



An
Bord
Pleanála

Inspector's Report ABP-311303-21

Development	Modify the permitted site layout on 17/601007 by removal of the pathway and construction of a boundary fence in its place.
Location	Ardgeeha, Glenconnor, Clonment, Co. Tipperary.
Planning Authority	Tipperary County Council
Planning Authority Reg. Ref.	21/425
Applicant(s)	Michael Flannery
Type of Application	Permission
Planning Authority Decision	Grant, subject to 2 conditions
Type of Appeal	Third Party -v- Decision
Appellant(s)	James Moloney and other residents of Rockfield & Glenconnor Cottages
Observer(s)	None
Date of Site Inspection	9 th November 2022
Inspector	Hugh D. Morrison

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1.0 Site Location and Description

- 1.1. The site is located in the north-western outskirts of Clonmel in a position between the radial routes of Haywood Road, to the east, and Glenconnor Road, to the west. This site abuts the Waterford/Limerick railway line to the north, beyond which lies the Clonmel Inner Relief Road, which forms part of the N24 and is known as the Frank Drohan Road. To the east and to the south-west of the site lie residential streets known as Glenconnor Cottages. Originally these streets were developed to provide cottages for WW1 service men. They have been further developed over the years.
- 1.2. The site itself is of roughly regular shape, although the western half of its southern boundary meanders. This site rises at gentle/moderate gradients from its north-eastern and north-western corners to a high point towards the centre of the southern boundary. It extends over an area of 0.83 hectares, and it has recently been developed to provide 2 no. two-storey detached dwelling houses on plots that comprise roughly the south-eastern and north-western halves of the site. Both dwelling houses are accessed off a turning circle within the north-eastern corner of the site. This turning circle is itself accessed from the cul-de-sac to the east known as Glenconnor Cottages. Formerly, the site was accessed by means of a footpath that runs along the eastern side of No. 21 Glenconnor Cottages to the south-west of the site. This footpath is still in-situ. However, it is overgrown and partially blocked at its southern end by a concrete block and fully blocked at its northern end by security fencing.

2.0 Proposed Development

- 2.1. The proposal refers to permitted application 17/601007, under which the north-western house plot was developed. The site layout for this plot showed the provision of a pathway between it and the adjoining south-eastern house plot, i.e., running on roughly a diagonal alignment from the turning circle in the north-east to the northern end of the footpath that runs along the eastern side of No. 21 Glenconnor Cottages to the south-west of the site.
- 2.2. The proposal is to remove the pathway and, in its place, to erect a 1.2m high timber post and rail fence and to plant a whitethorn hedge.

3.0 Planning Authority Decision

3.1. Decision

Following the receipt of further information, permission was granted subject to two conditions, the second of which states the following:

(a) The proposed fence line shall be relocated to the southern side of the pathway line demarcated on site layout plan PD-201. The area demarcated on the above referenced drawing as previously permitted pathway shall remain free of any development and planting.

(b) The boundary at the south-western end of the site where the pathway terminates shall be constructed in a manner that same can be opened to allow pedestrian movement. Details in this regard shall be submitted to the Planning Authority for written agreement prior to development commencing.

Reason: In the interest of orderly development and to protect the amenities of the area, having regard to the alleged right of way through the subject site.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The following further information was requested:

The site “may contain some form of a private right of way relating to the layout of development at this location by the Irish Sailors and Soldiers Land Trust.” The applicant is requested to show how such a right of way, if it is established that it currently exists, would be accommodated on the site. The applicant is also requested to submit any information/evidence concerning the existence or otherwise of this right of way.

The applicant’s solicitor responded to this request by making the following points:

- The Irish Sailors and Soldiers Land Trust ceased to exist on 15th May 1987.
- If any right of way did exist, then it could be extinguished by non-use following a period of 12 years.

- Given the lapse in time since 1987, it would be difficult for any party claiming an entitlement to a right of way to show that the same has not been abandoned.
- The applicant acquired the site over 4 years ago. During this period, public access to the site has not been available and no legal proceedings have been instigated by any third party claiming that a right of way has thereby been infringed.
- Reference is made to a letter from the Planning Authority dated 25th July 2017, which states that there is “insufficient evidence demonstrating that there was a public right of way.”
- The view is expressed that a grant of permission “will not prevent the accommodation of a right of way by our client in the event that it was established that a legally enforceable right of way exists.”

3.2.2. Other Technical Reports

- TII: No observations.
- Regional Design Office: Site lies within the boundary of the constraints study area for the N24 Waterford to Cahir Project. While options for this route have yet to be worked up, the presence of the railway line and the Clonmel Inner Relief Road to the north of the site and dwelling houses in its immediate vicinity ensure that this site would be unaffected by the Project.
- Area Engineer: No objection.

4.0 Planning History

- 10/27: Dwelling house: Outline permission granted + 14/550006: Permission consequent on the outline permission.
- 14/550024: Split-level dwelling house to be sited in the eastern portion of the site: Permission granted + 16/600670: Change of house type and garage: Permission granted.

- 14/600397: Two dwelling houses to be sited in the central and western portions of the site: Refused on the grounds that the access road would be of inadequate width to allow vehicles to pass, and it would have no footpath.
- 15/600729: Dwelling house to be sited in the western portion of the site: Permission granted at appeal PL92.245816 + 17/601007: Change of house type: Permission granted. Condition 5(c) attached to the latter permission states the following:

Site levelling shall include for levelling works to the pathway through the site from its south-west end to the turning area. The ground levels of the pathway shall be restored to the original ground level.

- TUD-16-186: Re: Security fencing obstructing an alleged public right of way: File closed, and owner of the site advised in a letter dated 25th July 2017 that the Planning Authority had received legal advice to the effect that “while some form of right of way existed there was insufficient evidence demonstrating that same was a public right of way.” Consequently, the security fencing constituted exempted development under Class 16 of Part 1 of Schedule 2 to Article 6 of the Planning and Development Regulations, 2001, as amended.

5.0 Policy and Context

5.1. Development Plan

Under the Clonmel Local Area Plan 2013 – 2019 (LAP), the site is shown as lying within an area that is zoned residential, wherein the objective is “To preserve and enhance existing residential amenity including avoiding excessive overlooking, reduction in general safety and the reduction in the general usability and security of existing public and private open space.”

The LAP’s Policy INF 3, Pedestrian/Cycle Infrastructure, states “It is the policy of the Council to provide for the improvement of facilities for pedestrians, cyclists and those with special mobility requirements as opportunities arise and to require that all new development proposals provide for associated infrastructure and facilities where appropriate and as part of the development.”

I have not been able to confirm that the LAP has been extended beyond 2019. I am however able to confirm that the Planning Authority has begun the process of making a new LAP for the period 2024 – 2030.

5.2. **Natural Heritage Designations**

Lower River Suir SAC (002137)

5.3. **EIA Screening**

The project is “not a class” for the purpose of EIA.

6.0 **The Appeal**

6.1. **Grounds of Appeal**

- The appellant, James Moloney, represents local residents of Rockfield and Glenconnor Cottages who object to the Planning Authority’s decision to allow the removal of a longstanding right of way through the site. This right of way was used daily between the 1920s up until October 2016, when the applicant blocked it off. Appendices A and B attached to the grounds of appeal explain how the right of way provided a convenient pedestrian link between Rockfield and Glenconnor, which facilitated interaction between the two neighbourhoods.
- Appendices C and D attached to the grounds of appeal set out letters from the resident’s solicitors to the applicant seeking reassurances that the right of way be reopened post-construction of his dwelling house.
- Attention is drawn to the depiction of the right of way in all the applications for the site that have been made over recent years. Attention is also drawn to condition 5(c) attached to the permission granted to 17/601007, which explicitly refers to “the pathway”. In the light of these things, local residents trusted that the right of way would be reopened, only to be faced with the current application.

- The applicant's position that he did not know of the right of way is questioned in the light of Appendices E and F attached to the grounds of appeal, which set out a reference to it in the case planner's report on 17/601007 and notation on the site plan for 16/600670, i.e., "public right of way to be retained". This right of way was originally established by The Irish Soldiers and Sailors Land Trust in the 1920s and a considerable amount of evidence exists as to its subsequent usage, e.g., sworn affidavits, photographs, map and inspection reports, local newspaper articles, Ordnance Survey Maps, and GPS tracks.
- The risk of anti-social behaviour on the site has passed with its development. Appendix G attached to the grounds of appeal identifies the residential property of Jack O'Shea, which adjoins the site. He has been resident in this property since 1983 and he supports the reopening of the right of way. Failure to do so would entail the loss of an important amenity that has been enjoyed by local residents over the last 95 years and which is integral to the character of the area.

6.2. Applicant Response

- The applicant considers that James Moloney is the appellant and not the residents of Rockfield and Glenconnor Cottages.
- The applicant refers to his solicitor's letter, which confirms that when he purchased the site there was no burden on the title to the site in terms of either a public or private right of way across it.
- The applicant expresses the concern that the unsupervised pathway in question may become a venue for anti-social behaviour and so it would not equate with the proper planning and sustainable development of the area.
- The Planning Authority's Condition No. 2 has now placed a burden on the applicant's title to the site where one did not previously exist.
- The view is expressed that Condition No.2 was only attached because of the objection that was raised to the proposal and that it amounts to an unlawful burden on the title to the site.

6.3. **Planning Authority Response**

None

6.4. **Observations**

None

6.5. **Further Responses**

None

7.0 **Assessment**

7.1. I have reviewed the proposal in the light of the Clonmel Local Area Plan 2013 (LAP), relevant planning history, the submissions of the parties, and my own site visit. Accordingly, I consider that this application/appeal should be assessed under the following headings:

- (i) Background and planning history,
- (ii) Amenity, and
- (iii) Appropriate Assessment.

(i) Background and planning history

7.2. The appellant's grounds of appeal are accompanied by Appendices A and B, which set out a summary of the history of the site, which is known as "The Hilly Field", and a newspaper article on the same, dated 13th April 2017. These Appendices draw attention to the three clusters of cottages that make up Glenconnor Cottages, which were built by the Irish Sailors and Soldiers Land Trust for ex-WW1 service men and their families. The two northern clusters were linked by means of a pathway through "The Hilly Field", which served as a meeting place. They also draw attention to the recent blocking of this pathway and the fact that, by comparison, alternate routes to the north and to the south between these clusters are long and convoluted.

7.3. During my site visit, I observed that the footpath along the eastern side of No. 21 Glenconnor Cottages is overgrown, and it is partially blocked at its southern end and fully blocked at its northern end, which abuts the south-western corner of the site. I

also observed that, while old Ordnance Survey maps of the site clearly show a track across this site from its south-western corner to its north-eastern one, the presence of a track or a pathway across the site is now no longer evident.

7.4. Enforcement enquiry TUD-16-186 concerned the erection of site security fencing that obstructed a public right of way across the site. This enquiry led to the Planning Authority issued a warning letter dated 3rd January 2017. However, subsequent legal advice concluded that no *public* right of way exists and so the enforcement action was discontinued. Both the appellant and the Planning Authority recognise that a private right of way may exist, but this has yet to be established legally. Consequently, the Planning Authority's Condition No. 2 attached to its grant of permission seeks to ensure that, should such a right of way be legally established, the opportunity to provide a corresponding pathway across the site would exist, i.e., a route for the same would be reserved "on the ground".

7.5. Turning to the planning history of the site, the question of a right of way has featured, as follows:

- Under 14/550006, the Borough Engineer advised that the "right of way" situation in relation to the path running through the site be established.
- Under 14/50024, the submitted site layout plan showed a path running through the site from the north-eastern corner to the south-western one.
- Under 14/600397, the applicant, Dan Cassey, was requested, under further information, to address the question of a right of way. He did so by stating that, while there was no documentary evidence of such a right, one "can be accommodated if the Planning Authority deem inclusion of same is in the public interest." The case planner acknowledged the existence of a pathway through the site, which he judged to be of "public utility". He also noted that "the site layout plan submitted as further information shows this pathway maintained through the site."
- Under 16/600670, the submitted site layout plan showed a pathway through the site with accompanying notation stating "Public right of way provided for through site as per the request of the Borough Engineer in planning application 14/550006."

- Under 17/601007, the applicant, Michael Flannery, submitted a site layout plan (drawing no. PD-201), which shows a pathway through the site. Permission was subject to the following Condition No. 5(c) pertaining to this pathway:

Site levelling shall include for levelling works to the pathway through the site from its south-west end to the turning area. The ground levels of the pathway shall be restored to the original ground level.

The case planner comments that this Condition was prompted by a submission from James Moloney (the current appellant) in which he requested that the ground levels across the pathway be the same as the pre-existing ground levels. It was not appealed by the applicant.

- 7.6. The planning history of the site indicates that the pathway across it has been raised as an issue and addressed by successive applicants, including the current one. Indeed, the permitted layout of the site has been predicated on the provision of a pathway of roughly diagonal alignment between the two-house plots.
- 7.7. I conclude that, while for legal purposes a right of way across the site remains to be established, the development of the site has been granted on the basis that a pathway would be provided across the site, thereby maintaining the historic link between the north-eastern and north-western clusters of cottages that comprise Glenconnor Cottages.

(ii) Amenity

- 7.8. Under the LAP, the zoning objective for the site is “To preserve and enhance existing residential amenity” and, under Policy INF 3, the Planning Authority undertakes to “provide for the improvement of facilities for pedestrians”, including the provision of such facilities in new development.
- 7.9. During my site visit, I observed that, in combination with the blocked footpath along the eastern side of No. 21 Glenconnor Cottages, a pathway as envisaged by the permission granted to 17/601007 across the site would ensure the continued connectivity of Glenconnor Cottages to the east and south-west of this site. In its absence, there is no comparable route for pedestrians between these Cottages and so they would be segregated and isolated from one another. The attendant dis-amenity would affect recreational users and residents of Glenconnor Cottages, who

may enjoy communal links with one another. The heritage of the locality would also be rendered less legible, as a historic link of relevance to the social history of the area would be lost.

- 7.10. In the light of the foregoing, I consider that the LAP's zoning objective and Policy INF 3 were upheld by the permission that was granted to 17/601007. This permission has been largely implemented with the substantial completion of the dwelling house on the north-western house plot, which accompanies the dwelling house on the adjoining south-eastern house plot that has been completed and is now occupied. While the site has not been laid out to provide the pathway shown on the site layout plan (drawing no. PD-201), the local planning circumstances "on the ground" have not changed since the permission was granted and so the amenity justification for the provision of a pathway remains as it did then. Condition No. 5(c) attached to this permission requires that the original ground levels to the pathway be restored, in conjunction with the provision of this pathway. This Condition has not been implemented and the applicant's request that the pathway now be removed would materially contravene it.
- 7.11. The Planning Authority's Condition No. 2 attached to the current permission requires the reservation of a route for the pathway, should it be legally established that a right of way exists across the site. While this Condition could be considered prudent, it fails to recognise the amenity value of a pathway, regardless of any right of way, and its consequent justification for planning purposes.
- 7.12. I conclude that the pathway at issue would be of amenity value to the area and that its provision under Condition 5(c) attached to the permission granted to 17/601007 should be confirmed by the refusal of the current application.

(iii) Appropriate Assessment

- 7.13. The site is not in or beside any European site. It is a fully serviced suburban site. Under the proposal, a previously proposed pathway across the site would be omitted. No Appropriate Assessment issues would arise.
- 7.14. Having regard to the nature, scale, and location of the proposal, and proximity to the nearest European site, it is concluded that no Appropriate Assessment issues arise as the proposal would not be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.0 Recommendation

8.1. That permission be refused.

9.0 Reasons and Considerations

The proposed development to modify the permitted site layout on planning file reference 17/601007 by removal of the permitted pathway and construction of a boundary fence in its place would contravene materially Condition 5(c) attached to the existing permission for development granted to planning file reference 17/601007. This Condition requires that the original ground levels of the pathway be restored following levelling works, to facilitate the resumption in its use. The proposed development would remove this permitted pathway and so negate such resumption. Longstanding pedestrian connectivity between the eastern and western clusters of Glenconnor Cottages would thereby be lost and, in the absence of any comparable route between these Cottages, significant inconvenience and disamenity would ensue. The proposed development would thus be seriously injurious to the amenities of the area and, as such, contrary to the proper planning and sustainable development of the area.

Hugh D. Morrison
Planning Inspector

18th November 2022