



An  
Bord  
Pleanála

## Inspector's Report

### ABP-312969-22

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<b>Development</b>	Application for substitute consent for infilling of land.
<b>Location</b>	Tulla Road, Knockanoura, Ennis, Co. Clare.
<b>Planning Authority</b>	Clare County Council.
<b>Applicant(s)</b>	Valley Healthcare Fund – Infrastructure Investment Fund ICAV.
<b>Type of Application</b>	Substitute Consent.
<b>Observer(s)</b>	1. Pat Quinn
<b>Date of Site Inspection</b>	27 <sup>th</sup> November 2023.
<b>Inspector</b>	Daire McDevitt.

## **1.0 Introduction**

The current application for substitute consent was made following the Board's decision to grant Leave to Apply for Substitute Consent under ABP-307172-20 on the 22<sup>nd</sup> September 2021 and ABP 311859-21 Extension of Time Request dated 8<sup>th</sup> December 2021 which extended the time to the 16<sup>th</sup> March 2022 for an application to be lodged. The application was lodged on 9<sup>th</sup> March 2022.

Amendments to Part XA of the Planning and Development Act 2000 (the 2000 Act) and Part 19 of the Planning and Development Regulations 2001 (the 2001 Regulations) concerning Substitute Consent. These amendments derive from sections 6, 7 and 8 of the Planning and Development, and Residential Tenancies, Act 2020 (No. 27 of 2020) (the 2020 Act), as enacted on 19 December 2020 and the Planning and Development (Amendment) (No. 2) Regulations 2020 (S.I. No. 692 of 2020) (the 2020 Regulations), which were signed and came into force on the 23 December 2020. All of which preceded the date the current application before the Board was lodged. I can confirm that I shall be considering 'exceptional circumstances' in my assessment and that I have had no regard to any previous analysis relating to this matter carried out under ABP 307172-20 (Leave to Apply for Substitute Consent) in my assessment.

## **2.0 Site Location**

The site is located on the southern side to the Tulla Road to the northeast of Ennis town centre. The site forms part of a larger field (known locally as Glynn's holding). The site is accessed off Tulla Road which forms the northern boundary. To the west is a petrol station and commercial units. To the east is the Observer's house which front onto and is accessed off Tulla Road with Castlerock housing estate to the southeast. The southern boundary is not defined or physically separated from the larger plot from which this site is taken. The applicants have set out that the remainder of the holding which bounds the Fort Fergus Stream is stated not to be in the applicants' ownership.

The site is vacant and overgrown with infill material noted in places under vegetation. The site is relatively flat with a slight change as one moves westwards. Some

surface water noted on site at the time of inspection (27 November 2023) after a period of heavy rains with rushes visible on the site and wider landholding.

### **3.0 The Proposal**

The development which is the subject of this application for substitute consent is the filling of land and raising of ground level to provide a level hardcore surface, intended to facilitate future development on the site.

The applicant's cover letter dated 7<sup>th</sup> March 2022 sets out the development in detail.

### **4.0 Planning History**

**ABP 307172-20** refers to a September 2021 Grant for Leave to Apply for Substitute Consent under section 177 of the Planning and Development Act 2000 (as amended).

**ABP 311859-21** refers to a December 2021 extension of time for lodging an application for substitute consent for infilling of land. (Extension to 16<sup>th</sup> March 2022).

**PA Ref. 19/409** refers to an invalid application by Valley Healthcare Fund for planning permission for a 4 storey healthcare facility, on site parking, building signage, landscaping and all associated site works.

**PA Ref. R20-25 (ABP Ref. 307625-20)** refers to a Section 5 Declaration sought relating to 'whether the groundworks undertaken, including importation and deposition of fill material to create a hardstanding area and the raising of ground levels from 2013 onwards is or is not development and/or is not exempted development. The Board decided that the groundworks undertaken, including the importation and deposition of fill material to create a hardstanding area and the raising of ground levels from 2013 onwards at Knockanoura, Tulla Road, Ennis, Co. Clare are development and are not exempted development'.

**ABP 307625** refers to an April 2021 Section 5 Declaration relating to "Whether the groundworks undertaken, including importation and deposition of fill material to create a hardstanding area and the raising of ground levels from 2013 onwards is or is not development and/or is or is not exempted development".

**Ref. RL3611** refers to a January 2019 Section 5 Declaration by Crossfield Property Co. Ltd relating to “whether ground works, including importation and deposition of fill material, creation of hard standing area and raising of land area is or is not development or is or is not exempted development. The Board determined that the groundworks undertaken including the importation and deposition of fill material to create a hardstanding area and the raising of ground levels at Tulla Road environs, Ennis, Co. Clare is development and is exempted development/permitted development”. The Board’s Declaration was quashed by Order of the High Court (2019 144 JR).

**Ref.03.RL3202** refers to a Section 5 Declaration sought from An Bord Pleanála by the residents of Woodstock Hill and Woodstock View as to “whether or not the removal of fill material from lands for the use in the construction of embankments as part of the Ennis South Flood Relief Scheme constitutes development and if it constitutes development whether or not the works constituted exempted development. The Board issued a Declaration that the construction of embankments as part of the Ennis South Flood Relief Scheme which is incidental to the works being carried out pursuant to the approval under Appeal Ref. No. 0.3.JP0013 together with the exemptions specified under Article 9 of the said Regulations that the works in question constitute development which is exempted development.

**A synopsis of Planning Enforcement History outlined in correspondence from Clare County Council dated 6th April 2022, limited details outlined as follows:**

- UD 1530. Warning Letter issued, file subsequently closed based on ABP Determination.
- UD 18 076 file closed.
- UD 20 068 file closed.

## **5.0 Policy Context**

### **5.1 National**

#### **Project Ireland 2040 – the National Planning Framework**

The National Planning Framework (NPF) is the Government’s high-level strategic plan for shaping the future growth and development to the year 2040.

The Framework is based on a set of values that will ensure Ireland’s long term economic, environmental and social progress. In framing a new way forward, the

National Planning Framework draws upon lessons learned from the National Spatial Strategy and highlights a vision of success based on better choices.

### **Climate Action Plan 2023 (December 2022)**

The plan implements the carbon budgets and sectoral emissions ceilings and sets out a roadmap for taking decisive action to halve our emissions by 2030 and reach net zero no later than 2050, as committed to in the Programme for Government. Climate Action Plan 2023 sets out how Ireland can accelerate the actions that are required to respond to the climate crisis, putting climate solutions at the centre of Ireland's social and economic development.

### **Section 28 Guidelines**

- Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment (2018).
- The Planning System and Flood Risk Management – Guidelines for Planning Authorities & Technical Appendices (2009).

Other:

- Guidance on Appropriate Assessment for Planning Authorities (NPWS)

## **5.2 Regional**

### **Southern Region Regional Social Economic Strategy (RSES) (2020)**

The RSES provides a long-term, strategic development framework for the future physical, economic and social development of the Southern Region and includes Metropolitan Area Strategic Plans (MASPs) to guide the future development of the Region's three main cities and metropolitan areas – Cork, Limerick-Shannon and Waterford.

The RSES sets out a vision for the Southern Region to:

- Nurture all our places to realise their full potential.
- Protect, and enhance our environment.
- Successfully combat climate change.
- Achieve economic prosperity and improved quality of life for all our citizens.
- Accommodate expanded growth and development in suitable locations.

- Make the Southern Region one of Europe's most creative, innovative, greenest and liveable regions.

The RSES seeks to achieve balanced regional development and full implementation of Project Ireland 2040 – the National Planning Framework. It will be implemented in partnership with local authorities and state agencies to deliver on this vision and build a cohesive and sustainable region.

### 5.3 Local

#### Clare County Development Plan 2023-2029

#### Volume 3a Ennis Municipal District Settlement Plans

#### Section 1 Ennis.

The lands are zoned 'Commercial', section 19.4 sets out the nature of zonings. This notes that the use of land zoned for 'commercial' purposes shall be taken to include the use of the lands for commercial and business uses including offices, service industry, warehousing and the facilitation of enterprise/retail/office type uses as appropriate. Retail Warehousing is open for consideration under this zoning, provided that a sequential test is carried out and the lands are demonstrably the optimum location for the nature and quantum of retail development proposed.

The site along with lands to the west are identified as Opportunity Site **OP18 (Commercial Buildings, Tulla Road (0.74ha))**.

*This Opportunity Site is located on the Tulla Road (R352) in the Roslevan neighbourhood and is zoned for commercial use. There are a number of existing uses on the site including a petrol station and forecourt with ancillary shop and car wash, as well as a number of smaller retail/commercial units. The existing retail and commercial developments on the site have been developed in a piecemeal manner and as such, issues relating to traffic management and points of entry/exit to the site have not been developed in a co-ordinated manner. This site has the capacity to be redeveloped for high quality, mixed/commercial development of a limited scale, providing a landmark building on the site. As the site is partially located within an area identified as being at risk of flooding, the site is not considered appropriate for more vulnerable uses. A Traffic Management Plan will be required to accompany any future planning application and must address issues such as management of*

*site access and egress for pedestrians, vehicles and cyclists. Adequate analysis for fuel delivery vehicles should be incorporated into the plan.*

*The Fergus Minor River marks the western boundary of the site and, as such, there is an opportunity to provide pedestrian access from the Tulla Road to the River Fergus to accommodate access to possible future riverside walkways. All development proposals must be progressed in full compliance with the requirements of the Habitats Directive. Future development proposals must demonstrate, through a light spill modelling study, that there will be no negative impacts on the habitats of protected species. A site-specific Flood Risk Assessment must also accompany any development proposals for the site, having regard to the location of the site within Flood Zones A and B. The Flood Risk Assessment must be prepared having regard to the Strategic Flood Risk Assessment in Volume 10c of the Plan. Due to the proximity of the site to the Fergus Minor River, a Construction Method Statement will be required detailing how surface water run-off will be controlled during construction, especially in relation to the release of silt to the adjoining river, which is connected to the Lower River Shannon SAC. Drainage plans must also be submitted in relation to surface water run-off during operation, ensuring that run-off is treated via appropriate SuDS (petrol interceptor, silt traps etc.) prior to discharge to any surface water features. A contaminated land study/assessment will also be required to ensure that future development proposals will not have a negative impact on the amenities of the surrounding area.*

#### **5.4 Natural Heritage Designations**

The site is not located within or bounding a designated site.

- Lower River Shannon SAC (site code 002165) is c.50m to the southwest and c.100m to the west (encroaches on the larger field from which the site is taken)
- Ballyallia Lake SAC (site code 000014) is c.764m to the north and c.1.9km to the north west.
- Ballyallia Lough SPA (site code 004041) is c.1.9km to the northwest.
- River Shannon and River Fergus SPA (site code 004077) is c.4.2km to the south.
- Newhall and Edenvale Complex SAC (sit code 002091) is c.4.5km to the southwest.

## 5.5 EIA Screening

Under the Leave to Apply for Substitute Consent ABP-307172-20, BD-009118-21 (Board Direction) as reflected in the Board Order signed 22<sup>nd</sup> September 2021 which states in the Reasons and Considerations that the Board determined that “the development is one where an Environmental Impact Assessment or a Determination as to whether an Environmental Impact Assessment is not required and An Appropriate Assessment is required”.

## 6.0 Submissions

### 6.1 Observer Submissions

One submission has been received from Pat Quinn, 5 Knockanoura, Tulla Road, Ennis, Co. Clare. The observer’s property immediately bounds the site to the east.

It is submitted that there is no defined southern boundary and that the site forms part of a larger undeveloped plot that extends further south and to the rear of the petrol station and should be assessed according.

The main issues raised as summarised as follows:

#### 6.1.1 Exceptional Circumstances:

It is the observer’s opinion that exceptional circumstances do not exist in this instance and that the Board is therefore precluded from granting permission.

It is unreasonable to consider the applicants were unaware of the planning status of the infilling of lands and that the infilling was not part of the River Fergus Lower (Ennis) Certified Drainage Scheme (phase 2) as approved and therefore could not have been considered exempted development.

Reference to and copy of email correspondence dated 2014 with the applicant’s consultants that refers to the planning status of the site and options available to the observer.

The site outlined in red only refers to a portion of the lands which was the subject of a section 5 referral (ABP Ref. RL 03.307625) which was identified as where unauthorised infilling works had taken place. (identified as Area A and Area B by



Clare County Council). It is submitted that A& B differentiate the area for the Drainage Scheme (Area B) and the remainder.

It is submitted that is not reasonable to consider the different plots separately, notwithstanding ownership and the entire 'Glynn Holding' should be considered within this application.

It is submitted that the applicants cannot avail of exceptional circumstances as they did not take necessary precautions by not waiting for the 8 week Judicial Review period to expire prior to signing the purchase documents.

The applicants have not demonstrated that exceptional circumstance exist in accordance with section 177(D)(2) of the Act, therefore the proposed development does not fall within the scope of the 'Exceptional Circumstances' test for Substitute Consent application.

The regularisation of the development within the boundary comprised in this application would restrict the area to be assessed for likely significant impacts in a manner which circumvents the purpose and objectives of the Habitats Directive and would therefore not satisfy the criteria specified in s.177(D)(2)(a) of the Act.

As such by reference to the provision of section 177K(1A) of the Act it is the Observer's opinion that the Board is precluded from granting Substitute Consent in this case.

#### 6.1.2 Residential Amenity:

The works have a significant negative impact on his residential amenities and those of the adjoining area.

The raising of ground levels and the creation of an extensive hardstanding area over the subject site and full extent of Area A and Area B has resulted in the Observer's residential amenity being grossly interfered with.

The observer is of the view that the granting of permission for the unauthorised infilling works is not in accordance with the proper planning and sustainable development of the area and should therefore not be permitted.

Photographs stated to be taken January 2017 included with the submission.

Summary of information contained in planning files relating to ground level comparison submitted as follows:

	PL. File 9721061 (prior to any infilling works)	PL. File 051142 (post the original infilling works 1999-2000)	JB Barry Survey 03/09/14 (post Drainage Scheme contract)	PL. File P19-409 (post all infilling works 1999-2000)
Levels on Tulla Road (R352)	4.46 - 4.6m	4.44m - 4.63m	Not given	4.4m – 4.6m
Stoned Section of Area A	3.02m - 3.07m	3.75m – 4.5m	4.4m – 4.7m	4.4m – 4.8m
Rear of Area A.	3.12m - 3.3m	3.0m – 3.25m	3.0m – 3.1m	3.97m – 4.079m

Labelling of areas in table above corresponded with 'sketch' included with the submission.

It is submitted that overall, the front of the subject land (i.e front portion of Area A fronting onto Tulla Road) would appear to have been raised by between 1.4m and 1.7m from the original ground levels. The rear of Area A would appear to have been raised by between 0.85m and 1m.

Variation between level of the subject site and at Observer's Property submitted to be: +0.614m, +0.818m, +0.883m and +1.283m.

The Observer notes that the Trail Hole Assessment submitted has excavations made at 1m levels to a depth of 6m, trail holes revealed made-up ground down to more than 3m which would suggest a greater level of infill on the site as was estimated and outlined above.

It is submitted that the overall increase in land levels has resulted in the boundary wall being made redundant with regard to protecting the observer's residential amenity. 6ft wall is now in effect a 3ft wall.

### 6.1.3 Land Use Zoning:

The observer made a submission on the draft plan as it is considered that to permit a zoning objective to provide for future development of the suite would compound the unauthorised activities on the site and not in accordance with the orderly development of the area. Request that the subject site be reclassified as 'Open Space'.

#### 6.1.4 Flooding:

Part of the site lies within Flood Risk Zone B with the remainder of Area A and Area B within Flood Risk Zone A and B as per Flood Risk Zones and Flooding map included in Volume 3a Ennis Municipal District Plan from Clare County Development Plan 2017-2023.

Zoning Objective OP18 applies to the site, this requires a Flood Risk Assessment for any development proposal.

#### 6.1.5 Other:

The rNIS is not clear if mitigation/mediation measures are proposed or what they are as it states "...mitigation measure may not be appropriate as the unauthorised infilling has already been completed."

The rNIS refers to the requirement to monitor measures to inform if remediation or future mitigation measures are required. But the rNIS are recommended to deal with this.

Appendix includes submission from Mr. Pat Quinn dated 11<sup>th</sup> April 2022 with Exhibits 1-12 which highlight inter the following items:

- Summary of planning History and factual background regarding the subject site and public awareness.
- Summary of history of the infilling, how it came about and the ramifications.
- Summary of resources available to the applicant and refence to the aim of purchasing 10 to 20 sites etc.
- Review of evidence adduced by the applicant in purported fulfilment of s.177D(2)(b) of the PDA 2000.
- Summary of how the relevant background history serves to undermine the applicant's claim of exceptional circumstances.
- Query if the infilling of lands by Crossfield Property Company Ltd would have obtained a grant of planning permission if a valid planning application in respect thereof had been made to CCC in advance of same.
- Query the issue of hardship that would be occasioned by refusal of the application for substitute consent.

- Reference to the conduct of the applicant and their advisors in the planning process with respect to these lands.
- The role of An Bord Pleanála in assessment the application. Reference to the constitution and case law.

List of submitted Exhibits:

Exhibit No. 1. Copy of Notice of Motion No. 23.

Exhibit No. 2 . Extract from HRA document.

Exhibit No. 3. Copy of correspondence to An Bord Pleanála dated 24<sup>th</sup> January 2019 relating to Order 03.RL.3611.

Includes weblinks to photographs stated to be from Google Maps Street View as June 2009, January 2010, March 2011. Aerial Image as of May 2016.

2 further appendices attached (B & C which include photographs stated to depict the situation prior to any works (B) and then pertaining to the temporary provision of vehicular access track (C).

Appendix A includes copies of 2013/2014 correspondence with JB Barry and with Wills Bros.

Exhibit No. 4. A copy submission from DCHG relating to PA Ref. 19/408.

Exhibit No. 5. Newspaper article dated 26 June 2018 relating to land acquisitions by Valley Healthcare in Cork and Kerry.

Exhibit No. 6. Newspaper article dated 11 April 2018 relating to land acquisitions by Valley Healthcare.

Exhibit No. 7. Extract (Not sources) dated 24 April 2018 relating to Irish Infrastructure Funding adding two Primary Care Centres to Valley Healthcare.

Exhibit No. 8. Copy of 2013 email from Malcolm Duncan (Wills Bros).

Exhibit No. 9. Copy of 2014 emails from Richard Long (JB Barry).

Exhibit No. 10. Extract from Land Use zoning, Ennis & Environs Development Plan 2008-2014.

Exhibit No. 11. Copy of 2014 emails from Gary Rowan (HRA Planning).

Exhibit No. 12. Copy of 2014 emails from Gary Rowan (HRA Planning) and Richard Long (JB Barry).

Summary of JR proceedings.

No evidence presented regarding date of purchase of the site by the applicant.

Correspondence submitted regarding unauthorised works and discussions/submissions to Clare County Council.

## **6.2 Prescribed Bodies**

**Irish Aviation Authority (IAA)** (10<sup>th</sup> June 2022). No observations to make.

**Transport Infrastructure Ireland (TII)** (17<sup>th</sup> June 2022). No specific observations to make.

**HSE** (24<sup>th</sup> June 2022). Confirms that the HSE entered into an agreement with the applicants for the provision of a substantial Primary Care Centre on the site. Refers to Section 5 and JR proceedings and confirm that the site continues to be the preferred location in Ennis. Two serviced sites identified in Ennis to serve the services needs and provide two primary care centres. Development underway at the Station Road site.

## **6.3 Planning Authority Response**

Planning Authority Response dated 6<sup>th</sup> April 2022 outlines the planning/enforcement history associated with the site. Policy context with regard to the 2017-2023 County Development Plan which was in force at the response was written, flood risk, Natura 2000 site, and opinion of the Chief Executive with regard to whether or not substitute consent should be granted for the development.

I wish to draw the Boards attention to the fact the planning authority submission appears to refer to the larger parcel of land from which the site is taken with reference for example to 'An SAC site, SAC 002165 Lower River Shannon bounds the site immediately to the southwest'. This is not the case.

Points of note include:

- Site is zoned 'commercial' as per the operative Development Plan.
- Opportunity Site 18 applies to the site.
- The planning authority carried out an AA and concluded that in accordance with Regulation 42(11) and 42(12) of the Habitats Regulations, the planning authority (An Bord Pleanála) must determine whether or not a plan or project would adversely affect the qualifying interests of the European sites potentially linked to the works site, taking account of the reports prepared (and any other relevant information). Based on the submitted rNIS, and current review of site information, and the scope of existing development in the vicinity of the site (building, hard surfaces, lighting, traffic, regional road, footpaths) the conclusion that the works undertaken have not had a significant effect on qualifying interests of the SAC is reasonable.

The planning authority is not aware of any remedial works have been undertaken. However the planning authority would concur with the rNIS regarding the implementation of future monitoring measures.

The Opinion, including reasons, of the Chief Executive:

Having regard to the nature, scale and extent of the development which was carried out, and the remedial measures, and subject to compliance with the conditions set out, the planning authority is satisfied that the subject development:

- Has not and would not seriously injure the amenities of the area or of property in the vicinity, has not had and would not have an unacceptable impact on the ecology, landscape or visual amenities of the area.
- Was and would be in acceptable in terms of public health, traffic safety and convenience.
- Was and would be in accordance with Clare County Development Plan 2017-2023, as varied.
- And was and would, therefore, be in accordance with the proper planning and sustainable development of the area.

4 no. conditions recommended relating to:

1. Development to be retained in accordance with plans, particulars and rNIS.

2. The Substitute consent hereby granted relates solely to the development which has already been carried out on site, namely the infilling of the site.
3. Compliance with mitigation measures and associated monitoring.
4. Within 4 month of the date of consent, submission of a monitoring programme for noxious weeds and invasive species which may be dormant or suppressed by recent weed control.

## **6.4 Further Responses**

### **6.4.1 Applicant Response to Third Party Observation & Planning Authority**

#### **Submission**

Applicant's response received dated 15 September 2022 contains a response to the third party observation and response to the Planning Authority's submission.

A) Response to the Third Party Observation.

This is broadly a rebuttal to issues raised in particular regarding reference to the professional conduct of HRA Planning and advise issued in 2014 is considered unprofessional and out of context. A summary of HRA's role and times line of involvement with the case is set out.

Section 4.7.3 of the rNIS assesses cumulative impacts with specific regard to potential impacts arising from water quality, noting that between 1991 and 2019 the water in the Fort Fergus stream was or poor or moderate quality.

B) Response to the Planning Authority's submission.

Welcomes the submission by Clare County Council, its recommendation and confirmation that there is no, nor have been, any enforcement notices issued, or legal proceedings initiated by the Authority relating to the subject site.

CCC concurs with the rNIS regarding the implementation with future monitoring measures.

Note that CCC outline that the site is Flood Zone B in the 2017-2023 Plan. It is submitted that this actually only refers to the very small area located in the southwest corner. Section 12.3.4 of the SFRA relating to Site OP18 confirms that 'the Justificaiton Test passed for OP18 lands, under the caveat that any such

development should be located only within flood zones A & B. Further, all new development should include finished floor levels in excess of the 1 in 100 year fluvial, or 1 in 200 year tidal level, with an allowance for climate change.

The applicants restate that they are of the view that they have clearly demonstrated exceptional circumstances and that the Board is not precluded from granting substitute consent in this case.

#### **6.4.2 Further Observer Submission**

Observer's response to applicants response received 20 September 2022 consists of a copy of the submission dated 8<sup>th</sup> June 2020.

#### **6.4.3 Further Planning Authority Submission**

Planning Authority response to applicants response received 21 September 2022 outlines no further comments to make.

### **7.0 Planning Assessment**

I have reviewed the proposal in the light of the National Planning Framework, the Clare County Development Plan 2023-2029, relevant national and regional guidance, the planning history of the site, the submissions of the applicant, the Planning Authority, and the observer, and my own site visit. Accordingly, I consider that this application for substitute consent should be assessed under the following headings:

- Context
- Exceptional Circumstances
- History and Extent of Infilling.
- Residential Amenity
- Flood Risk
- Other matters

Appropriate Assessment is addressed in section 9 of this report.

#### **7.1 Context**

The development which is the subject of this application for substitute consent is the infilling of land and raising of ground level to provide a level hardcore surface, intended to facilitate future development on the site. Works have been carried out in



the past and the current application is an attempt to regularise the status of said works in order to enable the future development of the site. Any potential development of the site in the future and additional infilling that may/may not be required would be assessed by the relevant planning authority in the event this materialises and does not come within the scope of my assessment.

The site is located c.50m northeast and c. 100m east of the Fort Fergus Stream which bounds the larger landholding (Glynn's Holding) from which the site is take, The stream drains into the River Fergus c.450m further south. Both of which form part of the Lower River Shannon SAC.

The OPW carried out works in relation to the River Fergus under the River Fergus Lower (Ennis) Certified Drainage Scheme which was the subject of EIA and NIS, the adjoining lands to the south and southwest were infilled in conjunction with the Certified Drange Works in 2013 with the site infilled at a later date.

The filling of land and raising of ground level took place during 2013-2015. The activity is not ongoing and as such there are no potential traffic, noise, dust etc impacts associated with the works likely to occurring or likely to occur. The substitute consent application addresses the extent of infill through the submission of Trial Hole Assessment report which I address in section 7.3. I address the issue of Potential flood risk in section 7.6 and the potential impact on European Designated Natura 2000 sites by the submission of a Remedial Natura Impact Statement (rNIS) which I address in section 8. There is extensive correspondence on file from the observer, Mr. P Quinn which predominantly relates to the history of the site and extent of infill, the impact on residential amenities of No. 5 Knockanoura, Tulla Road, Ennis which I address in section 7.5. The observer has raised serious concerns regard the applicants compliance with the criteria/test for Exceptional Circumstances which I address in section 7.2 and the extent of unauthorised works carried out on the lands is in essence addressed by the submission of an application for substitute consent which seeks to regularize the status of the works carried out regardless of who carried out the works or when.

## **7.2 Exceptional Circumstances**

The Observer has raised that the applicants have not demonstrated that exceptional circumstance existing in accordance with section 177(D)(2) of the Act, therefore the

proposed development does not fall within the scope of the 'Exceptional Circumstances' test for Substitute Consent application. I draw the Board's attention to the fact that section 177(D)(2) of the Act refers to Leave to Apply for Substitute Consent and not to Substitute Consent applications.

As set out in section 1 of this report Amendments to Part XA of the Planning and Development Act 2000 (the 2000 Act) and Part 19 of the Planning and Development Regulations 2001 (the 2001 Regulations) concerning Substitute Consent. These amendments derive from sections 6, 7 and 8 of the Planning and Development, and Residential Tenancies, Act 2020 (No. 27 of 2020) (the 2020 Act), as enacted on 19 December 2020 and – the Planning and Development (Amendment) (No. 2) Regulations 2020 (S.I. No. 692 of 2020) (the 2020 Regulations), which were signed and came into force on the 23 December 2020. All of which preceded the date the current application before the Board was lodged. I can confirm that I am considering 'exceptional circumstances' in my assessment and that I have had no regard to any previous analysis relating to this matter carried out under ABP 307172-20 (Leave to apply for Substitute Consent) in my assessment.

The applicants are required to demonstrate exceptional circumstances and the Board must be satisfied that exceptional circumstances exist in order to grant substitute consent. It is the observer's opinion that exceptional circumstances do not exist in this instance and that the Board are therefore precluded from granting permission. I address the test for exceptional circumstance below.

#### **7.2.1 Whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive.**

The application does not relate to a development, which due to its size and location, requires to be informed by an EIAR, and so it is not subject to the EIA Directive. An EIA Screening was carried out under ABP 307172-20 Leave to Apply for Substitute Consent under section 177 of the Planning and Development Act 2000 (as amended). BD-009118-21 (Board Direction) as reflected in the Board Order signed 22<sup>nd</sup> September 2021 states in the Reasons and Considerations (a) the development is one where an Environmental Impact Assessment or a determination as to whether

an Environmental Impact Assessment is not required and An Appropriate Assessment is required.

The application does relate to development that is informed by a rNIS, and so it is subject to the Habitats Directive. This rNIS, and its assessment, provides the opportunity for the purpose and objectives of the Habitats Directive to be upheld. Therefore, I conclude that this application for substitute consent which includes a rNIS and carrying out of AA would not circumvent the objectives of the Habitats Directive.

### **7.2.2 Whether the applicant had or could reasonably have had a belief that the development was not unauthorized**

The applicants submit that they did not carry out the works which are the subject of this substitute application and purchased the lands in 2019 under the impression that the works carried out were exempted development as supported by the Declaration by An Bord Pleanála relating to works on the overall landholding which included the current site, this Declaration was subsequently quashed by Order of the High Court.

It appears unlikely that the present applicants were not aware of the planning status of the development on the site. Nevertheless, I consider that such awareness does not preclude the making of an application for substitute consent.

### **7.2.3 Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired**

The process of AA involves the research and provision of information to the public and consenting authorities in relation to likely significant effects on European sites having regard to the sites' conservation objectives. In the present case the ability to provide such information has not been substantially impaired and the provision of information would facilitate public participation in the assessment/consent process. I conclude that the ability to prepare an rNIS to assess the effects on the Lower River Shannon SAC(002165) and River Shannon and River Fergus Estuaries SPA (004077) or any other European site has not been substantially impaired nor has the capacity for public participation in the process through the making of submissions to

the Board in relation to any application for substitute consent has been substantially impaired.

With the submission of the rNIS, the ability to carry out an appropriate assessment has not been substantially impaired. Furthermore, the lodgement of the current application and its accompanying rNIS has afforded the opportunity for the public to be formally consulted when the application was lodged and advertised accordingly. The opportunity for public participation has thereby been afforded, and indeed taken up as is evidence by the third party observer submission received.

#### **7.2.4 The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development**

Having regard to the submission by the applicants and planning authority in this case, I conclude that the submission of a rNIS facilitates the assessment of actual or likely adverse effects on the integrity of a European Site resulting from the works carried out to date comprising of the infilling of material and raising of ground level.

#### **7.2.5 The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated**

The site is within the red line development boundary of Ennis town in the current County Development Plan (2023-2029) which has been the subject of SEA and AA. On the basis of the material available, including the information set out in the County Development Plan and in the submissions by the applicants, observer and planning authority in this case I conclude that it is possible to remedy any adverse effects on any European site.

#### **7.2.6 Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development**

Works carried out relating to the infill of material and raising land level were carried out prior the applicant purchasing the lands and at a time when they were under the impression that a Section 5 Declaration had been obtained for the development which is the subject of this application for substitute consent. I acknowledge that the applicants did not carry out the works and appears to have purchased the lands during the JR period which bring to mind the principle of 'caveat emptor' ie let the

buyer beware. Since the applicants have been made aware of the status of the works/development they have sought to pursue avenues to regularize the status of same through the lodgment of a Leave to Apply for Substitute Consent to An Bord Pleanála under ABP 307172-20. Which was granted in September 2021 and a subsequent extension of time to comply granted until 16<sup>th</sup> March 2022 with the application for substitute consent being lodge with An Bord Pleanála on the 9<sup>th</sup> March 2022 in accordance with the Board's requirements.

The planning authority states that there are no outstanding enforcement files in relation to the applicant in this case. I conclude that the applicant is making appropriate efforts to regularise this development by engaging in the substitute consent process.

#### **7.2.7 Such other matters as the Board considers relevant.**

The applicants submit that the site is identified for development purposes, identified as an opportunity site by Clare County Council in the County Development Plan.

I do not consider that there are other matters that the Board should consider relevant.

Having regard to the foregoing and the applicant's submission relating to exceptional circumstances. I conclude that there is no legal impediment to prevent the Board from proceeding to assess/determine the current application for substitute consent in the normal manner. I also conclude that the application meets the exceptional circumstances test.

#### **7.3 Planning History & Extent of Infill/raising of land.**

There is extensive planning history associated with Section 5 Declarations for the wider landholding from which the site is taken, known as 'Glynn Landholding'. Section 5 of this report sets out in detail the planning history associated with the site and in particular the status of the infill and raising of ground level. The matter that the infill has been carried out is not disputed by any party nor the planning status of same. I do not propose revisiting the planning history associated with the site as this is not disputed by the applicants and the current application for substitute consent is their attempt to regularize the matter.

Trial Hole Assessment have been carried out on the site and results submitted. The Observer has submitted a summary of information contained in planning files relating to ground level comparisons for the site and larger field from which the site is taken. It is submitted that overall, the front of the subject land (i.e. front portion of Area A fronting onto Tulla Road) would appear to have been raised by between c.1.4m and 1.7m from the original ground levels. The rear of Area A would appear to have been raised by between c.0.85m and 1m. This application before the Board refers only to the lands outlined in red in the documentation, i.e. the 0.32 hectares roughly rectangular in shape which immediately bounds the Observer's property and the Tulla Road

Details provided by the Observers submitted that the variation between level of the subject site and at Observer's Property are: +0.614m, +0.818m, +0.883m and +1.283m.

The Observer notes that the Trail Hole Assessment submitted has excavations made at 1m levels to a depth of 6m, trail holes revealed made-up ground down to more than 3m which would suggest a greater level of infill on the site as was estimated and outlined above.

The applicants purchase the site in 2019 with the infill works in place. Details of historical levels on site are based on planning documentation and third party information. PA Ref. P97/21061 indicates a level ranging between 3.02m and 3.12m. PA P05/21142 refers to spot levels ranging from 3m to 4.25m. Indicating that a level of infilling took place between 1997 and 2005. A 2001 application (PA P01/211152) refers to the retention of infilling of land at the petrol station to the west and adjoining Fort Fergus stream, this application did not include the current site before the Board. ABP RL03RL.3611 refers to infilling that took place between 2013-2015, this coincides with when the site was used to access the land to the rear which was the subject of works under the River Fergus Certified Drainage Scheme (which was the subject to EIA and AA). In 2015 the site was used as a temporary compound for contractors involved in improvement works to a water supply scheme.

Based on planning history, information on file and submissions received the bulk of the infill works appear to have taken place between 2013 and 2015. Information

provided submits that the ground is made up of deposited materials comprised mainly of inert material (mainly of soil, stone, gravel, boulders) with an estimated c.4129 tonnes of material imported and deposited on the site. It is estimated that the material build up raised the levels between c.1.4 to 1.7m and I have no reason to dispute this information.

It is the applicants intention to develop the lands and as such the substitute consent application does not include proposals to restore the lands to greenfield use, but have no objection to such a condition if the Board consider it appropriate. I note a submission from the HSE supporting an application for a Primary Care Centre at this location and if the Board is of a mind to grant Substitute Consent, I do not consider that a condition to restore the lands to its original condition merited in this instance.

#### **7.4 Principle of Development**

The report of the planning authority sets out that the authority considers the principle of development to be acceptable in the context of the Clare County Development Plan 2017-2023 and in the event of a grant of permission a number of conditions recommended. I wish to draw the Board's attention to the fact that the Clare County Development Plan 2017-2023 was the operative Plan in place at the time of writing the planning authority's report, whereas the current Plan is the 2023-2029 one. I have reviewed both Plans and note that the land use zoning remains the same and general policies/objectives relating to the site are broadly the same.

Submissions received from prescribed bodies (IAA, TII and HSE) during the course of the application which are set out in section 7.2 of this report. No objections to the granting of substitute consent were raised in any of the submissions.

Having regard to the above, the planning history associated with the site and the current context to the site and extent of works carried out in the past. I am of the view that it is reasonable to conclude that the consequences for proper planning and sustainable development in the area are largely positive. This is contingent on ensuring that the effects on the environment of the development which took place, by itself or in combination with other development in the vicinity, was and is acceptable and that the integrity of European sites were not adversely affected, in view of the

site's conservation objectives. I have set out my consideration of these and other relevant matters in the following sections of this report.

## **7.5 Residential Amenity**

The Observer has set out in detail in his submissions that the raising of the ground levels has resulted in his boundary wall with the site more or less rendered redundant as it is submitted that the original 6ft boundary is now in effect the 3 ft boundary which offers no protection from a residential amenity point of view and that his and his family's privacy and residential amenity is negatively affected.

I note that a wayleave is shown along the eastern portion of the site which immediately bounds the Observer's residence. The site is zoned commercial, as such any development, if this was to occur, would have to have regard to protecting the residential amenities of existing properties, in particular the Observers residence which immediately bounds the site. The requirement to provide a way leave is acknowledged but I am of the view that additional boundary treatment along the Observers boundary would not impinge in the wayleave and would address the concerns raised. In this regard I would recommend the in the event the Board consider granting substitute consent that the applicants be required by condition to augment the boundary treatment along the eastern boundary of the site with the Observer' property by providing a 2m high boundary along the length of the observer's property without impacting on the wayleave.

## **7.6 Flood Risk**

The Observer has raised concerns related to flood zones and flood risk.

A SSFRA is not submitted with the application. I note the works carried out under the River Fergus Lower (Ennis) Drainage Scheme) to the southwest of the site.

The site is zoned commercial and identified as OP18 in the Clare County Development Plan 2023-2029 which was the subject of a SFRA at the time. I consider this acceptable as no evidence has been presented that the infilling of material has increased flood risk at the site or on adjoining lands. I note that the planning authority has not raised concerns relating to this matter. Any potential development of the site in the future would be required to comply with the



requirements set out for OP18 lands and I note that this include the requirement for the submission of a SSFRA.

No evidence has been presented that the works carried out resulted in a flood risk on the lands or on adjoining lands. The planning authority raised concerns in this regard. Based on all of the information before me I am of the view that this matter has been adequately addressed.

## **7.7 Other Matters**

The observer outlined that they made a submission on the draft plan as it was considered that to permit a zoning objective to provide for future development of the site would compound the unauthorised activities on the site and not in accordance with the orderly development of the area. Request that the subject site be reclassified as 'Open Space'.

The Clare County Developemnt 2023-2029 Plan was adopted on the 9<sup>th</sup> March 2023 The plan came into effect on the 20<sup>th</sup> April 2023 and the site is zoned 'Commercial'. The review of the development plan would have addressed zoning submissions as part of the process. Requests for the reclassification of lands/zoning submissions are not within the remit of this report.

## **8.0 Appropriate Assessment**

### **8.1 Introduction**

The Remedial Natura Impact Statement (rNIS) dated February 2022 submitted with the application includes reference to stage 1 screening that was carried out by Clare County Council and An Bord Pleanála whom determined that a rNIS was required at Leave to Apply for Substitute Consent stage.

As set out previously in this report, the application for substitute consent was lodged on foot of an application for Leave to Apply for Substitute Consent (ABP 307172-20) which carried determined that a Remedial Natura Impact Statement was required. Included with the application is Trial Hole Assessment Report.

### **8.2 Compliance with Article 6(3) of the EU Habitats Directive**

The Habitats Directive deals with the Conservation of Natural Habitats and of Wild Fauna and Flora throughout the European Union. Article 6(3) of this Directive requires that any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The competent authority must be satisfied that the proposal will not adversely affect the integrity of the European site before consent can be given.

### **8.3 Screening Appropriate Assessment (stage 1)**

#### **8.3.1 Description of Development**

A description of the project is provided in section 3 of the rNIS. I refer the Board to section 3 of this report.

#### **8.3.2 Description of Site Characteristics.**

A description of the site characteristics is provided in section 1.2.2 and 1.2.3 of the rNIS.

The site has an area of 0.32 hectares, located on the southern side of the Tulla Road in the northeastern environs of Ennis Town.

The information submitted notes that the site was cleared, levelled and hard core material imported and deposited within the site between c.2013-2015 which resulted in the difference in site levels between the site and adjoining lands to the east. In 2015 the site was used as a temporary compound associated with adjoining improvement works to a water supply. The works took place during the period of the Certified Drainage Scheme on the River Fergus which comprised of the construction of a high berm, these works took place to the southwest of the site on lands which form part of the original filed form which the site is taken. Access to the works was via the site.

The site is currently overgrown and vacant. There are no defined boundaries between the site and the larger plot from which it is taken. Block wall from the eastern boundary with existing houses (Including the Observer's house), the roadside boundary is a low wall and a wall from section of the boundary with the adjoining petrol station with boundaries are bare in places. The Fergus Stream and River Fergis are located to the southwest. Extensive works have taken place along this section of the water course under the River Fergus Lower (Ennis) Certified Drainage Scheme. The steam drains in the River Fergus which forms part of the Lower Shannon SAC is c.50m to the southwest of the site with part of the larger plot of land encroaching on the SAC. The SAC runs along the western boundary of the adjoining petrol station and commercial units which bound the site immediately to the west and separated the site from the SAC at this point.

### **8.3.3 Relevant prescribed bodies consulted**

The submitted rNIS does not identify specific consultations with prescribed bodies but does refer to a desktop review of published documents and information.

### **8.3.4 Test of likely significant effect**

The project is not directly connected with or necessary to the management of a European Site and therefore it needs to be determined if the development is likely to have had significant effects on a European site(s).

The development is examined in relation to interactions with European sites designated Special Conservation Areas (SAC) and Special Protection Areas (SPA) to assess whether it gave rise to significant effects on any European Site.

Taking account of the characteristics of the development in terms of its location and the scale of works carried out, the following issues are considered for examination in terms of implications for likely significant effects on European sites:

- Habitat loss/ fragmentation/alteration
- Habitat degradation as a result of hydrological impacts.
- Disturbance and displacement impacts on QI/SCI

- Changes in water quality and resource

The rNIS is submitted with the application refers to Stage 1 screening carried out by Clare county Council and An Bord Pleanála which concluded that a rNIS was required. No Natura 2000 sites have a direct hydrological connection to the proposed development site. However, potential pathways /connections between the application site and the Lower River Shannon SAC (002165) identified via surface water given the slight gradient of the land to the Fort Fergus Stream which is located within the SAC, a tributary of the River Fergus which in turn drains into the River Shannon and River Fergus Estuaries SPA (004077) c.4.2km to the south. The submitted rNIS concluded that the Lower River Shannon SAC and the River Shannon and River Fergus Estuaries SPA are the only Natura 2000 sites considered to be potentially impacted by unauthorised infilling of the site.

The applicant has not submitted a 'screening report for appropriate assessment' as part of its rNIS. Section 3.2 'Identification of Natura 2000 sites' includes a list of designated sites within 15km radius and justification why all but 2 Natura 2000 sites have been screened out and not discussed further in the rNIS. I note the justifications set out and consider them acceptable. Furthermore I have conducted my own screening exercise.

Section 3.2 of the submitted rNIS concluded that "The Lower River Shannon SAC and River Shannon and river Fergis Estuaries SPA are considered to be the only Natura 2000 sites of relevance in this assessment. Species within the SAC and SPA could have been potentially impacted by the unapproved and uncontrolled infilling operations that have taken place and which are still in place and may contribute to long term effects. Development of such projects usually creates potential for the generation of contaminated runoff."

Having reviewed the documents and submissions, I am satisfied that the information allows for a complete examination and identification of any potential significant effects of the development, alone, or in combination with other plans and projects on European sites.

### **8.3.5 Designated sites within Zone of Influence**

The application site is not located within or adjacent to any European site. A potential indirect hydrological connection arises in the form of surface water run-off and storm overflows to the River Fergus via the Fergus Stream which forms part of the Lower River Shannon SAC (site code 002165). The River Fergus flows in a southerly direction, therefore Ballyallia Lake SAC (site code 00014) located to the north. can be screened out Ballyallia Lough SPA.Lake SPA (side code 004041) is located to the north and not considered within the zone of influence for screening as considered to be at remove from the application site and in respect of which there is no pathway or connection which could give rise to significant effects on the conservation objectives of those sites from the development before the Board. A number of the sites within a 15km radius identified the south are at a significant remove from the application site and in respect of which there is no pathway or connection which could give rise to significant effects on the conservation objectives of those sites from the development before the Board. Lesser horseshoe bats (QI for Newhall and Edenvale Complex SAC (site code 002091) tend to forage in summer in broadleaved woodland and around riparian vegetation. The conservation objective target is that there is no significant decline in potential foraging habitat within 2.5km of qualifying roosts. The site does not support these habitats as such can be screened out for potential ex situ impacts.

The closest European sites with potential indirect pathways are c.50m to the southwest and c.100m to the west , i.e Lower River Shannon SAC (site code 002165) and the River Shannon and River Fergus Estuaries SPA (site code 004077) which is located c.4.26km to the south.

European Site Name [Code] and its Qualifying interest(s) / Special Conservation Interest(s) (*Priority Annex I Habitats)	Location Relative to the Proposed Development Site
<p><b>Lower River Shannon SAC (site code 002165)</b></p> <p><b>Qualifying Interests:</b></p> <p>Sandbanks which are slightly covered by sea water all the time [1110], Estuaries [1130], Mudflats and sandflats not covered by seawater at low tide [1140], Coastal lagoons [1150], Large shallow inlets and bays [1160], Reefs [1170], Perennial vegetation of stony banks [1220], Vegetated sea cliffs of the Atlantic and Baltic coasts [1230], Salicornia and other annuals colonising mud and sand [1310],</p>	<p>c.50m to the southwest and c.100m to the west (encroaches on the larger field from which the site is taken)</p>

Atlantic salt meadows (*Glauco-Puccinellietalia maritima*) [1330], Mediterranean salt meadows (*Juncetalia maritimi*) [1410], Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitriche-Batrachion* vegetation [3260], *Molinia* meadows on calcareous, peaty or clayey-silt-laden soils (*Molinion caeruleae*) [6410], Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*) [91E0], *Margaritifera margaritifera* (Freshwater Pearl Mussel) [1029], *Petromyzon marinus* (Sea Lamprey) [1095], *Lampetra planeri* (Brook Lamprey) [1096], *Lampetra fluviatilis* (River Lamprey) [1099], *Salmo salar* (Salmon) [1106], *Tursiops truncatus* (Common Bottlenose Dolphin) [1349], *Lutra lutra* (Otter) [1355]

Conservation Objectives:

- To restore the favourable conservation condition of the Freshwater Pearl Mussel.
- To restore the favourable conservation condition of Sea Lamprey.
- To maintain the favourable conservation condition of Brook Lamprey.
- To maintain the favourable conservation condition of River Lamprey.
- To restore the favourable conservation condition of Salmon.
- To maintain the favourable conservation condition of Sandbanks which are slightly covered by sea water all the time.
- To maintain the favourable conservation condition of Estuaries.
- To maintain the favourable conservation condition of Mudflats and sandflats not covered by seawater at low tide.
  
- To restore the favourable conservation condition of Coastal lagoons
- To restore the favourable conservation condition of Coastal lagoons.
  
- To maintain the favourable conservation condition of Reefs.
  
- To maintain the favourable conservation condition of Perennial vegetation of stony banks.
  
- To maintain the favourable conservation condition of Vegetated sea cliffs.
  
- To maintain the favourable conservation condition of *Salicornia* and other annuals colonizing mud and sand.

<ul style="list-style-type: none"> <li>• To restore the favourable conservation condition of Atlantic salt meadows (<i>Glaucopuccinellietalia maritimae</i>).</li> <li>• To maintain the favourable conservation condition of Bottlenose Dolphin.</li> <li>• To restore the favourable conservation condition of Otter.</li> <li>• To restore the favourable conservation condition of Mediterranean salt meadows (<i>Juncetalia maritimi</i>).</li> <li>• To maintain the favourable conservation condition of Water courses of plain to montane levels with the <i>Ranunculion fluitantis</i> and <i>Callitricho-Batrachion</i> vegetation.</li> <li>• To maintain the favourable conservation condition of Molinia meadows on calcareous, peaty or clayey-silt laden soils (<i>Molinion caeruleae</i>).</li> <li>• To restore the favourable conservation condition of Alluvial forests with <i>Alnus glutinosa</i> and <i>Fraxinus excelsior</i> (<i>Alno-Padion</i>, <i>Alnion incanae</i>, <i>Salicion albae</i>).</li> </ul>	
<p><b>River Shannon and River Fergus SPA (site code 004077)</b></p> <p><b>Qualifying Interest:</b></p> <p>Cormorant (<i>Phalacrocorax carbo</i>) [A017], Whooper Swan (<i>Cygnus cygnus</i>) [A038], Light-bellied Brent Goose (<i>Branta bernicla hrota</i>) [A046], Shelduck (<i>Tadorna tadorna</i>) [A048], Wigeon (<i>Anas penelope</i>) [A050], Teal (<i>Anas crecca</i>) [A052], Pintail (<i>Anas acuta</i>) [A054], Shoveler (<i>Anas clypeata</i>) [A056], Scaup (<i>Aythya marila</i>) [A062], Ringed Plover (<i>Charadrius hiaticula</i>) [A137], Golden Plover (<i>Pluvialis apricaria</i>) [A140], Grey Plover (<i>Pluvialis squatarola</i>) [A141], Lapwing (<i>Vanellus vanellus</i>) [A142], Knot (<i>Calidris canutus</i>) [A143], Dunlin (<i>Calidris alpina</i>) [A149], Black-tailed Godwit (<i>Limosa limosa</i>) [A156], Bar-tailed Godwit (<i>Limosa lapponica</i>) [A157], Curlew (<i>Numenius arquata</i>) [A160], Redshank (<i>Tringa totanus</i>) [A162], Greenshank (<i>Tringa nebularia</i>) [A164], Black-headed Gull (<i>Chroicocephalus ridibundus</i>) [A179], Wetland and Waterbirds [A999]</p> <p><b>Conservation Objectives:</b></p> <ul style="list-style-type: none"> <li>• To maintain the favourable conservation condition of Cormorant.</li> </ul>	<p>c.4.2km to the south</p>

- To maintain the favourable conservation condition of Whooper Swan.
- To maintain the favourable conservation condition of Light-bellied Brent Goose.
- To maintain the favourable conservation condition of Shelduck.
- To maintain the favourable conservation condition of Wigeon.
- To maintain the favourable conservation condition of Teal.
- To maintain the favourable conservation condition of Pintail.
- To maintain the favourable conservation condition of Shoveler
- To maintain the favourable conservation condition of Scaup.
- To maintain the favourable conservation condition of Ringed Plover.
- To maintain the favourable conservation condition of Golden Plover.
- To maintain the favourable conservation condition of Grey Plover.
- To maintain the favourable conservation condition of Lapwig.
- To maintain the favourable conservation condition of Knot.
- To maintain the favourable conservation condition of Dunlin.
- To maintain the favourable conservation condition of Black-tailed Godwit.
- To maintain the favourable conservation condition of Bar-tailed Godwit.
- To maintain the favourable conservation condition of Curlew.
- To maintain the favourable conservation condition of Redshank.
- To maintain the favourable conservation condition of Greenshank.
- To maintain the favourable conservation condition of Black-headed Gull.
- To maintain the favourable conservation condition of the wetland habitat.



<p><b>Newhall and Edenvale Complex SAC (site code 002091)</b></p> <p><b>Qualifying Interests:</b></p> <p>Caves not open to the public [8310], Rhinolophus hipposideros (Lesser Horseshoe Bat) [1303].</p> <p>Caves not open to the public (8310) is integrally linked to lesser horseshoe bat (Rhinolophus hipposideros) (1303) as part of the habitat for the species.</p> <p><b>Conservation Objectives:</b></p> <p>To maintain the favourable conservation condition of Lesser Horseshoe Bat.</p>	<p>c.4.5km to the southwest.</p>
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The Lower River Shannon SAC which traverses Clare, Cork, Limerick, Kerry & Tipperary overlaps with River Shannon and River Fergus Estuaries SPA (004077), Loop Head SPA (004119), Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161), Slievefelim to Silvermines Mountains SPA (004165) and Kerry Head SPA (004189). It is also adjacent to Clare Glen SAC (00930). Having regard to the significant remove of the bulk of these sites from the site which is the subject of this assessment and subject to further dilution effects within the river such that significant effects from the development are not considered likely to have occurred and can be screened out from further assessment.

Given the scale of the development carried out, the lack of a direct hydrological connection, the dilution provided and the distances involved other sites along the River Shannon and Fergus are excluded from further consideration this screening. I do not consider that any other European sites fall within the zone of influence of the project based on a combination of factors including the nature and scale of the project, the distance from the site to European sites, and any potential pathways which may exist from the development site to a European site, aided in part by the applicant's Appropriate Assessment and Natura impact Statement the conservation objectives of Natura 2000 sites, the lack of suitable habitat for qualifying interests, as well as by the information on file and I have also visited the site.

There is no operational phase associated with the development. Works which are the subject of this assessment relates to the infilling of land subsequent raising of

levels which have already taken place. Any potential subsequent infilling would be subject of assessment as part of any future proposal.

In-combination effects from other development sites (i.e the works carried out as past to the River Fergus Lower (Ennis) Certified Drainage Scheme which was the subject of EIA and AA at the time) could potentially have arisen.

Having regard to the above, I consider the following Natura 2000 sites to be within the Zone of Influence are the Lower River Shannon SAC (002165) and River Shannon and River Fergus Estuaries SPA (004077). In determining the zone of influence, I have had regard to the nature and scale of the project, the distance from the development site to the European Sites, and any potential pathways which may exist from the site to a European Site. I do not consider that any other European sites fall within the zone of influence of the project based on a combination of factors including the nature and scale of the project, the distance from the site to European sites, and any potential pathways which may exist from the development site to a European site. See also the conservation objectives of Natura 2000 sites, the lack of suitable habitat for qualifying interests, as well as by the information on file, including observations made by prescribed bodies at application stage and I have also visited the site.

### **8.3.6 Potential Effects on Designated Sites**

The development is on a site with potential hydrological connections to Lower River Shannon SAC (site code 002165) and the River Shannon and River Fergus Estuaries SPA (site code 004077) via land drains and streams. The conservation objectives for these Natura 2000 sites is to maintain or restore the favourable conservation condition of species and habitats as listed as qualifying interest (QI) above.

Taking account of the characteristics of the development in terms of its location and the scale of works, the applicant's rNIS submitted that there was potential for significant effects upon these Natura 2000 sites arising from activities associated with the development. The following issues are considered for examination in terms of implications for likely significant effects on European sites:

Possibility of potential impacts associated with:

- excavation works to facilitate infilling.
- Use of fuels/oils/chemicals during the infilling of the project.
- Use of construction equipment, vehicles and plant.
- The risk of contaminated runoff during the infilling phase.
- The risk of accidental spillages of fuel/oils during the infilling phase.
- The risk of imported unapproved contaminated material.
- Cumulative impacts arising from discharges associated with the development site, the area infilled as part of the drainage scheme interacting with other sources of water pollution such as wastewater treatment discharges or agricultural runoff.

Possibility that the release of sediment and pollutants from the development into the stream and transported downstream could potentially have had detrimental impacts on the water quality within the Fort Fergus Stream and downstream within the River Fergus. The applicant undertook Trial Hole tests to monitor ground water quality and an assessment of the make up of the imported material was undertaken and submitted to ascertain if leachate had occurred, is occurring is likely to occur and if appropriate action required. I have reviewed this information and consider it robust and integral to my assessment.

With regard to habitat loss and fragmentation, given the site is not located within or adjoining any European sites, there is no risk of direct habitat loss impacts or potential for habitat fragmentation.

The site does not support suitable habitats for protected species associated with the SPA and SAC, therefore there is no evidence that ex situ impacts arose or have potential to arise.

Potential pathways via groundwater (noted at c.2.8-3.4m below existing ground level) with flow direction towards the Fort Fergus stream and potential pathways via air or land to Natura 2000 sites to the nearest European site is c.50m from the proposed development given its proximity.

There was a potential indirect pathway to both SPA and SAC via land drains and streams in the proximity of the site during the construction phase. In the absence of

mitigation, an accidental pollution event could have occurred during the importation phase of the development given the absence of barriers between the site and larger holding which was also the subject of infilling arising from polluting materials, such as accidental spillage of oil, hydraulic fluid and concrete, entering the stream via land drains and being transported downstream could have detrimental impacts on the QI for both the SAC And SPA. The provision of berms on the adjoining land reduces the potential for impacts to occur and occur in the future.

### **8.3.7 Screening Determination**

The development was considered in light of the requirements of Section 177U of the Planning and Act 2000 as amended. Having carried out screening for appropriate assessment of the project, it has been concluded that the potential for significant effects arising on two European Site, the Lower River Shannon SAC (site code 002165) and the River Shannon and River Fergus Estuaries SPA (site code 004077) as a result of the project individually or in combination with other plans or projects could not be excluded in view of the Conservation Objectives of those sites, and Appropriate Assessment is therefore required.

The sites screened in for appropriate assessment are the sites included in the rNIS submitted with the application for substitute consent.

The possibility that significant effects occurred on other European sites has been excluded on the basis of scale of the works carried out, separation distance and lack of substantive ecological linkages between the site and European sites. In reaching the conclusion of the screening assessment, no account was taken of measures intended to avoid or reduce the potentially harmful effects of the project on any European Site.

## **8.4 Stage 2 Appropriate Assessment**

The application included a rNIS, which is entitled “Appropriate Assessment Remedial Natura Impact Statement. Application for Substitute Consent for proposed development on Tulla Road, Ennis, Co. Clare” dated February 2022. The stage 2 assessment (rNIS) examines and assesses potential adverse effects of the development on the River Shannon SAC(002165) and River Shannon and River Fergus Estuaries SPA (004077).

The rNIS was prepared in line with current best practice guidance, and it concluded that “The most likely impacts were assessed to be on the adjacent SAC. These were considered to arise from the potential of silt, other sediment and pollutants to enter the Fort Fergus stream, which forms part of the SAC. Any silt or other sediments potentially released from the infilling of the development site would have been intercepted by the large, infilled area and berm created as part of the River Fergus Lower (Ennis) Certified Drainage Scheme. It was therefore concluded that any significant impact on the Natura 2000 sites from inert infilling material in the form of silt or other sediments was unlikely to have taken place, to be currently happening or to arise in the future”.

Having reviewed the rNIS, I am satisfied that the information allows for a complete assessment of any adverse effects of the development on the conservation of the River Shannon SAC (002165) and River Shannon and River Fergus Estuaries SPA (004077) or in combination with other plans and projects.

#### **Appropriate Assessment of implications of the development**

The following is a summary of the objective scientific assessment of the implications of the project on the qualifying interest features of the European sites using the best scientific knowledge in the field. All aspects of the project which could have resulted in significant effects are assessed, monitoring and remediation for future impacts arising from noxious weeds are included. There are no monitoring and remediation measures for future impacts that would be required implemented to ensure significant negative impacts on the integrity of the European sites can be avoided.

I have relied on the following guidance:

- DoEHLG (2009). Appropriate Assessment of Plans and Projects in Ireland: Guidance for Planning Authorities. Department of the Environment, Heritage and Local Government, National Parks and Wildlife Service.
- EC (2002) Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and 6(4) of the Habitats Directive 92/43/EC.
- EC (2018) Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive 92/43/EEC.

I have also examined the Natura 2000 data forms as relevant and the Conservation Objectives supporting documents available through the NPWS website ([www.npws.ie](http://www.npws.ie)) accessed 8<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> December 2023. As noted above the main aspects of the development that could have adversely affected the conservation objectives of the European sites:

- Possibility that the release of silt, sediment and pollutants from the development into the Fort Fergus stream and transported downstream could have detrimental impacts on the qualifying interests of the SAC and SPA.

The qualifying interests and conservation objectives for the River Shannon SAC(002165) and River Shannon and River Fergus Estuaries SPA (004077) are set out above under my screening exercise.

Having regard to the distance from the site and the location of the infilling works thereon, it is unlikely that direct runoff from surface water having occurred, occurring or likely to occur to the Forth Fergus stream.

Indirect impacts may have occurred through contaminated runoff during the infilling stage which could have had an impact on the integrity of the Lower River Shannon SAC and Lower Shannon & River Fergus Estuaries SPA which could have been indirectly affected by the proposed development as a result of reduction in water quality and foraging potential for qualified interests. There is no direct hydrological connection between the site and the Fort Fergus stream which reduces the potential that indirect impacts occurred, are occurring or could occur on the SAC and SPA as a result of the development, i.e the infilling if material.

The applicant's rNIS refers to groundwater analysis which took place on the site in January 2022, this indicated that previously infilled material has not negatively impacted on groundwater in the area. Trial Hole Assessment carried out and submitted to assess the potential for impacts on water quality, especially to groundwater due to the importation of material on to the site. The Trial Assessment carried out to determine the make up of the imported and material, groundwater samples were taken from each trial hole to determine potential impacts due to hydrocarbons. These indicated little or no waste of an extraneous nature, no traces of putrescible or degradable waste nor methane. Based on this information it is unlikely that the imported material or related activities had or is having a negative impact on the integrity of the SAC and SPA or their qualifying interests.

The rNIS acknowledged that mitigation measures may no be appropriate as the infilling has already occurred and has been completed on site. I concur with this conclusion. Monitoring measures to inform remediation and future mitigation are set out in section 4.8 of the rNIS. This refers solely to *“a monitoring programme for noxious weeds and invasive species on the site which may be dormant or suppressed.”*

Overall, I am satisfied based on the available information and evidence and measures referenced in the rNIS, and identified above, the historic development did not, is or could not adversely affect the integrity of the aforementioned European designated sites, having regard to the conservation objectives for the site. No reasonable scientific doubt remains as to the absence of such adverse effects on the site as a result of the historic infilling of land and raising of ground levels.

### **In-Combination Effects**

The site is located in an urban environment in the northeastern environs of Ennis town. There are no ongoing activities on site. The rNIS relates to historical works carried out comprising of the infilling of material and raising of ground levels. A review of permitted and constructed development in the vicinity has been carried out and I conclude:

- The potential principal source of in combination effect arose during the construction phase of the Certified River Fergus Drainage Relief Works. All works have been completed and there is no potential for a significant adverse effect due to in combination effects to have occurred, occur or may occur.

### **Evaluation of Effects**

The development which is the subject of this assessment is the infilling of material and raising of ground levels that took place c.10 years ago. No mitigation measures are proposed/required as this activity is historic and does not refer to an ongoing activity. I consider that the monitoring and remediation measures set out in the rNIS are clearly described, are reasonable, practical and enforceable. I am satisfied that the measures outlined fully address potential impacts arising from the development and that it is reasonable to conclude on the basis of objective scientific information, that the development has not had an adverse effect on the River Shannon SAC(002165) and River Shannon and River Fergus Estuaries SPA (004077).

### **8.5 Appropriate Assessment Conclusion**

Having carried out a Stage 1 Appropriate Assessment Screening of the project, it was concluded that it could have had a significant effect on the Lower River Shannon SAC(002165) and River Shannon and River Fergus Estuaries SPA (004077). Consequently, an Appropriate Assessment was required of the implications of the project on the qualifying features of that site in light of its conservation objectives.

Following a Stage 2 Appropriate Assessment, with submission of a rNIS, it has been determined that subject to mitigation (which is known to be effective) the development, individually or in combination with other plans or projects would not adversely affect the integrity of the European sites Lower River Shannon SAC(002165) and River Shannon and River Fergus Estuaries SPA (004077) or any other European site, in view of the sites Conservation Objectives.

On the basis of the information provided with the application, including the remedial Natura Impact Statement, which I consider adequate in order to carry out a Stage 2 Appropriate Assessment, the submissions received and the assessment carried out



above, I am satisfied that the historic infilling of material and raising of ground levels, individually or in combination with other plans or projects would not have adversely affected the integrity of the European Sites: Lower River Shannon SAC (002165) and River Shannon and River Fergus Estuaries SPA (004077) or any other European site, in view of the sites' Conservation Objectives

This conclusion is based on:

- A full and detailed assessment of all aspects of the project in relation to the Conservation Objectives of Lower River Shannon SAC (002165) and River Shannon and River Fergus Estuaries SPA (004077).
- Assessment of in combination effects with other plans and projects including historical projects, current proposals and future plans.
- No reasonable scientific doubt as to the absence of adverse effects on the integrity of Lower River Shannon SAC (002165) and River Shannon and River Fergus Estuaries SPA (004077).

## **9.0 Recommendation**

I recommend that the Board grant substitute consent in accordance with the following Draft Order

## **10.0 Recommended Draft Board Order**

The Board, in accordance with section 177K of the Planning and Development Act 2000, as amended, and based on the Reasons and Considerations set out below, decided to GRANT substitute consent in accordance with the conditions set out below.

### **Reasons and Considerations**

In coming to its decision the Board had regard, inter alia, to the following:

- (a) the provisions of the Planning and Development Act, 2000, as amended, and in particular Part XA (Substitute Consent) and the provisions of the Planning and Development Regulations, 2001, as amended.
- (b) the applicable national, regional and local planning policy including in particular, the provisions of the Clare County Development Plan 2023-2029

- (c) the remedial Natura Impact Statement and supporting documentation submitted with the application;
- (d) the report and the opinion of the planning authority and the applicant's response to the report;
- (e) the submissions received from prescribed bodies;
- (f) The observer submissions received
- (g) the planning history of the subject site and adjoining lands;
- (h) the nature, scale, characteristics and location of the historic development;
- (i) the Inspector's assessment as set out in the Inspector's Report;

## **Environmental Impact Assessment**

Screening for EIA carried out under Apply for Substitute Consent ABP-307172-20

Under the Leave to Apply for Substitute Consent ABP-307172-20, BD-009118-21 (Board Direction) as reflected in the Board Order signed 22<sup>nd</sup> September 2021 which states in the Reasons and Considerations that the Board determined that "the development is one where an Environmental Impact Assessment or a determination as to whether an Environmental Impact Assessment is not required.

## **Appropriate Assessment**

### **Appropriate Assessment Stage 1 (Screening)**

The Board agreed with the Screening Assessment carried out by the Inspector which concluded that the following European Site is that for which a Stage 2 Appropriate Assessment was required, and that significant effects on any other European Sites can be ruled out:

- River Shannon SAC(002165).
- River Shannon and River Fergus Estuaries SPA (004077).

### **Appropriate Assessment Stage 2**

The Board considered the remedial Natura Impact Statement and all other relevant submissions and carried out an Appropriate Assessment of the implications of the proposed development for the River Shannon SAC(002165) and River Shannon and River Fergus Estuaries SPA (004077)\_ in view of the site's conservation objectives. The Board considered that the information before it was adequate to allow the

carrying out of an Appropriate Assessment. In completing the assessment, the Board considered the likely direct and indirect impacts arising from the historic development, both individually or in combination with other plans or projects, the remediation and monitoring measures set out in the remedial Natura Impact Statement and the conservation objectives for the European Site.

The Board is satisfied that, subject to the implementation of the identified remediation and monitoring measures and on the basis of the information available, the development, either individually or in combination with other plans or projects, did not adversely affect the integrity of this European site or any other such European designated site, in view of the conservation objectives of any such site.

### **Proper Planning and Sustainable Development**

Having regard to the nature, scale and extent of the development and to the acceptability of the environmental effects and noting that the integrity of European Sites were not adversely affected, in view of the relevant sites' conservation objectives, as set out above, and subject to compliance with the conditions set out below, the Board is satisfied that to grant substitute consent to the development accords with the proper planning and sustainable development of the area.

### **Conditions**

1.	<p>(a) This grant of substitute consent shall be in accordance with the plans and particulars submitted to An Bord Pleanála with the application on the 9<sup>th</sup> day of March 2022, except as may otherwise be required in order to comply with the following conditions.</p> <p>(b) This grant of substitute consent relates only to development undertaken, as described in the application, and does not authorise any future development on the subject site.</p> <p><b>Reason:</b> In the interest of clarity.</p>
2.	<p>Within 12 weeks of the Order granting substitute consent the applicant shall provide a 2m high boundary along the eastern boundary for the length of the boundary with No. 5 Knockanoura, Tulla Road, Ennis, Co. Clare.</p> <p><b>Reason:</b> In the interest of residential amenity.</p>

3.	<p>The Local Authority and any agent acting on its behalf shall comply with the remediation and monitoring measures outlined in the plans and particulars submitted with the application, including the remedial Natural Impact Statement (February 2022), shall be carried out in full except as may otherwise be required in order to comply with other conditions.</p> <p><b>Reason:</b> In the interest of clarity and the proper planning and sustainable development and to ensure the protection of a European site during construction.</p>
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I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

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Dáire McDevitt  
Senior Planning Inspector

19<sup>th</sup> December 2023