5 years of the date of payment to the authority of the contribution (or final instalment thereof, if paid by phased payment under subsection (15)(a)),*

*(ii) have commenced, but have not been completed within 7 years of the date of payment to the authority of the contribution (or final instalment thereof, if paid by phased payment under subsection (15)(a)), or*

*(iii) where the local authority decides not to proceed with the proposed works or part thereof. The contribution shall, subject to paragraph (c), be refunded to the applicant together with any interest that may have accrued over the period while held by the local authority,*

*(c) where under subparagraph (ii) or (iii) of paragraph (b), any local authority has incurred expenditure within the required period in respect of a proportion of the*

*works proposed to be carried out, any refund shall be in proportion to those proposed works which have not been carried out.*

- 7.3 The Development Management Guidelines for Planning Authorities, June 2007 addresses such conditions as follows (section 7.12):

*“‘special’ contribution requirements in respect of a particular development may be imposed under section 48(2)(c) of the Planning Act where specific exceptional costs not covered by a scheme are incurred by a local authority in the provision of public infrastructure and facilities which benefit the proposed development. A condition requiring a special contribution must be amenable to implementation under the terms of section 48(12) of the Planning Act; therefore, it is essential that the basis for the calculation of the contribution should be explained in the planning decision. This means that it will be necessary to identify the nature/scope of works, the expenditure involved and the basis for the calculation, including how it is apportioned to the particular development. Circumstances which might warrant the attachment of a special contribution condition would include where the costs are incurred directly as a result of, or in order to facilitate, the development in question and are properly attributable to it. Where the benefit deriving from the particular infrastructure or facility is more widespread (e.g., extends to other lands in the vicinity) consideration should be given to adopting a revised development contribution scheme or, as provided for in the Planning Act, adopting a separate development contribution scheme for the relevant geographical area. Conditions requiring the payment of special contributions may be the subject of appeal.”*

- 7.4 The amount of €53,299 towards “works proposed to be carried out for the provision of future road improvements which will be required as a result of damage to the public road due to the operations of the site” in Condition no 44 is expressly specified as a special contribution. As outlined above the specific explanation as to when a planning authority may require the payment of a Special Contribution is covered in Section 48(2)(c) of the Planning and Development Act 2000. It is clear that such a request should only be made in respect of a particular development, which is likely to incur specific exceptional costs not covered by the General Development

Contribution Scheme of the Council. They are in addition to the terms of the general scheme and might cover specific developments whereby the scale of the development and the demand the proposed development is likely to place on public services and facilities is deemed to be exceptional. The specified works in condition 44 are *“future road improvements which will be required as a result of damage to the public road due to the operations of the site”*

7.5 Cork County Council did not respond to the appeal and the basis for or justification of the contribution arises in the second report of the Area Engineer where it is outlined that *“the structure of the road network servicing the site will deteriorate as a result of the heavy vehicles associated with this type of development, therefore a special contribution shall be levied towards the future upgrading of roads leading to the site which will be required because of the inevitable damage this development will cause. In the recent past CCC has imposed a Special development charge for local roads of €0.70 per m<sup>3</sup>/km from the nearest main road. For the proposed site this equates to : Local Road = 0.70x126.903x0.6km = €53,299. The proposal to impose a bond of €9,900 as outlined in original report no longer applies.”* The initial report had recommended a bond of €9,900 calculated on the basis of cost of reinstating the road at the entrance  $€180\text{m}^2 \times €55/\text{m}^2 = €9,900$ .

7.6 The first question is whether these road improvement works to address damage to the public road due to the operations of the site can be taken to fall within the category of works for which a special contribution might be sought. I note that the proposed development involves a fill rate of 24,154 tonnes or 16,170m<sup>3</sup> per annum over a period of 7 years. Clearly the level of traffic movements arising have the potential to give rise to damage to the public road over the lifetime of the permission, and therefore could be deemed to be “exceptional” costs. I note however the apparent duplication with Condition 11 which states that *“Any part of the public road damaged during the proposed works shall be resurfaced by the developer to the satisfaction of Cork County Council.”* As regards the issue of benefit the upgrading of the road would clearly be of general benefit to many and therefore apportionment question arises. Furthermore, the condition is not sufficiently specific to be compatible with the terms of Section 48 (12) (a) and the application of the terms of Section 48 (12) (b) and (c) relating to refund or partial refund should the works not be

commenced, or be partially completed within the specified timeframes, if subsequently required.

- 7.7 Having reviewed the application documents, the grounds of appeal and the planning authority's development contribution scheme, I conclude that the planning authority acted ultra vires its powers under the Planning and Development Acts, 2000 as amended in attaching the requirement for a special contribution of €53,299. This contribution does not accord with the provisions of Section 48 (2) (c) of the Planning and Development Act, 2000 with reference to the payment of a special contribution and the said contribution is not amenable to being applied in accordance with the provision of Section 48(12) of the Act.

- 8 **RECOMMENDATION** Omit condition 44 for the reasons and considerations set down below.

The Board considered that the contribution of €53,299 imposed under condition number 44 as a special development contribution for the future road improvements is not in accordance with the provisions of Section 48(2)(c) of the Planning and Development Act 2000. The condition is an unnecessary duplication in light of condition 11 requiring that *"any part of the public road damaged during the proposed works shall be resurfaced by the developer to the satisfaction of Cork County Council"*. The Board considered that the planning authority had failed adequately to "specify the particular works" proposed to be carried out relating to the contribution sought as required by section 48(12)(a) of the Planning and Development Act, 2000, as amended and determined that the condition should be removed.

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Bríd Maxwell,

Planning Inspector  
02 June 2021