



An
Bord
Pleanála

Inspector's Report ABP-310724-21

Development	Demolition of existing structure and construction of 31 two storey dwelling houses.
Location	Ballycasheen, Killarney, Co Kerry.
Planning Authority	Kerry County Council
Planning Authority Reg. Ref.	20508
Applicant(s)	Flesk Grove Developments Ltd.
Type of Application	Permission
Planning Authority Decision	Grant Permission with conditions
Type of Appeals	Third Party
Appellants	Elaine O Shea. Atlantic Capital Advisors Ltd Kathryn O Neill Flesk River Valley Residential Association Patrick & Vivienne Neary Flesk Grove Residents Group
Observer(s)	None.

Date of Site Inspection

23rd September 2021.

Inspector

Bríd Maxwell

1.0 Site Location and Description

- 1.1. This appeal relates to a site located at on the northern side of Ballycasheen Road to the southeast of Killarney, County Kerry. The Ballycasheen Road is a suburban road connecting the Muckcross Road (N71) with the N22 (Killarney-Cork) National Primary Road. It is characterised by extensive frontage development as well as a number of small modern housing estates and some commercial uses. Access to the site is by way of the access road serving the Flesk Grove residential estate and a private dwelling Alderhaven to the north-west of the site. The entrance from the Ballycasheen Road incorporates a footpath on the western side of the entrance with a grass verge on the eastern side.
- 1.2. The appeal site has a stated area of 0.948 hectares and is occupied by a two storey dwellinghouse formerly a Bed & Breakfast with open greenfield to the north. Application details outline that the site has been raised in the past by approximately 2m with uncontrolled construction fill material. The site is adjoined by three individual house facing onto Ballycasheen Road to the south and greenfield lands to the east. The appeal site is visually enclosed with predominance of native species along the northern and western boundaries with Monterey cypress hedging along the eastern boundary. The northern boundary is defined by mature trees with an unnamed stream flowing east to west (The stream eventually discharges to the Flesk River which flows to the south of Ballycasheen Road before entering Lough Leane to the west of Killarney). The railway line lies a short distance to the north of the site. A laneway serving a dwellinghouse on higher ground to the north-west (Alderhaven) runs along the western site boundary with dwellings of Flesk Grove backs onto the west of this. The land slopes primarily from south-east to northwest.

2.0 Proposed Development

- 2.1 The application involves permission to demolish the existing dwellinghouse (formerly a B&B and to construct a residential development. The initial proposal was to construct 34 no dwellings. During the course of the application and specifically in response to the Council's request for additional information the layout and

configuration was revised and the final proposal involves the construction of 31 two storey dwellinghouses to consist of eleven 2 bedroom terraced houses, six 2 bedroom semi-detached houses and fourteen 3 bedroom semi detached houses including modified site entrance, access road, footpaths, private refuse storage structures, landscaping, all necessary connections to public sewer services, public water supply and all necessary ancillary services works and site works.

3.0 Planning Authority Decision

3.1 Decision

3.1.1 By order dated 10th June 2021 Kerry County Council issued notification of the decision to grant permission and 27 conditions were attached which included the following of particular note:

- Condition 2. Development Contribution €78,816.00 in accordance with the development contribution scheme.
- Condition 3. Special Contribution €72,400 in respect of roads infrastructure, public lighting public footpath and traffic calming.

(100% Contribution towards the cost of resurfacing the vehicular entrance and the provision for a public footpath €22,600. 100% contribution towards the upgrading and providing 3 public lights and associated ducting to serve this development. €8,800. 100% Contribution towards improvements to the public footpath which serves this development €16,000. 25% contribution towards improvements to the traffic calming measures on the Ballycasheen Road which serves this development €25,000.)

- Condition 4. Part V agreement.
- Condition 5. Bond €175,000.
- Condition 6. *“The rear /northern boundary property line shall be set back to allow for a 6m corridor along the northern end of the development. The width of 6m corridor shall run from the top edge of the bank (existing field level) to the rear of the property line. The development shall be revised to take account of this set back. House no 1*

shall be omitted to allow for the re-siting of the other 30 no dwellings and associated site development works in a southerly direction. A revised site layout plan complying with this condition shall be submitted for the written agreement of the planning authority prior to commencement of development.

Reason: In the interest of orderly development, to allow for the future construction of a streamside walkway / cycleway which will provide improved accessibility between this development and the town amenities, to allow for any future maintenance of the stream and the preservation of the ecological of the river bank.”

Condition 7. Mitigation measures in the NIS to be adhered to in full.

3.2 Planning Authority Reports

3.2.1 Planning Reports

3.2.1.1 Planner's initial report refers to Housing Department report indicating that a Part V – statement of understanding has been signed. I am happy with Part V element.¹ The report expressed concerns regarding elements of the layout and sought a number of items of additional information to include *inter alia* the following:

- Pre-development archaeological testing report.
- Tree survey and detailed landscaping scheme.
- Relocation of green area adjacent to the western boundary
- Section drawings to detail garden levels adjacent to stream. Boundary treatment details.
- Stage 1 /2 road safety audit. Analysis of impact on roadway junctions.
- Sightline details, turning bay details. Road layout to comply with DMURS. Universal Access details crossing points pedestrian provision and disabled parking.
- Flood impact assessment.

¹ I note that no housing report was provided by Kerry County Council to the Board and it is not evident whether this was a written or verbal report.

- Alternative surface water outfall and attenuation proposals. Surface water design details in accordance with SUDS.
- Appropriate Assessment screening report and Natura Impact Statement if mitigation required.

3.2.1.2 Final Planner's report considers further information response to be satisfactory. Proposal is a well-considered and well laid out development. Medium density is considered to be in keeping with national policies. The recommendation of the Area Engineer with regard to the setting back of the development from the stream is noted and desirable in the context of Objective 8.4.1. of the Development Plan which seeks to promote the "development of a coherent network of routes and facilities for pedestrians and cyclists with equal consideration for access for all". The setting back from the stream will result in the loss of house 1. Permission was recommended subject to conditions as outlined in subsequent decision.

3.2.2 Other Technical Reports

3.2.2.1 Housing Estates Unit report questions flood risk. Layout is considered to be visually poor. Road layout, boundary treatment, lighting details. Part V ?

3.2.2.2 Biodiversity Officer. Initial report asserts that if permission is granted consideration should be given to landscaping with native Irish species. Pollinator friendly seed mix. Mature hedgerows to be maintained where possible.

Second report noted 3rd party submissions with regard to the potential impact on stream draining to the River Flesk Part of the Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC. Appropriate Assessment screening report to be submitted and Natura Impact Statement if required.

Final report concludes that the proposal will not have an adverse effect on the integrity of the European Sites. Tree loss is justified and mitigated by proposed landscaping and not likely to affect lesser horseshoe bat species commuting /foraging. Noting mitigation measures proposed the proposal is unlikely to have an ecological impact on the unnamed stream. No identified downstream adverse effects on the integrity of the SAC from water quality impacts. Notably the Flesk

retains populations of freshwater pearl mussel that are not qualifying interest of the SAC. As no negative impact on water quality are envisaged no negative impact on extant populations of Freshwater Pearl Mussel envisaged. Recommend that mitigation measures outlined in NIS and OCEMP are required by condition.

3.2.2.3 Email from Gerry O Riordan, Kerry County Council Site is not at risk of flooding in 1:100 or 1: 1000 predicted event according to OPW CFRAM Flood Maps.

3.2.2.4 Municipal District Engineer – Stage 1 / 2 road safety audit required. Detailed analysis of junction manoeuvres to be outlined. Road layout does not comply with DMURS Standards. Attention to universal design, crossing points for pedestrians. Flood impact assessment. The capacity of the stream to the north is questioned and an alternative location for outfall should be considered. Attenuation proposals are inappropriate. An 8m wide wayleave required in relation to stormwater pipeline. Stormwater System to be designed in accordance with SUDS. Report following additional information - Recommendations of stage 1 /2 road safety audit to be implemented. Stage 3 Safety Audit to be carried out. Road opening license and site-specific safety plan. Public lighting details to be agreed. Rear property boundary line to be set back to allow for a 6m corridor along the northern end of the development. The width of the corridor to run from the top edge of the bank to the rear of the property line. The corridor is required firstly to allow for future construction of a streamside walkway / cycleway which will provide improved accessibility between this development and the town amenities, secondly to allow any future maintenance of the stream and thirdly for the preservation of the ecology of the riverbank. Special development contribution for upgrading public infrastructure. €72,400, 100% Contribution towards the cost of resurfacing the vehicular entrance and the provision for a public footpath €22,600. 100% contribution towards the upgrading and providing 3 public lights and associated ducting to serve this development. €8,800. 100% Contribution towards improvements to the public footpath which serves this development €16,000. 25% contribution towards improvements to the traffic calming measures on the Ballycasheen Road which serves this development €25,000.

3.2.2.5 Initial Archaeological report notes that there are no recorded monuments in proximity to the development however given the scale of the development pre- development testing to be carried out.

Second archaeological report following submission of additional information notes that no archaeological features were recorded during testing and that up to 2m in depth of imported soil makes up the current site stratigraphy. No mitigation required.

3.3 Prescribed Bodies

3.3.1 Irish Water No objection subject to standard requirements regarding connection agreement, subject to capacity requirements and in accordance with code of practice. Any proposal to build over or divert existing water or wastewater infrastructure shall be subject to written approval.

Applicant has engaged with Irish Water in respect of pre-connection enquiry and has been issued with confirmation of feasibility subject to upgrades.

3.4 Third Party Observations

3.4.1 The Planning Authority received a number of submissions from the following third parties.

- Elaine O Shea 6 Flesk Grove
- Eileen Lucey 17 Flesk Grove.
- Kathryn O Neill, Ballycasheen Killarney.
- Basil Sheerin, 3 Flesk Grove.
- Sheila Kingston, 13 Flesk Grove
- Eugene & Kathleen McCrohan, 11 Flesk Grove
- Oran Kane, 44 Flesk Grove
- Joan & Sean Cronin 49 Flesk Grove.
- Barth O Neill. Atlantic Capital Advisors, Wood Lodge, Park Road Killarney.
(Adjoining landowner)
- John and Noreen O Riordan, 48 Flesk Grove

- Mark and Rachel Kavanagh, 46 Flesk Grove
- Sean Culloty, Ballycashen Road
- Vivienne and Patrick Neary, 8 Flesk Grove.
- Elizabeth Thomas, 47 Flesk Grove
- Catherine Doyle Flesk Grove.
- Donnacha O Connor and Niamh O Connor, Kiln View, Headford, Killarney.
- Gaye Mainifold, 39 Flesk Grove.
- Teicniúill Priory Consulting Engineers on behalf of Brian Bowler, Flesk Grove
- Maureen O Sullivan 4 Flesk Grove.
- Sean and Liz Tagney, 22 Flesk Grove.
- Jim Ryan, 32 Flesk Grove.
- Madeleine Doyle, 2 Flesk Grove.
- Matt O Neill, 1 Flesk Grove
- Mary McCarthy 50 Flesk Grove
- Siobhán Donaldson, 24 Flesk Grove.
- Flesk Grove Residents Group, C/O Patrick Neary, 8 Flesk Grove
- Flesk River Valley Residents Association, C/O Noreen O Sullivan, 48 Flesk Grove.
- Gerald Riordan, 7 Flesk Grove.
- Gerldine O Riordan, 9 Flesk Grove

3.4.2 The submissions outline vehement objection to the proposed development on a number of common and particular grounds. In the interest of brevity, I have summarised the issues raised as follows:

- No Environmental Impact Statement provided. Environmental and Ecological Impacts not addressed.

- Area subject to flooding and flood risk is significant. Local residents are unable to get flood insurance cover.

Claims with respect to return periods are not matched by industry standard best practice modelling software. Following detailed assessment of the proposed stormwater system using industry standard best practice modelling software the system will cause surface flooding for any storm event that has a return period in excess of 10 years. This is at odds with the assertion in the planning documentation that states that the system is designed to cater for a storm event with a return period of 100 years with no flooding.

- Impact on rail line.
- Access road has not been taken in charge. Legal entitlement to carry out works questioned.
- Excessive density will lead to social problems.
- Height of dwellings inappropriate. Overlooking of established dwellings.
- Construction disturbance dust noise and traffic.
- Application should be deemed invalid in absence of part v proposal
- Direct Hydrological link to the Flesk River and SAC. Yet application has not included a Natura Impact Statement.
- No road safety audit or traffic impact assessment submitted.
- Capacity of foul network questioned. Flesk Grove is at the end of the system with periodic back up requiring jetting of the system. This issue exacerbated by flooding.
- Entitlement with respect to name Flesk Grove questioned.
- Site is made ground. Nature of fill on the site unclear.
- Lack of clarify on landscaping, boundary treatments and screening proposals.
- Impact on existing trees.
- False / misleading information within the application.
- Flesk River is an important source of brown trout. Ecological impact on protected species not detailed.

- Traffic safety and ongoing issue of speeding in the area.
- Development cannot proceed in the absence of a wayleave over the adjoining property. Grant of permission would be a collateral attack on adjoining landowners constitutional property rights.
- Application has failed to comply with the statutory requirements in respect to ownership and consent. No agreement with landowner in respect to the access of services for the development. Proposed discharge to the stream outside the redline boundary would be a trespass into a private culvert.
- Application drawings are deficient.

3.4.3 Following submission of additional information further detailed submissions maintain strong objection to the proposal citing the following grounds:

- Consent has not been sought and will not be forthcoming in terms access to services for water and sewer connection, footpath construction on third party lands, and access to culvert.
- Riparian rights are limited to the use of the water for animals, sport, fishing, boating and natural surface water run-off. They do not give rights to discharge water to the stream.
- Additional information is built on a foundation of unlawfully obtained evidence as a trespass occurred to take photographs and survey.
- Discrepancies in the application with respect to surface water discharge, conflicting values with regard to discharge rate.
- Reference is made to the report of a 2002 Flood Study Group UCC commissioned by Malachy Walsh and Partners Consulting Engineers on behalf of Kerry County Council to assess flood risk. The report was part of an application to Commissioners of Public works under Section 50 of the Arterial Drainage Act 1945 for the construction of a new bridge at Mill Road, Whitebridge, Killarney on the Flesk River. The calculated flood levels from a 1/80 scale model of the flesk river at Mill Road Whitebridge show the 1/100 flood level to be 34.14mOD. Based on this data the

flood level adjacent to the development site 270m downstream is calculated to be 33.488mOD for a 1/100-year flood event. This would indicate that the floor levels of the proposed houses 31.5m – 32.05m OD would be underwater to a depth of 1.43 – 1.98m in a 1/100-year event. Flooding could exceed this as the stream to the north of the site will back up when unable to discharge to the flooded River Flesk. Study also did not consider of climate change.

- It is of concern that consultants carrying out site specific flood risk assessment did not visit the site. No consideration given to the restricted discharges to the unnamed stream where it meets the Flesk River. Accuracy is questioned.
- Reliance on CFRAM maps inappropriate.
- Validity of application is questioned having regard to the amendments to proposal and extensive further information.
- Higher density development is inappropriate in the context of the site.
- Screening is outside the site boundary.
- Proposed junction will create a traffic hazard
- Request for alternative run off discharge ignored. Attenuation tank undersized.
- Road safety audit not informed by site visit.
- No Part V proposals.
- Deficits in planning application documents have not been addressed.

4 Planning History

00/23567 Permission granted 23/3/2001 for construction of 12 no 2 storey houses service road and associated development works.

5 Policy Context

- 5.1 Project Ireland 2040 - National Planning Framework The NPF includes a Chapter, No. 6 entitled 'People, Homes and Communities'. It sets out that place is intrinsic to achieving good quality of life. National Policy Objective 33 seeks to "prioritise the provision of new homes at locations that can support sustainable development and at an appropriate scale of provision relative to location".

National Policy Objective 35 seeks "to increase residential density in settlements, through a range of measures including restrictions in vacancy, re-use of existing buildings, infill development schemes, area or site-based regeneration and increased building heights".

National Planning Objective 13 also provides that "In urban areas, planning and related standards, including in particular height and car parking will be based on performance criteria that seek to achieve well-designed high-quality outcomes in order to achieve targeted growth. These standards will be subject to a range of tolerance that enables alternative solutions to be proposed to achieve stated

outcomes, provided public safety is not compromised and the environment is suitably protected”.

5.2 Section 28 Ministerial Guidelines

The following is a list of section 28 Ministerial Guidelines considered of relevance to the proposed development. Specific policies and objectives are referenced within the assessment where appropriate.

‘Urban Development and Building Heights’ Guidelines for Planning Authorities

‘Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas’ (including the associated ‘Urban Design Manual’)

‘Design Manual for Urban Roads and Streets’ (DMURS) • ‘The Planning System and Flood Risk Management’ (including the associated ‘Technical Appendices’)

‘Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities

5.3 Development Plan

5.3.1 The Kerry County Development Plan 2015-2021 and Killarney Town Development Plan 2009-2015 refer.

Two zoning objectives apply to the site within the Killarney Town Development Plan 2009-2015 as extended and varied. The southern part of the site is zoned R2 Existing Residential – the objective to protect and improve existing residential area. The northern part of the site is R1 New / Proposed Residential – the objective is to facilitate the development of residential units in accordance with the Core Strategy. Requirements for New Residential Developments are set out in Chapter 12 Land Use Zoning and Development Management Standards.

I note within the County Development Plan 10.7.1 Riparian Buffer Zones. It is an objective of the Council to :- NE-36

“Maintain and improve aquatic riparian zones along watercourses, free from inappropriate development. Proposals which may have a significant impact on the riparian zone / habitat will only be considered favourably if they can be justified on wider sustainability grounds and where no viable alternative exists.

NE-37 Require, where necessary, that proposals comply with the relevant provisions of the Shannon Regional Fisheries Board document “Planning for watercourses in the urban environment”

5.4 Natural Heritage Designations

The site is not within a designated area. The nearest such sites are Killarney National Park Macgillicuddy’s Reeks and Caragh River Catchment SAC. Site Code 000365 which is within 140m to the southeast of the site. Killarney National Park Macgillicuddy’s Reeks and Caragh River Catchment proposed National Heritage Area pNHA.

5.5 EIA Screening

5.5.1 An Environmental Impact Assessment Screening report was not submitted with the application.

5.5.2 Class (10)(b) of Schedule 5 Part 2 of the Planning and Development Regulations 2001 (as amended) provides that mandatory EIA is required for the following classes of development:

- Construction of more than 500 dwelling units,
- Urban development which would involve an area greater than 2 ha in the case of a business district, 10 ha in the case of other parts of a built-up area and 20 ha elsewhere. (In this paragraph, “business district” means a district within a city or town in which the predominant land use is retail or commercial use.)

5.5.3 It is proposed to construct 31 dwellinghouses. The number of dwellings proposed is well below the threshold of 500 dwelling units noted above. The site has an overall area of 0.948ha and is located within an existing built-up area but not in a business district. The site area is therefore well below the applicable threshold of 10 ha. The site is partially brownfield and partially greenfield site located within the existing built-up area. The introduction of a residential development will not have an adverse impact in environmental terms on surrounding land uses. It is noted that the site is not designated for the protection of the landscape or of natural or cultural heritage and the proposed development is not likely to have a significant effect on any European Site. The proposed development would not give rise to waste, pollution or nuisances that differ from that arising from other housing in the neighbourhood. It would not give rise to a risk of major accidents or risks to human health. The proposed development would use the public water and drainage services of Irish Water and Kerry County Council, upon which its effects would be marginal.

5.5.4 Having regard to: -

- The nature and scale of the proposed development, which is under the mandatory threshold in respect of Class 10 - Infrastructure Projects of the Planning and Development Regulations 2001 (as amended),
- The location of the site on lands that are zoned for 'Residential' uses under the provisions of the Killarney Town Plan 2009-2015, and the results of the strategic environmental assessment of the Kerry County Development Plan, undertaken in accordance with the SEA Directive (2001/42/EC),
- The location of the site within the existing built-up urban area, which is served by public infrastructure, and the existing pattern of residential development in the vicinity,
- The location of the site outside of any sensitive location specified in article 109 of the Planning and Development Regulations 2001 (as amended) and the mitigation measures proposed to ensure no connectivity to any sensitive location,
- The guidance set out in the "Environmental Impact Assessment (EIA) Guidance for Consent Authorities regarding Sub-threshold Development", issued by the Department of the Environment, Heritage and Local Government (2003), and

- The criteria set out in Schedule 7 of the Planning and Development Regulations 2001 (as amended),

I have concluded that, by reason of the nature, scale and location of the subject site, the proposed development would not be likely to have significant effects on the environment and that on preliminary examination an environmental impact assessment report for the proposed development was not necessary in this case (See Preliminary Examination EIAR Screening Form).

6 The Appeal

6.1 Grounds of Appeal

6.1.1 There are six third party appellant parties as follows:

- Elaine O Shea 6 Flesk Grove.
- Atlantic Capital Advisors Ltd. Woodlodge, Park Road, Killarney. (Landowner of private roadway and adjoining lands)
- Kathryn O Neill, Ballycasheen,
- Flesk River Valley Residential Association c/o Noreen O Riordan Chairperson
- Patrick and Vivienne Neary, 8 Flesk Grove.
- Joe Bonner Town Planning Consultant on behalf of Flesk Grove Residents Group.

6.1.2 Grounds of appeal area summarised as follows:

- Kerry County Council failed to take adequate account of numerous third-party submissions.
- Proposal is not consistent with the Development Plan
- Design is inappropriate and out of character. Height will result in overlooking.

- Circular letter NRUP02/2021 calls for a more proportionate and tailored approach to residential development requiring that proposals respond to the character setting and scale of the town or village.
- Flood risk. Applicants flood analysis unduly reliant on CFRAM maps whereas numerous incidents of flooding. Actual flooding events have been ignored.
- Conflicting information. Note hydraulic modelling of Flesk River in July 2002 by Dr Eamon McGeogh, Flood Study Group UCC in respect of replacement of bridge over the Flesk River at Whitebridge Killarney circa 250m upstream of the development. Modelling shows 100-year flood levels in excess of the development. Evident discrepancies in site levels.
- Modelling and analysis only addresses the appeal site and not the potential flooding of adjacent access road and adjacent gardens.
- NIS does not correctly analyse the development's hydrological link to Flesk River and Killarney National Park Magillicuddys Reeks and Caragh River Catchment SAC (000355) NIS inadequate.
- Report by SLR Consulting alleges deficiencies in assessment regarding bats and freshwater pearl mussel.
- Surface water proposals deficient.
- Traffic hazard. Road safety audit carried out without site visit.
- Stream originates from a spring at the rear of Whitebridge Manor, and is a salmonid stream inhabited by salmon and trout smolts.
- Application contains significant lacunae has not demonstrated that proposal is not detrimental to SAC.
- Foul and Sewer network design not validated by Irish Water. Existing issues will be exacerbated.
- Applicant does not have sufficient legal interest to progress the planning application as set out. No wayleave for services entering the site nor can the applicant discharge to the stream without breaching the bank of the river which is outside the redline boundary. Application is invalid on basis of non-

compliance with Article 22. No wayleave and works are outside the redline without written consent of relevant landowner.

- Planning Authority can only impose conditions on land that is under control of the developer. Condition 3 of Kerry County Council levy of €22,600 in respect of road adjacent to the development is in breach of Section 34(4)(a).
- Conditions are not enforceable.
- Road safety audit suggests at page 5 para 2.1 that in the absence of a footpath connecting the development to Ballycasheen Road the development is unsafe. No footpath showing on drawing no 204108-Punch-XXX-XXX-DR-C-0460 just pedestrian crossings. Proposal would endanger public safety by reason of traffic hazard.
- Conditions altering the nature of development are permissible in respect of minor matters. Moving of the entire development 6m south is not a minor matter. Observation cannot be made on an unseen matters.
- Site is made of filled ground made up of construction and other waste. Historic fill is not addressed. Site contamination potentially industrial possibly toxic waste from *pretty polly* hosiery factory was dumped on the site in the 1980s.
- Part V issues have not been addressed. The applicant has denied the public and the planning authority the ability to fully understand and assess the implications, The Board is precluded from granting permission.
- Volume of Objection is significant given that this is a zoned site.
- Proposal started as a 34-unit scheme was then reduced to 31 as part of further information response and a further house was omitted in the decision. Despite pre-planning discussions plans for future walkway cycleway were not discussed. Revised layout has not been seen thereby depriving third parties of the ability to assess the proposal.
- The application and approach of the local authority has denied residents of their constitutional rights to fair procedures namely the right to make a submission before an adverse finding is made against them.

- Killarney Infrastructure map shows cycle and walking route along the northern side of the site.
- NIS and Environmental assessments have not addressed the permitted layout and are therefore invalid.
- Lack of clarity in terms of what is the development before the Board for consideration.
- The creation of a 6m wide embankment will require the redesign of the entire site and all surface water and drainage calculations presented are effectively redundant.
- Open space is inadequate and appears as an afterthought.

6.2 Applicant Response

6.2.1 The response by McCutcheon Halley, Chartered Planning Consultants on behalf of the first party is summarised as follows:

- Regarding Part V Obligations. A statement of understanding is provided signed by the applicant and Kerry County Council. Three units are to be transferred to Kerry County Council on completion of the development.
- Regarding Appropriate Assessment the screening report concluded that NIS was necessary and this was completed by suitably qualified experts.
- The findings of NIS resulted in a number of mitigation measures to ensure that the stream to the north would not be contaminated during the construction phase by way of a number of water quality control measures. Subject to mitigation the NIS concludes that the construction and operation of the scheme will not result in adverse impacts on the integrity of the Natura 2000 site Killarney National Park MacGillicuddy's Reeks and Caragh Reeks River Catchment SAC.
- Regarding legal interest in the landholding. Flesk Grove Estate road has been taken in charge prior to October 2005 by Kerry County Council as confirmed

in correspondence from Kerry County Council. Watermain and sewer also in charge of Irish Water. Folios appended.

- With regard to the stream to the north advise from Mr David O Dwyer BL concluded that so long as the rate of discharge of surface water from the site is not increased the objector has no basis for complaint in law with regard to surface water discharge. It is proposed to attenuate discharge and release storm water in line with existing level of 1 litre per second achieved through the proposed system and use of a hydro break.
- As regards flood risk the site-specific flood risk assessment completed by Punch Consulting Engineers examined two modelling scenarios the existing scenario and culvert blockage. Using Flood Modeller it was determined that all water levels adjacent to the site are below the lowest proposed finished floor level within the site which is 31.6m AOD. Modelling provides a high level of confidence that the proposed development will not be subject to fluvial flooding for the Q100 or the Q1000 year event. Therefore, site is considered to be in flood zone C. Residual risk assessed of a blockage in the culvert downstream of the site demonstrates that while such a blockage results in raised flood levels at the site the flood levels do not present a flood risk to the proposed properties or infrastructure. Any such resulting overland flows would mimic existing flood scenario in which floodwater pass over the access track and return to the stream at the downstream end of the culvert.
- As noted in Kerry County Council assessment the OPW CFRAM Flood Maps for Killarney show that the site is not at risk of flooding either in the 1:100 or 1:1000 predicted flood event.
- Regarding Traffic and Road Safety Audit the Assessors were unable to visit the site in person due to coronavirus restrictions however as noted in TII advice which issued on January 2021 such assessments could be done by the assistance of *Google Maps*. All recommendations of Stage 1 /2 road safety audit have been assessed and will be implemented.
- Condition 6. Concur with appellant that it is incorrect for Kerry County Council to apply condition 6 to the grant of permission as it alters the layout as submitted and assessed by third parties. Imposition of condition 6 impacts on

third party rights and impacts on the agreed mitigation measures of the NIS as condition 6 requires substantial works to the stream to the north of the site.

- As condition 6 requires the omission of one of the proposed dwellings the removal of the condition would also require an amendment to conditions 8 and 9 which refer to 30 rather than 31 dwellings.
- Proposed streamside walkway is not consistent with the planning policy framework and would not benefit the proposed development.
- The requirement to cede land without compensation is outside the scope of Section 34(4) of the Planning and Development Act 2000 as amended. The wording of condition 6 contravenes the requirements of Section 7.3 of the Development Management Guidelines for Planning Authorities 2007.
- Condition 6 is inconsistent with conditions 7 and 27 as it would undermine the implementation of the mitigation measures outlined in the NIS and landscape plan.
- It is important that the site is developed at a sustainable density and in accordance with a coherent traffic and transportation strategy.
- The cycle path proposed under condition 6 would not form part of the proposed networks proposed and would undermine the coherence of the movement strategy as set out in the LAP.
- Condition 6 effectively requires the applicant to transfer part of the site to an unspecified entity, for works which have not been designed, assessed or approved and where there is no legal or financial agreement in respect of the transfer of the works or where there is no indication as to who will be responsible for the management or security of the land to be transferred.
- Wording of condition 6 does not comply with Section 34(4)(m) as there is no specific provision for the applicant to be reimbursed for the cost of public facilities which are clearly in excess of the immediate needs of the proposed development. Wording also fails to comply with Section 7.3 of the Development Management Guidelines. Condition is neither necessary nor relevant to the development proposed.

- Condition is unenforceable and ultra vires the power of the Planning Authority under Section 34(4)(m). Lack of precision. Condition is unreasonable as it was not raised in request for additional information and stated reason for the condition is invalid,
- Request the Board to grant permission for the proposed development.

6.3 Planning Authority Response

The Planning Authority did not respond to the grounds of appeal.

6.4 Observations / Prescribed Bodies

I note that the Board referred the appeal to a number of prescribed bodies including Inland Fisheries Ireland, Development Applications Unit DAU, An Taisce, The Heritage Council. No response was received from these bodies in relation to the appeal.

6.5 Further Responses

6.5.1 The response of on behalf of Flesk River Valley Residents Association notes the following:

- A wide berth of technical expertise was engaged in terms of the various 3rd party submissions.
- Responses provided in the first party observations do not adequately address any of the issues raised within the 3rd party submissions.
- No rationale or legal justification provided for the use of the 15km zone of influence within the NIS.
- No assessment of lesser horseshoe bat and potential effects on this species.

6.5.2 Response of Joe Bonner on behalf of Flesk Grove Resident's Group

- Regarding Part V obligations it is notable that the statement of understanding was signed in excess of 5 weeks after the application was lodged.
- Noting the applicants arguments with regard to the removal of condition 6 it is surprising that the applicant was not aware of the development plan objective with regard to the walkway / cycleway.
- Reference to Section 34(4) of the Planning and Development Act 2000 is not relevant. There is no indication that the Planning Authority is trying to acquire land without the payment of compensation.
- As the development has yet to be designed and assessed therefore the Board is precluded from granting permission. Applicant could take choose to withdraw the application.
- Notable lack of open space and amenities.
- Removal of condition 6 and grant permission will effectively permit a private development to the detriment of the common good and designate the purpose of preparing development plans and their objectives to irrelevance. It will set a precedent for similar such development.
- Proposal would be a material contravention of the development plan.
- Road Safety Audit inadequate and requires works outside the boundary of the site and not within the control of the local authority. In the absence of same works would endanger public safety by reason of traffic hazard.
- Application is invalid and cannot be rectified through the appeal process.

6.5.3 Submission from Eversheds Sutherland on behalf of Atlantic Capital Advisors

- Request an oral hearing in relation to the appeal on the basis of a fundamental change in the prevailing circumstances before the Board and in the consideration, it must apply to the application of the provisions of Section 134(1) and Section 134(2)(c)(i) of the Act. Most recent submission by the applicant raises new and unanticipated points affecting the appellant.
- Misleading information has been provided portrayed incorrectly as being factual.
- It is respectfully but forcibly submitted that the Board must convene a public oral hearing to test the information and seek the presentation of sworn evidence against the submissions made by the applicant.

- Failure to hold an oral hearing would amount to a breach of fair procedures and a matter that is capable of judicial challenge.
- Submission by the applicant that its Engineer met with Kerry County Council Engineer and specifically represented that the land in front of the entrance has been taken in charge amounts to hearsay and is demonstrably untrue.
- Land adjacent to the entrance is owned by the appellant. Sewer pipe and water pipe remain in private ownership.
- Assertion that no more water is discharging to the stream and culvert is incorrect. Considerably increased volumes of water will discharge into the stream.
- With regard to nature conservation and flood mitigation this requires culvert improvement on lands outside the control of the applicant. Reliance on measures including the clearing of a 900mm culvert downstream of the site. Appellant does not and will not consent to the proposed measures being carried out on the 900mm pipe.
- Most recent analysis of the culvert demonstrates that it is far from being fully efficient where there is a bed of silt laying at its base that reduces the effective capacity of the be estimated to be in the order of 54-70% only.
- Planning reference 942558 Flesk Grove (map appended) clearly demonstrates that the eastern boundary of the site outlined in red does not abut the application site. Taking In charge process cannot extend beyond the original planning permission granted. Folio map attached.
- Contradictory statement that area taken in charge and yet the applicant sought to register a right of way
- Title shows no legal interest is registered for Irish Water on the folio.
- Board is obliged to independently verify the factual position in so far as no evidence is offered on behalf of Irish Water, Kerry County Council and the Property Registration Authority. No substantive evidence before the Board as to whether the road is in the ownership of the appellant has been taken in charge by the local authority, whether the pipes serving the property are in the ownership of the appellant or Irish Water, whether more water will discharge to the stream and through the appellants culvert because of this development, contrary to competing submissions and where the matter was historically considered by the local authority when it refused an application on these lands because of the issue of the culvert dating back to the 1970s.

- Any permission granted will become inoperable in the absence of the applicant having the capacity to service the site as proposed. The application will be redundant for want of being capable of being executed.
- Referencing *Ashborne Holdings v An Bord Pleanála* [2003] 2OR 114 that conditions that are not capable of being implemented should not form subject matter of a grant, Precedent of *Frescati Estates v Walker* [1975] IR 177 as adopted in *McCallig v An Bord Pleanála* [2014] IEHC 353 that established that a party might not apply for planning permission without the consent of the landowner. The owner has not given consent to use the pipes to service the land. In addition no consent given to the necessary mitigation measures referenced in site specific flood risk assessment. No consent to discharge water to stream. This obligation to gain consent is mandatory and goes to the heart of the Board's jurisdiction. *Sweetman v An Bord Pleanála* (Bradán Beo Teo) [2021 IEHG 16 (Paragraph 30)]

6.5.4 Patrick and Vivienne Neary.

- Note that the Part V statement of understanding signed on 30/7/2020 two weeks after the closing date for third party submissions. Document did not appear on public file until after the publication of the first party observation document 1/7/2021.
- Reiterate Concerns with regard to Natura 2000 site.
- Regarding flood risk reality on the ground has not been considered. Question the analysis of flood risk of the stream to the rear of the development. Data presented is unverified and unvalidated. Submissions from the first party refers variously to discharge rate of 1 litre per second whereas the proposed discharge rate is five times this rate.
- Decision of the Planning Authority reduces the green area to the western side of the development which will reduce the available area for attenuation further compromising drainage and requiring reconfiguration of the layout.
- Applicant's observation submission and request for removal of condition 6 is a de-facto appeal against the permission.
- Additional information deposited within the electronic planning file in the past month. "Random" information goes back as far as June 2020 is not in date order and intersects with various stages of the timeline of the application.

- Planning Authority should have refused permission at several stages throughout the process.

6.5.5 Submission of Kathryn O Neill.

- Part V statement of understanding after the original planning application submission renders this invalid.
- 50% of the residents of Flesk Grove estate and low-lying residents of Ballycasheen adjacent to the development cannot obtain flood insurance due to flood risk.
- Area flooded in 2009 and three times in 2015.
- Road safety audit on basis of google maps not acceptable.
- Procedurally invalid approach to remove condition 6

7 Assessment

7.1 Having examined the file, considered the prevailing local and national policies, inspected the site, and assessed the proposal and all submissions. I consider the key issues can be assessed under the following broad headings :

- Procedural Matters
- Legal Interest
- Principle of development, design, layout and density
- Traffic, Flooding, Site Contamination & Servicing Issues
- Appropriate Assessment

7.2 Procedural Matters

7.2.1 I note that the submission of Eversheds Sutherland on behalf of third party appellant Atlantic Capital Advisors requested an oral hearing of the appeal within their response to the first party response to the appeal. The submission advocates that

the Board use its absolute discretion in accordance with the provisions of Section 134(1) of the Act to hold an oral hearing of the appeal on the basis of the contested evidence before it particularly with respect to ownership and landowner consent. As acknowledged by the third party the request to convene an oral hearing was made outside the appropriate period for such a request. Following deliberation on this matter and based on the extent of the written evidence and arising from my conclusions with regard to the detail of the development as proposed and furthermore in light of the nature of the contested evidence I would question the value of an oral hearing in this instance. I am satisfied that the appeal may be determined on the basis of the written submissions without recourse to an oral hearing.

7.2.2 The validity of the application as submitted to Kerry County Council is questioned by the third parties on the basis of the absence of specific Part V proposals within the initial application. It is asserted that the omission and alleged error in validating the application was further compounded by the failure of the local authority to address the issue in the request for additional information. On this basis it is submitted that the Board is precluded from granting permission and I note third party submissions in respect of the Board's "role in validating applications" by reference to *McCallig v An Bord Pleanála* [2014] IEHC 353. I note that the initial planner's report refers to a report of the Housing Section stating the following "*Part V statement of understanding has been signed. I am happy with the Part V element.*" I note that the Board has not been provided with a copy of this report and it is not clear whether it was a verbal report or one made in writing. The first party provided as Appendix A to the response to the appeals a copy of the Part V Statement of Understanding signed by the applicant and Kerry County Council on 30th July 2020 (application was submitted on 12th June 2020). The agreement made refers to the transfer of 3 units on the site. Based on the evidence submitted it is clear that the initial application was deficient in terms of the omission of details of proposals to intended compliance with Part V. Notwithstanding this the Local Authority validated the application and it is apparent that the discussions with regard to Part V proceeded during the course of the application. It is not possible for the Board to revisit the decision to validate the

application however the Board may determine that it is precluded from granting permission on the basis of the identified deficiency in the initial application.

7.2.3 I note that the third-party appellants raise concerns with regard to the alteration of the nature of the development during the course of the application to the local authority, from a 34 unit scheme in the initial application to a 31 unit scheme in response to the request for additional information and finally to a 30 unit scheme as permitted by Kerry County Council. The expansion of information provided in response to further information in comparison to the initial application is also raised as a barrier to third party ability to engage in the application. I note the numerous and detailed submissions by third parties to the local authority and the appeals and it is evident from those submissions that the third parties were fully engaged with the application and the appeal. It is therefore appropriate to proceed to engage with the assessment of the proposal on its planning merit. The issue of legal interest also needs to be addressed.

7.3 Legal Interest.

7.3.1 On the issue of legal interest I note that the submissions of the third party Atlantic Capital Advisors Ltd, the owner of the private roadway immediately adjacent to the western boundary of the appeal site and lands to the north which asserts that the applicant does not retain the legal entitlement to access the site, incorporate and avail of the stream to the north of the site in terms of surface water drainage measures or the ability to carry out intended (and conditioned) measures to the entrance to the Flesk Grove entrance. The third-party submission contends that the discharge to the stream would amount to a trespass. It is further contended that the clearing of the culvert to the west of the site which is recommended within the NIS as a mitigation measure to prevent significant impact on the SAC and to prevent flooding will not be consented to. The submissions also note issues with regard to culvert capacity.

7.3.2 The first party in response to the appeal submits the folio in respect of the property and claims sufficient legal interest in the site and access to same. As regards the ability to discharge to the stream the first party submits a legal opinion of Mr David O Dwyer BL which considers the entitlement to discharge surface water to the stream as proposed. The submission concludes that so long as the rate of discharge of surface water from the site is not increased the objector has no basis for complaint in law. On the issue of the entrance to the Flesk Grove Estate the first party asserts that the entrance and watermain and sewers have been taken in charge by the Council and Irish Water Respectively. The third party submission by Evershed Sutherland on behalf of Atlantic Capital Advisers Ltd outlines that the original permission for the Flesk Grove Development ref 94/2558 did not extend to the western boundary of the appeal site and therefore the taking in charging beyond the original site boundary is not feasible. I have noted and reviewed the detailed submissions by all parties with regard to the contested evidence in terms of the applicant's legal interest in the site. I note that the Planning Authority did not address the issue despite the fact that it was raised in a number of submissions.

7.3.3 As noted in Section 5.13 of the Development Management Guidelines the planning system is not designed as a mechanism for resolving disputes about title to land or rights over land and these are ultimately matters for resolution in the Courts. I consider that it is not a matter for the Board to determine ownership or entitlement and I would refer the parties to Section 34(13) of the Planning and Development Act 2000, as amended as follows: *"A person shall not be entitled solely by reason of a permission under this section to carry out any development"*. However I do consider that the questions raised with regard to the measures intended outside the redline boundary with regard to the works to the culvert and road safety measures at the entrance from the public road have not been adequately addressed by the first party or by the Planning Authority. Thus on the basis of the detail provided, I consider that the Board cannot be satisfied that the applicant has sufficient legal interest to carry out the necessary road improvement measures to the access to the site or has the approval of the person who has sufficient legal estate or interest to enable such works.

7.3.4 I have noted the third-party submissions with regard to the procedurally invalid approach of the first party in the submission in response to the third-party appeals a de facto appeal of condition 6. I consider that the condition is incongruous and the valid criticisms of the condition are well rehearsed by both the first party and the third parties in relation to the extent of layout alteration, implications in terms of third party rights and impact on submitted appropriate assessment and mitigation measures.

7.3.5 As regards Planning Authority procedures and the availability of documents this is also queried by third parties and concerns are raised that documentation intersecting various stages in the timeline of the application have been latterly deposited within the electronic planning file thereby compromising third party rights of participation. I cannot verify the facts in relation to these allegations and I note in any case that such procedural matters are not matters for the Board in terms of the appeal but rather are the preserve of the courts. The extensive submissions of the third-party appellants with respect to the proposal as modified during the course of the application suggest that third parties exercised their rights in terms of participation in the planning application process and I note the value of these submissions in terms of enabling the assessment of the planning merits of the case.

7.4 Principle of Development, Planning Policy Context, Design Layout and Density.

7.4.1 As regards the principle of development having regard to the fully serviced nature and urban location of the site and residential zoning objective pertaining and in light of the established settlement pattern the proposal is infill type development and is viewed positively subject to the detailed matters. The site is centrally located within easy walking distance of Killarney town centre in a fully serviced area. The proposal seeks to provide for residential development in order to expedite the more efficient use of currently underutilised serviced land. In considering the proposal in light of the National Planning Framework which seeks to consolidate new development within

the footprint of existing built-up areas I consider the proposal to be acceptable in principle.

7.4.2 As regards the principle of demolition of the existing dwelling on the site I note that no structural analysis or detailed justification for demolition has been provided however the dwelling appears to be of no particular architectural merit and its loss is justified in terms of opening up these currently underutilised lands for development.

7.4.3 In considering the planning policy context of the site I note that the adjoining greenfield lands to the east are also zoned “new residential” and the application provides no review or analysis of potential for integration with future development on these lands. I note that within the Infrastructure Map of the Killarney Town Development Plan the lands to the north are Zoned G3 Landscape Protection, the objective the conservation and preservation of landscape. The Infrastructure Map also denotes a Pedestrian and Cycle Route on the northern bank of the stream which runs along the northern boundary of the appeal site. The application demonstrates a clear lack of consideration of the interface with the stream and the landscape protection area opposite. The final layout provides for dwellings 17-27 at the northern boundary of the site backing onto the stream with provision for a 1.8m high steep post and wide chain link fence to extend along top of the existing embankment within approximately 2m of the stream. I note that within the decision of the Council the permitted layout was to be relocated southwards arising from the municipal district Engineer’s recommendation for the provision of a 6m corridor from the top of the embankment to be kept free from development. I note that the recommendation (and condition) referred to the provision of a walkway / cycleway path route on the appeal site. The promotion of cycle and pedestrian permeability is a general objective and this should clearly be part of a coherent strategy and form an element of a holistic design approach.

7.4.4 As regards ecological impact I consider that the provision of a setback and buffer is necessary. I note the provisions within Kerry County Development Plan regarding

riparian buffer zones including NE-36 *“to maintain and improve aquatic riparian zones along watercourses free from inappropriate development. Proposal which may have a significant impact on the riparian zone / habitat will only be considered favourably if they can be justified on wider sustainability grounds and where no viable alternative exists.”* NE-37 *“Require, where necessary, that proposals comply with the relevant provisions of the Shannon Regional Fisheries Board document “Planning for watercourses in the urban environment”.* I note the recommendations of Inland Fisheries Ireland document *“Planning for Watercourses in the Urban Environment”* with regard to the provision a the three buffer subzones namely the streamside zone >10m, the middle zone 15m-30m and the outer zone >8m. I consider that the application has failed to appropriately consider and incorporate the stream in the design approach in the interest of quality of life of future residents and in the interest of environmental amenity and ecology. I note that within the Kerry County Development plan it is outlined that *“Protection of aquatic zones can require riparian/buffer zones of up to 50m. However, the width of the riparian buffer zone will depend on factors such as land use constraints, land topography (e.g., slope), soil type, channel width/gradient and critical habitats to be protected and a width of 5-10 meters may suffice at some locations.”* 10.7.1 Riparian Buffer Zones, Kerry County Development Plan 2015-2021. Clearly the decision on an appropriate buffer and detailed design should be made on a case-by-case basis in the context of any particular site. In the case of the current appeal site, I am not satisfied that this issue has been taken into consideration by the first party and I conclude that the provision of chainlink fence to individual private gardens within 2m of the stream is not appropriate. On this basis I consider that a fundamental alteration of the approach and layout is required in the interest of proper planning and sustainable development.

7.4.5 I have concluded that in light of the context of the site the provision for improved permeability and integration with adjoining zoned lands should be explored and the outlook to the stream should be considered in terms of the layout responding appropriately to the unique characteristics of the site. I consider that the proposed development as currently configured fails to address the unique context of the site and could compromise the future development of the adjoining lands. On this basis I

consider that the proposal as set out would not be in accordance with the proper planning and sustainable development of the area.

7.4.6 In considering the issue of density I note that a number of the third-party appellants express a concern that the proposed density is excessive on the site. I note that the site is within approximately 2.3km and 2.7km distance of Killarney bus and rail stations. The context is suburban and characterised by low density residential development however the site is well enclosed and the natural features provide an attractive setting while the set back from established residential development also ensures that significant amenity impacts do not arise. I consider that the proposed density range would be appropriate to this site. I am of the view that in line with best practice the layout needs to evolve in the context of the overall development of the wider area and with reference to the complete set of 12 criteria which encapsulate the range of design considerations for residential development and the tried and tested principles of good urban design as set out in the Urban Design Manual Best Practice Guide, Department of Environment Heritage and Local Government 2009 and in line with the Urban Design Policy Objectives as set out in the Killarney Town Plan 2019-2015 as extended and varied.

7.5 Traffic and Flooding Site Contamination and Servicing Issues.

7.5.1 I note the recommendations of the State 1 /2 road safety audit submitted in response to the request for additional information with respect to the provision of additional footpaths at the established Flesk Grove estate entrance onto Ballycasheen Road. I note that these works are outside the application boundary as outlined in red on submitted drawings and the applicant's ability to carry out such works has not in my view been clearly established. I note that the Council in its decision imposed a special contribution which included €22,600 100% contribution towards resurfacing the cost of resurfacing the vehicular entrance and the provision of a public footpath into the development. Given the uncertainty with regard to the ownership raised by third party submissions I consider that the validity of this condition is questionable.

7.5.2 On the issue of flooding, I note that the numerous third-party submissions refer to a history of flooding in this area and cite the inability to attain flood insurance in the locality. I note the contents of the site specific flood risk assessment by Punch Consulting Engineers which was submitted in response to the request for additional information. To carry out the assessment a 1D hydraulic model of the stream was developed and analysed. Based on modelling it is asserted that all dwellings will not be subject to fluvial flooding for the 100-year and 1000-year event and the land is deemed to be located within flood zone C as a result of the raising of ground levels. It is noted that the 900mm circular culvert downstream if not maintained correctly may cause minor flooding of rear gardens in the 1 in 100-year event. Access and egress to the site will not be impacted and the proposal will not impact on flooding elsewhere in the event of such flooding. It is asserted that arising from proposed on site attenuation flows from the site will be limited to a maximum discharge rate of 4.5 litres per second.

7.5.3 The third-party appellants are critical of the flood assessment noting undue reliance on CFRAM maps and the absence of detailed analysis of significant past local flood events. They cite failure to address backup of floodwaters in the Flesk River noting 4 significant flooding events since 2009 including incidences where the access to the site was under floodwater. Reference is made to a hydraulic modelling study of the Flesk River carried out in July 2002 by Dr Eamonn McKeogh of Flood Study Group University College Cork which related to the replacement of a bridge at Whitebridge circa 250m upstream of the proposed development. The third-party appellants also note the inability of Flesk Grove residents to attain flood insurance in respect of their properties. It is further noted that the modelling predictions in the event of a blockage of the culvert downstream results in overland flow over the access track and dwelling sites to the west of the site. The third-party appellants further note apparent discrepancies within the submissions on behalf of the first party with regard to proposed run off rate. (1 litre per second v 4.5litres per second). I consider that clarification and further detail by reference to historical flooding and previous studies in the area should inform a future application in respect of this site to ensure that flood risk is appropriately assessed and mitigated.

7.5.4 On the issue of the historic infilling of the site I note that the third-party submissions raise the fact that the site is made ground and question the nature of fill and raise potential for site contamination, health and safety and environmental issues. The first party has not addressed this issue which gives rise to uncertainty with regard to environmental impacts arising. As regards site servicing, I note that the submission of Irish Water indicated no objection subject to pre connection agreement, standard capacity constraints and the Irish Water Capital Investment Programme and compliance with Irish Water standards codes and practices.

7.6 Appropriate Assessment

7.6.1 I note that the AA Screening report and Natura Impact Statement by Malachy Walsh and Partners which were both submitted in response to the request for additional information. The screening report noted 6 natura sites within 15km radius of the site as follows:

- Killarney National Park Macgillicuddy's Reeks and Caragh River Catchment SAC (Site Code 00365) 120m southwest of the site
- Sheheree (Ardagh) Bog SAC (Site Code 000382) 1.5km south of the site
- Killarney National Park SPA (Site Code 004038) 1.65km southwest.
- Castlemaine Harbour SAC (Site Code 000343) 6km northwest
- Old Domestic Building Curraglass Wood SAC (Site Code 002041) 13km southwest
- Blackwater River (Cork Waterford) SAC (Site Code 002170) 14km east / northeast.

7.6.2 The screening report concludes that significant ecological impacts cannot be ruled out in relation to Killarney National Park, Macgillicuddy's Reeks and Caragh

Catchment SAC (000365) on the basis of proximity, direct hydrological connection and potential for direct /indirect water quality impacts. The remaining sites are screened out from further assessment on the basis of distance the small scale and limited nature of the works or lack of plausible impact pathway. Whilst hydrological connection exists to Killarney National Park SPA the habitats for which the SCI species are found are highland habitats which lies upslope of the site and therefore no significant direct or indirect habitat or species effects are envisaged.

7.6.3 In relation to Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC (000365) the SAC lies 0.12km to the southwest of the site and direct hydrological connection to the Flesk River it is concluded that there is potential for the development to have ecologically significant impacts in the absence of mitigation via direct / indirect water quality impacts.

7.6.4 The Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC (000365) site is a Special Area of Conservation (SAC) selected for the following habitats and/or species listed on Annex I / II of the E.U. Habitats:

000365 1024 Kerry Slug *Geomalacus maculosus*

1029 Freshwater Pearl Mussel *Margaritifera margaritifera*

1065 Marsh Fritillary *Euphydryas aurinia*

1095 Sea Lamprey *Petromyzon marinus*

1096 Brook Lamprey *Lampetra planeri*

1099 River Lamprey *Lampetra fluviatilis*

1106 Salmon *Salmo salar*

1303 Lesser Horseshoe Bat *Rhinolophus hipposideros*

1355 Otter *Lutra lutra*

1421 Killarney Fern *Trichomanes speciosum*

1833 Slender Naiad *Najas flexilis*

3110 Oligotrophic waters containing very few minerals of sandy plains (*Littorelletalia uniflorae*)

3130 Oligotrophic to mesotrophic standing waters with vegetation of the *Littorelletea uniflorae* and/or *Isoeto-Nanojuncetea*

3260 Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitricho-Batrachion* vegetation

4010 Northern Atlantic wet heaths with *Erica tetralix*

4030 European dry heaths

4060 Alpine and Boreal heaths

5046 Killarney Shad *Alosa fallax killarnensis*

5130 *Juniperus communis* formations on heaths or calcareous grasslands

6130 Calaminarian grasslands of the *Violetalia calaminariae*

6410 *Molinia* meadows on calcareous, peaty or clayey-silt-laden soils (*Molinion caeruleae*)

7130 Blanket bogs (* if active bog)

7150 Depressions on peat substrates of the *Rhynchosporion*

91A0 Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles

91E0 Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*)*

91J0 *Taxus baccata* woods of the British Isles

7.6.5 In terms of the assessment of potentially significant effects, the deterioration in water quality during the construction or operational phase via sediment / silt or pollutant release to the stream could result in adverse water quality impacts resulting in effects on the qualifying interests and species of the SAC. Mitigation measures are outlined within the outline Construction and environmental management plan to address pollutant runoff emissions to the aquatic environment to avoid significant effects on the qualifying interest habitats and species of the SAC. As regards surface water run off during the operational phase the potential for hydrocarbon or pollutant run off via surface water network is to be mitigated. I note that the issue site contamination and potential implications of historic landfill on the site is not addressed within the NIS.

7.6.6 In relation to the lesser horseshoe bat it is noted that the site is adjacent to the 2.5km foraging range of a known roost site (Bat Site Code 296) recorded within the SAC. The treeline flanking a section of the unnamed stream downstream of the site has been classed as a potential foraging grounds for the roost site. It is asserted that while the stream to the north of the site may provide commuting and foraging habitat for the lesser horseshoe bat foraging habitat will not be significantly reduced. Increase lighting is considered not likely to have significant impact given location within the urban environment. I note the submission of third parties in particular report of SLR Consulting which is critical of the NIS in particular with regard to the extent of survey information in relation to the Lesser horseshoe bat. It is asserted that a single daytime survey of the dwelling proposed for demolition is inadequate in terms of determining the significance of the site for the lesser horseshoe bat. Given that the proposal involves removal of trees along the stream to the north of the site the significance of the site in terms of commuting and foraging routes should be explored. It is asserted that discounting the effect on the lesser horseshoe bat in terms of loss of vegetation and increase in lighting as a result of the development is unsupported in terms of the absence of survey data. The submission is also critical on the level of detail provided with regard to surface water management during operational phase having regard to the presence of freshwater pearl mussel downstream of the proposed development particularly having regard to the sensitivities of the freshwater pearl mussel to silt release. The first party did not

specifically respond to these issues raised within the response to the appeal and I consider that these matters should be addressed in any future application.

7.6.7 On the basis of the information provided with the application and the appeal, and particularly having regard to the dearth of information with regard to historic infilling of the site and limited survey data with regard to the significance of the site for the lesser horseshoe bat, the Board cannot be satisfied that the proposed development individually, or in combination with other plans or projects would not result in adverse effects on the integrity of the Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC (000365) in view of the sites' conservation objectives. In such circumstances, the Board is precluded from granting permission for the proposed development.

7.8 Recommendation

7.8.1 Further to the above planning assessment of matters pertaining to this appeal, including consideration of the submissions of each party to the appeal and the site inspection, I conclude that it has not been demonstrated that the proposed development is appropriate in terms of its design and layout. The proposed development would constitute haphazard piecemeal development in the context of the adjoining undeveloped lands to the east and fails to appropriately address site context particularly in terms of its treatment of the riparian corridor within the northern part of the site. Reasonable scientific doubt arises as to the absence of adverse effects on the integrity of Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC. Accordingly, I recommend that permission be refused for the proposed development for the following reasons and considerations.

REASONS AND CONSIDERATIONS

1. Having regard to the location and configuration of the appeal site in the context of the adjoining undeveloped lands to the east, and the riparian corridor within the northern part of the site and to the layout and design of the proposed development the Board is not satisfied that the proposed development responds appropriately to the unique characteristics of the site context, and considers that the proposal would

lead to a disjointed and piecemeal form of development which would be detrimental to residential and environmental amenity. The proposal would therefore be seriously injurious to amenities of the area and would not be in accordance with the proper planning and sustainable development of the area.

2. Having regard to the configuration of the appeal site and based on submissions in relation to the appeal the Board is not satisfied that the applicant has demonstrated sufficient legal interest to carry out the necessary road improvement measures to provide adequate access the site or has the approval of the person who has sufficient legal estate or interest to enable such works.
3. On the basis of the information lodged with the application and the appeal, the Board cannot be satisfied that the proposed development individually or in combination with other plans or projects would not be likely to have significant effect on the Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC, in view of the site's conservation objectives. In such circumstances the Board is precluded from granting permission.

Bríd Maxwell
Planning Inspector

7th October 2021